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What is security for costs?

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The reality of any litigious proceedings is that they cost money (sometimes, lots of money). Where a party is successful in the proceeding; whether that be successfully proving the claim (**Plaintiff**) or defending it (**Defendant**), that party will generally be entitled to their 'costs'. Costs refers to the legal expenses incurred by the successful party in prosecuting or defending the claim (as the case may be). Where a Defendant successfully defends a claim, they may be placed in the frustrating circumstance of facing a Plaintiff who does not have sufficient money to pay the Defendant's costs. In this article we consider a Court order designed to alleviate this problem – a security for costs order.

What is a security for costs order?

Security for costs orders offer peace of mind to Defendants by requiring a Plaintiff to pay into the Court an amount of money the Court considers appropriate for the Defendant's costs of the proceeding. In Queensland security for costs orders are granted by the Court pursuant to rule 670 of the [Uniform Civil Procedure Rules 1999 \(Qld\)](#) (**UCPR**).



Prerequisites for a security for costs order

Pursuant to rule 670 of the UCPR the Defendant will need to bring an application to the Court seeking an order for security for costs. At the hearing of the application, the Judge is required to consider whether or not one (or more) of the prerequisites for ordering security for costs listed in rule 671 is present in the matter. These prerequisites include:

- 1** the Plaintiff is a corporation and there is reason to believe the Plaintiff will not be able to pay the Defendant's costs if ordered to pay them; or
- 2** the Plaintiff is suing for the benefit of another person, rather than for the Plaintiff's own benefit, and there is reason to believe the Plaintiff will not be able to pay the Defendant's costs if ordered to pay them; or
- 3** the address of the Plaintiff is not stated or is misstated in the originating process, unless there is reason to believe this was done without intention to deceive; or
- 4** the Plaintiff has changed address since the start of the proceeding and there is reason to believe this was done to avoid the consequences of the proceeding; or
- 5** the Plaintiff is ordinarily resident outside Australia; or
- 6** the Plaintiff is, or is about to depart Australia to become, ordinarily resident outside Australia and there is reason to believe the Plaintiff has insufficient property of a fixed and permanent nature available for enforcement to pay the Defendant's costs if ordered to pay them; or
- 7** an Act authorises the making of the order; or
- 8** the justice of the case requires the making of the order.

The onus for proving that one (1) of the prerequisites is relevant to the proceedings, and that security for costs should be ordered, lies with the Defendant ([Sanrus Pty Ltd v Monto Coal 2 Pty Ltd \[2018\] QSC 53](#) at [49] applying [Indoport Pty Ltd v National Bank Ltd \[2001\] NSWSC 744](#) at [60] – [62]).

The discretionary questions

Malcolm Burrows



B.Bus.,MBA.,LL.B.
LL.M.,MQLS.
Legal Practice Director
Tel: (07) 3221 0013
Fax: (07) 3221 0031
Mobile: 0419 726 535

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Once it is established that the prerequisites (although sometimes considered contemporaneously with the prerequisites) for security for costs have been satisfied, the Court uses its discretion to consider whether or not such an order is appropriate in the matter. Rule 672 provides a number of discretionary factors that the Court may take into account, including:

- ❏ the means of those standing behind the proceeding;
- ❏ the prospects of success or merits of the proceeding;
- ❏ the genuineness of the proceeding;
- ❏ for rule 671(a) – the impecuniosity (not having money) of a corporation;
- ❏ whether the Plaintiff's impecuniosity is attributable to the Defendant's conduct;
- ❏ whether the Plaintiff is effectively in the position of a Defendant;
- ❏ whether an order for security for costs would be oppressive;
- ❏ whether an order for security for costs would stifle the proceeding;
- ❏ whether the proceeding involves a matter of public importance;
- ❏ whether there has been an admission or payment into court;
- ❏ whether delay by the Plaintiff in starting the proceeding has prejudiced the Defendant;
- ❏ whether an order for costs made against the Plaintiff would be enforceable within the jurisdiction; and
- ❏ the costs of the proceeding.

How is security given?

Security for costs will be given in the manner prescribed by the Court, who may prescribe the form, time and conditions for the giving of the security: rule 673(1).

Where the Court does not prescribe the form, time or conditions for the giving of security, rule 673(2) provides that the security must be issued in a form satisfactory to the registrar of the Court.

Common examples of ways security is provided include making a payment into Court or lodging an appropriate bond or bank guarantee with the registrar.

In special circumstances, the Court may vary or set aside (remove) a security for costs order: rule 675.

Take aways

Litigation can be an expensive undertaking. If proceedings have been commenced against you or your enterprise, you should consider whether the party commencing them has the ability to pay your legal fees in the event that you successfully defend the claim. A security for costs application can provide you with some protection from being left with the burden of expensive legal fees for a matter you successfully defended.

Further references

Cases

[Indoport Pty Ltd v National Bank Ltd \[2001\] NSWSC 744](#)

[Sanrus Pty Ltd v Monto Coal 2 Pty Ltd \[2018\] QSC 53](#)

Legislation

[Uniform Civil Procedure Rules 1999 \(Qld\)](#)

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Malcolm Burrows B.Bus.,MBA.,LL.B.,LL.M.,MQLS.

Legal Practice Director

Telephone: (07) 3221 0013 | Mobile: 0419 726 535

e: mburrows@dundaslawyers.com.au

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Dundas Lawyers Pty Ltd · ACN 150 373 167 | +61 7 3221 0013 or Local Call 1300 386 529
Dundas Lawyers Gold Coast Pty Ltd · ACN 627 097 170 | +61 7 5646 9174 or 0420 205 105
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