SECURITY FOR COSTS - CORPORATIONS[1]

A. Introduction

1. The solvency of a corporation which is an opposing party in litigation should always be a consideration. But it is worth remembering that, in certain circumstances, an application for security for costs may assist to protect the client.
2. Security for costs may be ordered in various circumstances.[2] This is a broad topic but, in this paper, I want to focus on situations where the plaintiff (or a counterclaimant) is a corporation and there are doubts as to whether it has sufficient assets in the jurisdiction to pay costs if ordered to do so.

B. Court Rules

3. Rule 62.02(1)(b) of the *Supreme Court (General Civil Procedure) Rules* 2015 relevantly provides that, where the plaintiff is a corporation and "there is reason to believe the plaintiff has insufficient assets in Victoria to pay the costs of the defendant if ordered to do so",:

> the Court may, on the application of a defendant, order that the plaintiff give security for the costs of the defendant of the proceeding and that the proceeding as against the defendant be stayed until the security is given.

4. Rule 62.01 provides that a "defendant includes any person against whom a claim is made in a proceeding" and "plaintiff includes any person who makes a claim."

C. Corporations Act

[1] © A Coote May 2023
[2] For example, see O 62.02 of the Supreme, County and Magistrates' Court Rules

5. Moreover, s 1335(1) of the *Corporations Act 2001* (Cth) is relevant, it states:

> where a corporation is plaintiff in any action or other legal proceeding, the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the corporation will be unable to pay the costs of the defendant if successful in his, her or its defence, require sufficient security to be given for those costs and stay all proceedings until the security is given.[3]

D. Principles

6. Although the wording is not identical, the relevant principles apply equally to the Court Rules and the *Corporations Act*, in other words they achieve the same result.[4]
7. The same test is also applicable to both. This test was outlined by the Court of Appeal in *Livingspring Pty Ltd v Kliger Partners* [2008] VSCA 93 ("*Livingspring*").
8. The first question the Court must ask is whether "there is reason to believe that the corporation will be unable to pay the costs of the defendant if successful"? This is a threshold condition for the exercise of the power and this "jurisdictional condition must be satisfied before the discretionary power to order security for costs is enlivened."[5]
9. In *Livingspring* the Court of Appeal defined "reason to believe" as follows:

> The phrase 'reason to believe' is the touchstone of jurisdiction. It requires a rational basis for the belief – and no more. The wording adopted may be contrasted with other familiar formulations such as 'If the court is satisfied that...' or 'If in the view of the court it is likely that...'. The section requires the making of a judgment, a risk

[3] This provision need not be cited in the summons/application to be relied upon in submissions at the hearing (*Worldwide Enterprises Pty Ltd v Silberman & Anor* [2010] VSCA 17 at [67])
[4] *Livingspring Pty Ltd v Kliger Partners* [2008] VSCA 93 (Maxwell P and Buchanan JA) at [10]
[5] *Livingspring Pty Ltd v Kliger Partners* [2008] VSCA 93 (Maxwell P and Buchanan JA) at [11]

assessment: is there a risk that the corporation will be unable to pay? (It adds nothing, in our view, to say that it must be a "real risk".) A risk assessment is, of necessity, imprecise. The section calls for a practical, commonsense approach to the examination of the corporation's financial affairs.

It may be said, with justification, that this is a low threshold. But the test simply reflects the policy of the provision, which is to protect a defendant against the risk of the plaintiff corporation's impecuniosity.[6]

10. Once the power to order security for costs has been enlivened, the court must then consider whether the discretion should be exercised. Foremost amongst the court's discretionary considerations will be any argument by the plaintiff that an order for security would work an injustice.[7]
11. For some time there was debate as to whether, once the court was satisfied of the threshold question, the burden of proof shifted to the plaintiff to prove it could pay costs if ordered to do so. The Court of Appeal rejected this notion in *Livingspring*:

> While satisfaction of the threshold condition in the relevant sense 'calls for' the exercise of the power, this does not alter the fact that the burden rests on the defendant, from first to last, to persuade the court that the order for security should be made.
>
> There are, of course, particular discretionary matters of which the plaintiff must necessarily have carriage. If, for example, the plaintiff corporation asserts that an order

[6] *Livingspring Pty Ltd v Kliger Partners* [2008] VSCA 93 (Maxwell P and Buchanan JA) at [15] & [16]
[7] *Livingspring Pty Ltd v Kliger Partners* [2008] VSCA 93 (Maxwell P and Buchanan JA) at [17]

for security would impose on it such a financial burden as would stultify the litigation, the plaintiff must establish the facts which make good that assertion.[8]

E. Conclusion

12. As pointed out by the Court of Appeal, the threshold enlivening the jurisdiction to order security for costs against a plaintiff corporation is low. Therefore, practitioners should be vigilant as to circumstances in which this procedure can be deployed to protect their client's interests.

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Adam Coote

Barrister

Green's List

[8] *Livingspring Pty Ltd v Kliger Partners* [2008] VSCA 93 (Maxwell P and Buchanan JA) at [21] – [22]