

Article Information

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Security for costs | UK Deed of Indemnity

In 2016, Piper Alderman achieved a precedent setting decision for Litigation Capital Management which enabled it to provide security for costs by way of a deed of indemnity from a UK insurer: DIF III Global Investments Fund & Anor v BBLP LLC & Ors [2016] VSC 401 (DIF).

The decision paved the way for an innovative form of security and has been cited numerous times since. It is apparent from two recent examples^[1] that a refresher on the governing principles could be useful.

When considering a deed of indemnity as opposed to the usual forms of security:

- *The proposed deed needs to provide certainty as to its terms.* The deed offered in *DIF* was irrevocable, directly enforceable and unconditional.
- *Provide evidence on the financial standing of the party offering the deed.* The relevant party in *DIF* was AmTrust, a UK insurer with very substantial assets of the kind that could not easily be moved to avoid enforcement.
- *Where the deed involves a foreign entity, provide evidence of the enforcement steps in the foreign jurisdiction and the cost of that process.* In *DIF*, a small sum of \$10,000.00^[2] was also made available in the unlikely event that enforcement of the indemnity against AmTrust in the UK was required.

In *DIF*, Piper Alderman successfully argued:

- *Form is immaterial so long as it is adequate to achieve its object as a security.* That a bank guarantee or payment into Court are more familiar forms of security is irrelevant.
- *The plaintiff is entitled to propose security in a form least disadvantageous to it.* So long as it can be shown that the defendants are not unreasonably disadvantaged, security can be given in a way which is the least disadvantageous to the party giving it.
- *The ultimate question for the Court is to ask how justice is best served in the particular circumstances.* That requires focus on the specific evidence about the nature of the security being proposed. In circumstances where the deed of indemnity was given by a truly creditworthy entity with the wherewithal to pay and against whom enforcement could be readily enforced, it was right and proper for the Court to conclude the AmTrust deed provided real security.

Afterword | The *DIF* action proceeded to trial in 2018 and the AmTrust deeds were never called upon

^[1] *Equititrust Limited v Tucker & Ors* [2019] QSC 051 and *CCS Equipment Pty Ltd v Galaxy Resources Ltd* [2019] WASC 249.

^[2] Note, the figure of \$20,000.00 in the reported decision was a typographical error.