Security for Costs Order

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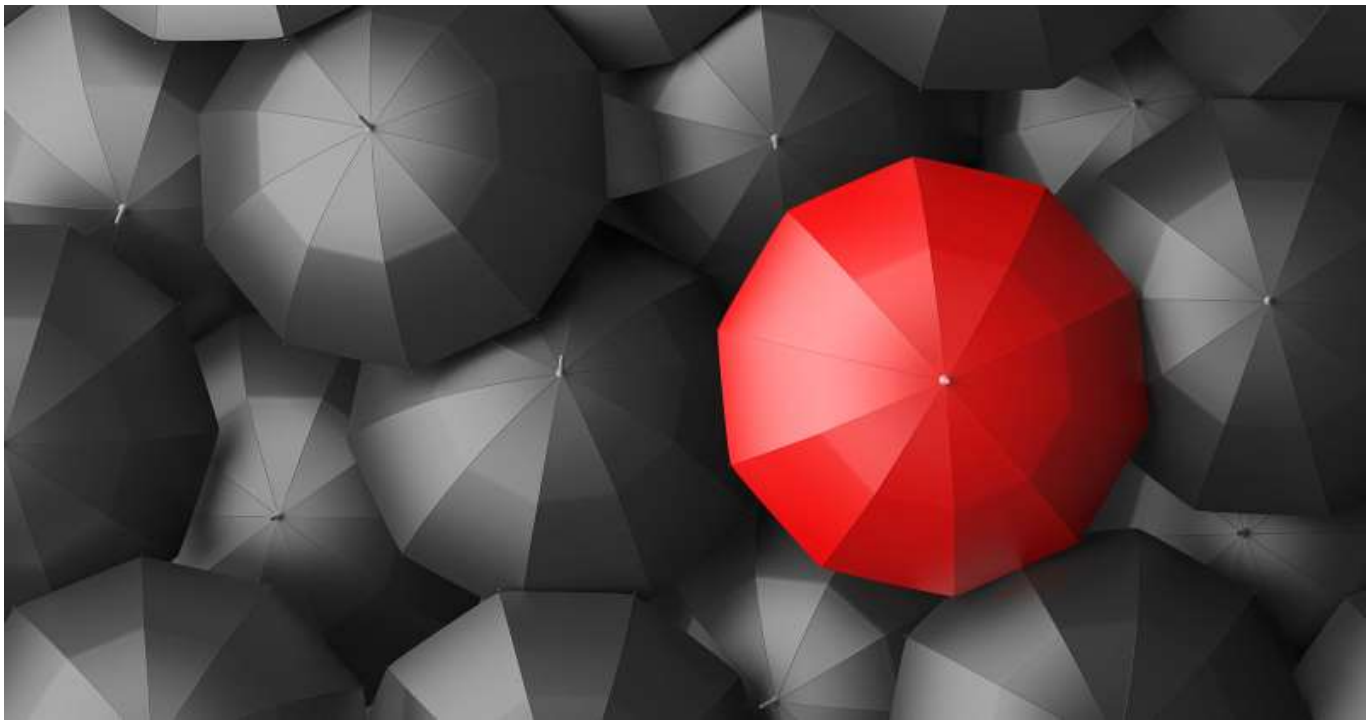

Security for Costs: How to not get dragged down by the impecunious Plaintiff

A successful defendant can often be left with a significant legal bill despite a court ordering the plaintiff to pay their costs of the proceeding – winning the battle but losing the war.

Imagine you find yourself as a defendant in proceedings that you never saw coming and which should ultimately never have happened. The plaintiff's claims may lack merit and have very low prospects of success, but they commenced proceedings against you anyway in a desperate attempt to recover money that they lost as a consequence of their own actions. After all of the hours of stress, sleepless nights, phone calls, meetings, and thousands of dollars of legal fees, you and your legal team emerge from litigation victorious, with the plaintiff to pay your costs of the proceeding – only to find out, the plaintiff has no money, no assets and is unable to pay your legal fees.

Unfortunately, situations like this are not uncommon – but depending on the circumstances of your individual case, there may be an avenue available for you to protect yourself from plaintiff's trying to drag you down with them: **a Security for Costs order**.

What is a Security for Costs Order?

The purpose of an order for security for costs is ensure that unsuccessful proceedings commenced by the plaintiff do not disadvantage the defendant.

If you have a legitimate concern that a plaintiff may not be able to pay your costs if you are successful in defending their claim, by getting a Security for Costs order you can ensure that, if they are unsuccessful in their claim against you, at least a portion of your legal costs will be covered.

The court can force the plaintiff to pay an estimated amount of money that you would likely spend defending your claim, before proceedings progress – and if that security payment is not provided, the court can order in certain circumstances that the proceedings be stayed (halted) until the security is given or ultimately dismissed without being heard.

How do I get a Security for Costs Order?

Whilst a very advantageous tool for a defendant, Security for Costs orders do not come easily, as the court's power to order security for costs is discretionary and the order will not be automatic.

This means that obtaining a Security for Costs order involves proving to the court why they should exercise their discretion to grant the order, as opposed to applying and automatically receiving one.

The court has to find a balance between the inherent right of a plaintiff to not be deprived of bringing legal proceedings, and the right of a defendant to not be forced to waste money defending an inevitably hopeless claim.

Applications to the court seeking a Security for Costs order must be made promptly and without delay, and require proof that there are special circumstances (i.e. a good reason to believe that the applicant will be unable to pay your costs if so ordered).

Some factors the court will have regard to in issuing a Security for Costs order include:

- If there is reason to believe that the plaintiff has divested assets with the intention of avoiding the consequences of the proceedings
- If a plaintiff has either not stated, mis-stated or changed their address to deceive or avoid the consequences of the proceedings
- The difficulty in enforcing an order for costs overseas against a non-resident plaintiff
- The plaintiff's prospects of success
- The impecuniosity of the plaintiff
- Whether an order for security for costs would stifle the proceedings
- The cost of the proceedings
- The timing of the application
- Whether the proceedings involve a matter of public importance
- Whether delay by the plaintiff in commencing the proceedings has prejudiced the defendant

Applications for Security for Costs orders can be an effective way for a defendant to protect themselves from being left with a costly legal bill despite winning their case against an

impecunious plaintiff.

If you are currently involved in a legal proceeding where you have a genuine concern about the plaintiff's capacity to pay a costs order against them, or would simply like more information to see whether this avenue may be an option for you, contact a Principal of the Matthews Folbigg Insolvency, Restructuring & Debt Recovery Group:

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