

LITIGATION READY REFERENCE SHEET: A FIRST POINT REFERENCE GUIDE

SECURITY FOR COSTS IN VICTORIAN COURTS

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Rationale for security for costs

A defendant is a “compulsory participant” in a proceeding. That is, unlike a plaintiff, a defendant has not chosen to be exposed to the risks of litigation. For this reason, a defendant has a special claim to protection from the financial risks relating to a court proceeding. That position may be recognised by ordering a plaintiff to provide security for the defendant’s costs.

What is the applicable legal framework?

Order 62 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) prescribes specific situations in which security for costs may be ordered. The court also has an inherent jurisdiction to regulate its own practice and procedures to procure proper and effective administration of justice and prevent abuse of process, including requiring a plaintiff give security for the defendant’s costs of the proceeding in certain circumstances (*Troiano v Voci* [2019] VSC 859, [22]).

When will security for costs be ordered?

Rule 62.02(1) prescribes six circumstances in which security for costs may be ordered:

- the plaintiff is ordinarily resident out of Victoria (although a plaintiff who resides out of Victoria but within Australia is not sufficient in and of itself to result in an award of security for costs: *Liu v Resi Ventures Leakes Pty Ltd (No 2)* [2019] VSC 638, [41]);
- the plaintiff is a corporation or sues for the benefit of another person (other than in a representative capacity), and there is reason to believe that the plaintiff has insufficient assets in Victoria to pay the costs of the defendant if ordered to do so;
- a proceeding by the plaintiff in another court for the same claim is pending;
- the address of the plaintiff is not stated or is not stated correctly in the plaintiff’s originating process (unless the plaintiff acted innocently and without intention to deceive, r 62.02(2));
- the plaintiff has changed its address after the commencement of the proceeding to avoid the consequences of the proceeding;
- under any Act the court may require security for costs.

With respect to the last circumstance, by way of example, if the plaintiff is a corporation, an application may be made under s 1335(1) of the *Corporations Act*

2001 (Cth), which permits a court to require sufficient security be given (and stay all proceedings until the security is given) 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/its defence.

What if the plaintiff is impecunious?

Natural person: Generally, the bare fact of impecuniosity is not of itself reason to order a plaintiff who is a natural person to provide security for costs (*Jeffery and Katauskas Pty Ltd v Rickard Constructions Pty Ltd* (2009) 239 CLR 75). This is because such an order may stultify the impecunious plaintiff from filing or continuing a proceeding, thereby depriving them of their rights (*Troiano v Voci* [2019] VSC 859, [23]).

Other factors that have resulted in orders that a natural person provide security for costs include: (1) where they are resident outside Australia; (2) where the claim is brought, to a significant extent, for the benefit of others; (3) lack of prospects of success; and (4) where there is evidence of the plaintiff avoiding their creditors and financial responsibilities (*Troiano v Voci*, [23]).

In terms of prospects of success, as a general rule, where a claim is *prima facie* regular on its face and discloses a cause of action, in the absence of evidence to the contrary, the court should proceed on the basis that the claim is bona fide with reasonable prospects of success: *Von Marburg v Aldred (No 3)* [2017] VSC 146 [44(a)]. Further, the court is not obliged to consider at length the merits of the claim, and to do so would ordinarily be considered to be a waste of resources: *Von Marburg v Aldred (No 3)*, [44(c)].

Corporate plaintiff: In contrast, an order for security for costs will more readily be made against an impecunious corporate plaintiff, noting that even in such circumstances, the court retains a discretion as to whether to require security, and in what amounts.

To make such an order, there need only be “reason to believe that the plaintiff has insufficient assets in Victoria”. This requires the court to ask: is there a risk that the corporation will be unable to pay? This is a low threshold. The court will then consider whether the power to order security should be exercised: *LivingSpring Pty Ltd v Klinger Partners* [2008] VSCA 93, [15]-[17].

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Except for matters that are peculiarly within the knowledge of the plaintiff (for example, that the plaintiff's impecuniosity was caused by the defendant), the burden of satisfying the court that it should exercise its discretion to order security for costs rests on the defendant: LivingSpring Pty Ltd v Klinger Partners, [21]-[22]. However, where the defendant has adduced credible evidence that the plaintiff company will be unable to pay a costs order, and the plaintiff company does not call evidence to the contrary, the company runs the risk of having an order for security made against it: Education Equity Pty Ltd v Austock Funds Management Pty Ltd [2010] VSC 636, [28]-[29].

In exercising its discretion, the court will consider: (1) whether the orders being sought would frustrate the claim; (2) the merits of the claim; (3) whether the defendant was the cause of the plaintiff's impecuniosity; (4) whether there was any delay, to the prejudice of the plaintiff, on the part of the applicant, for security; (5) whether there are any persons standing behind the company who are likely to benefit from the litigation and who are willing to provide the necessary security; (6) whether the persons (if any) standing behind the company have offered any personal undertaking to be liable for the costs and if so, the form of any such undertaking; and (7) whether the plaintiff is a plaintiff "in substance", or one forced to litigate in self-defence (Trility Pty Ltd v Ancon Drilling Pty Ltd [2013] VSC 577, [15]-[16]).

What is the manner of giving security?

The court has a broad discretion to direct the manner and time security for costs is given by the plaintiff (r 62.03). For example, a court may order that security be given in tranches linked to certain milestones in the proceeding (such as discovery, mediation and/or the commencement of trial).

Further, the court may set aside or vary any order requiring a plaintiff give security for costs (r 62.05). For example, by ordering further security if the existing security is insufficient (Oswal v Australia and New Zealand Banking Group Ltd [2016] VSC 282, [16]).

Amount of security

In determining the amount of security, the court takes a "broad brush" approach to identify an amount of security that is reasonable in the circumstances of the case (Shelteo Pty Ltd v Australia and New Zealand Banking Group Limited [2021] NSWSC 224, [47]).

It is generally accepted that a defendant is not entitled to security for the whole of its recoverable costs (see, for example, CBX2 Pty Ltd v National Australia Bank

(No 2) [2015] NSWSC 1969, [54]-[55]). The amount should not be so low that it fails to provide real protection to the defendant, but should not be so high as to be oppressive to the plaintiff (Troiano v Voci, [44]).

The court will have regard to (but is not bound by) any evidentiary basis put forward by the defendant as to an appropriate quantification of costs (Troiano v Voci, [44]). The form of this evidence is typically an affidavit from an experienced litigation solicitor who is familiar with the matter or alternatively an independent third party expert, such as a costs assessor (Norcast S.ár.L v Bradken Limited [2012] FCA 765, [17]-[18]).

Further, the court will apply an appropriate discount where the defendant has sought security for actual rather than recoverable costs, and/or to account for the prospects of settlement, the merits of the case, and the strength of the evidence regarding the amount of security required (Norcast S.ár.L v Bradken Limited, [17]-[22], [28]).

When should an application for security be sought?

Security for costs generally looks to protect costs to be incurred in the future. It is therefore prudent for a defendant to seek such an order as promptly as possible after: (1) the filing of an appearance (see r 8.02); and (2) obtaining the knowledge of the circumstances supporting the application. Delay in seeking such an order may be unfairly prejudicial to the plaintiff, and as a result, prevent the making of an order or otherwise limiting the quantum of security ultimately ordered by the court (Oswal v Australia and New Zealand Banking Group Ltd [2016] VSC 52, [44]).

Can a plaintiff receive security from a defendant?

An order for security for costs may be made against a defendant who counterclaims (r 62.01, definition of defendant).

More generally, if a defendant is perceived as the aggressor, a court may (albeit on an exceptional basis) order the defendant provide security for costs (see, by way of example, Farmitalia Carlo Erba SrL v Delta West Pty Ltd (1994) 28 IPR 336).

What happens if a party fails to give security?

A proceeding will be stayed until security is given (r 62.02). Where a plaintiff fails to give the security required by an order, the court may dismiss the plaintiff's claim (r 62.04).

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