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Security for Costs in Victoria: A Case Note

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Regulation 62.02 of the *Supreme Court (General Civil Procedure) Rules 2015 (Vic)*, the *County Court Civil Procedure Rules 2018 (Vic)* and the *Magistrates' Court General Civil Procedure Rules 2010 (Vic)* confer on



the respective Victorian state courts a discretion in certain circumstances, to grant a defendant an order for security for costs.

The principle is one of fairness; if a defendant is successful in the course of litigation the Court will, ordinarily, make orders requiring the plaintiff to reimburse the defendant their legal costs either on a standard (court scale) or indemnity basis. That being said, final costs orders offer little utility if the plaintiff is unable satisfy those orders.

For this reason, if a defendant has reason to believe that a plaintiff is in a financially precarious position they may prior to final judgment, make an application for security for costs. If the defendant's application is successful, the Court will make orders requiring the plaintiff to set aside security (often in the form of money) for the potential costs outlined above.

The decision of *US Realty Investments LLC #1 & Ors v Need [2013] VSC 590* ("**US Realty**") is instructive on the matters the Court will take into consideration in deciding whether or not to exercise its discretion under Regulation 62.02.

Facts

- The plaintiffs were four companies incorporated in the United States for which provisional liquidators had been appointed.
- The liquidators commenced proceedings against the defendant in an attempt to recover the sum of \$1,745,575.00 ("**Debt**") together with an order for possession of a property ("**Property**") owned by the defendant.
- The plaintiffs advanced funds to a corporate entity in which the defendant was to receive a ten per cent shareholding; in return the defendant executed a personal guarantee and provided a mortgage over the Property.

- The defendant put on a defence consisting of bare denials and non-admissions, but also foreshadowed that following the resolution of her application for security for costs, she would amend her defence to argue that the guarantee and mortgage were void and unenforceable.
- One of the provisional liquidators put on affidavit material deposing to the fact that the plaintiffs did not have funds to pay the liquidators fees, they were acting on a speculative basis and that two separate litigation funders had rejected their requests to fund the proceedings.

Burden of Proof

Associate Justice Derham, citing the case of *LivingSpring Pty Ltd v Kilger Partners [2008] VSCA 93* stated that it is entirely incumbent on a defendant to persuade the court that an order for security for costs be made, however there are “*particular discretionary matters in respect of which the plaintiff must necessarily have the carriage*”.

In *US Realty*, the plaintiffs had alleged that the granting of security for costs would be so onerous that it would stultify or frustrate their ability to proceed with the litigation entirely.

Prospects of Success

AsJ Derham then dealt with the issue of prospects of success stating that in the absence of evidence to the contrary, where a claim “*is prima facie regular on its face and discloses a cause of action, the Court should proceed on the basis that the claim is bona fide with reasonable prospects of success*”. Elaborating on this point, AsJ Derham proceeded to outline that whilst it is generally impracticable to assess a plaintiff’s prospects of success “*in any case of reasonable complexity*”, that does not necessarily preclude the court from taking this into consideration in all cases.



Stultification

The principle of stultification suggests that the court will not order security for costs in circumstances where the provision of that security would prevent the plaintiff from pursuing an arguable and legitimately instituted case. As enunciated by Bollen J in *Spiel v Commodity Brokers Australia Pty Ltd (In Liq) (1983) 35 SASR 294*, in such circumstances the granting of an order for security may result in an injustice to the plaintiff by allowing the defendant to achieve a victory without contest.

Whilst stultification will not in and of itself prevent the court from granting the defendant security for costs, it can act as a powerful factor in favour of the plaintiff in the court’s consideration.

Decision

In *US Realty*, security was awarded.

In making the decision, AsJ Derham determined that the plaintiffs would be unable to pay the defendant’s costs if the plaintiffs were to prevail in the proceedings.

Secondly, he stated that the plaintiff's prospects of success would largely be based on the strength of the defendant's amended defence, however on the materials available to him at the time of his judgment it would not be possible or appropriate to make a determination on this issue.

Finally on the issue of stultification, AsJ Derham acknowledged that granting the defendant security would have a stultifying effect on the proceedings. In determining whether to do so he considered the "*practical and commercial difficulties in providing any security ordered*". There were approximately 195 parties who had on average, each invested \$16,231.00 into the plaintiff companies. The issue for determination was whether or not it would be reasonable or practicable to expect the investors who each stood to gain from plaintiffs' success at trial, to provide funds to meet an order for security for costs especially given the small nature of the individual debts owed to them. The liquidators had previously written to the investors requesting that they advance funds to enable the plaintiffs to proceed with the litigation, however, only three investors expressed a willingness to contribute with a combined total of \$7,150.00.

Ultimately AsJ Derham concluded that:

"In these circumstances, the last matter to be put in the balance is whether it is fair that the defendant, being sued by the companies without means, should be in the position of having to incur substantial costs, in this case, tens of thousands of dollars of costs, and being at risk of liability for the plaintiffs' costs, and yet have no real chance of recovering costs even if the plaintiffs' proceeding is unsuccessful, when there are person who would benefit from the proceedings, who face no risk of liability for costs themselves, ad are either unwilling or unable to provide security".

It was ordered that the plaintiffs provide security for costs in the sum of \$46,500.00.

While there is an overriding principle of fairness, US Realty demonstrates that the circumstances particular to the case which comprise an overall judgement of "fairness" need to be adjudicated on the basis of merit and the individual facts before the court.

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