

# Legal Review

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## Security for Costs in the Context of Insolvency Litigation



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Security for Costs applications are often made by defendants in litigation to protect a Defendant from not being able to realise a costs order against a plaintiff if the defendant is ultimately successful. Essentially, the order is to protect a defendant against the risk that a costs order obtained at the end of the litigation may turn out to be of no value by reason of the impecuniosity of the plaintiff. Against this is that rule that the Courts should not stifle a person's right to access justice and that poverty is no bar to a litigant.

The principles that are often set out in applications for security for costs can be summarised as follows:

- The impecunious status of the plaintiff.
- The relevance of delay in bringing the application for security.
- The reasonableness or otherwise of the delay.
- The merits of the plaintiff's claim including any cross claim.
- Relevance of whether an order would be oppressive.
- Whether an order would stultify proceedings
- Weight to be given to personal undertakings to meet possible adverse costs orders.

When it comes to a corporation, a security for costs application is not an uncommon tactic wheeled out by a defendant to apply pressure to the plaintiff. Section 1335 of the *Corporations Act 2001* (Cth) gives courts the power to order security for costs against corporations, if there is reason to believe that the corporation will be unable to pay the costs of the defendant. Relevant factors when making an application against a corporation, which link into the above factors, are whether:

- The plaintiff company is a resident outside Australia and thus make it difficult for the defendant to enforce any costs order.
- Misstatement of the address of the plaintiff in the Originating Process.
- The company is suing for the benefit of another.

It is generally considered inappropriate by the courts to make a security for costs order against a plaintiff that is a natural person.

Whilst a liquidator, in voidable claims, such as unfair preference claim, brings the action on behalf of the company, they are specific statutory actions that vest in the liquidator in his personal capacity.

It has been held that section 1335 *Corporations Act 2001* (Cth) is inapplicable to proceedings where the liquidator personally, and not the company, is the plaintiff, such as avoidance proceedings under section 588FF(1) of the *Corporations Act 2001* (Cth).

This reasoning is most certainly likely to apply to an insolvent trading recovery claim under s 588M(2) of the *Corporations Act 2001* (Cth), which says that "[t]he company's liquidator may recover ... as a debt due to the company ... the loss or damage".

By reason of the wording of these sections it would be a rare occasion when such an application would come before the court as against the liquidator in his personal capacity. It should be noted the ultimately the decision is discretionary and each court has its own legislation and rules in addition to the *Corporations Act*. For example section 56 of the *Federal Court Act 1976* (Cth) gives the Federal Court great flexibility in considering such applications.

However if the liquidator decides to pursue litigation in the name of the company, for example to recover a loan account from a director, then the principles in respect of a security for costs application under section 1335 will come into play. It has been held that a relevant factor in favour of making a security for cost order is the fact that the company is insolvent.

The position for a Company litigating when in liquidation was summarised in in *Metalloy Supplies Ltd (in liq) v MA (UK) Ltd* [1997] 1 All ER 418 where the court stated:

***"It may be commercially unwise [for a liquidator] to institute proceedings without the means to provide any security for costs which may be ordered, since this will only lead to the dismissal of the proceedings; but it is not improper to do so....The defendant may offer to settle; he may not apply for security; and if he does the court may not order it to be given, particularly if such an order would stifle a meritorious claim."***

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