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# AN OWNERS CORPORATION IS NOT IMMUNE FROM GIVING SECURITY FOR COSTS

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### Introduction

In a recent NSW Supreme Court case of *The Owners – Strata Plan 87265 -v- Saaib* [2019] NSWSC 289, Saaib (a builder) was sued by an owners corporation for a breach of statutory warranties under the *Home Building Act 1989*.

The builder brought an application to the Court seeking an order that the owners corporation provide security for costs to protect the costs of the builder in the litigation in the event the builder was successful and unable to recover his costs from the owners corporation.

### What is Security for Costs?

Applications for security for costs are common in general litigation but are uncommon in strata litigation. A court may in an appropriate case, order security for costs in favour of a defendant, to ensure justice between the parties, and, in particular, to ensure that unsuccessful proceedings do not disadvantage defendants.

An order for security for costs normally requires the plaintiff to pay money into court or provide a bank guarantee or security deposit so that if the plaintiff loses the case and is ordered to pay the defendant's costs, the defendant is able to recover those costs from the security provided by the plaintiff.

Normally, a court will place a case on hold until the plaintiff provides the security for the defendant's costs in accordance with the court's order.

### When Does the Court Order Security for Costs?

To order security for costs, the court has a very wide discretion both at common law and pursuant to the *Civil Procedure Act 2005* and the *Uniform Civil Procedure Rules 2005*.

The general rule is that a natural person who sues another will not be ordered to give security for costs regardless of how poor the person is.

Whilst the general rule is not absolute, the power to order security for costs is a balancing process where the court will make an attempt to achieve a balance between ensuring adequate and fair protection to a defendant and avoiding injustice to an impecunious plaintiff by shutting it out from the conduct of the proceedings.

The factors that guide a court when considering an application for security for costs in NSW are set out in rule 42.21(1A) of the *Uniform Civil Procedure Rules 2005*.

For example, the court may consider factors such as the prospects of success of the claim, the genuineness of the case, the impecuniosity of the plaintiff and whether it is attributable to the defendant's conduct, whether the order for security for costs would stifle the plaintiff's claim and so forth.

### **The Claim for Security Against the Owners Corporation**

In *Saajib's* case, the owners corporation had a negative net asset position and it had largely borrowed funds from a lender to finance the conduct of its litigation against the builder.

The builder argued that if the owners corporation was unsuccessful, it would not be able to pay the costs of the builder because the owners corporation would have to strike a levy against each lot owner as it would not have sufficient funds to meet the builder's costs.

Furthermore, the builder argued that even if a levy was struck seeking contributions from lot owners, such contributions could be paid by lot owners in installments under the *Strata Schemes Management Act 2015* thus raising a possibility that the owners corporation could not raise funds to meet any order for costs without delay.

The owners corporation conceded that there was a reason to believe that it would be unable to pay the builder's costs however argued that security for costs should not be ordered for a number of reasons:

1. The owners corporation had brought the proceedings for the benefit of lot owners who stood behind the owners corporation, and therefore the case was not one where those who stood to benefit from the fruits of litigation could shirk the burden of an adverse result. In other words, lot owners would not be able to escape the burden of the litigation;
2. There was some delay on the part of the builder in bringing his application for security for costs some two years after the owners corporation having commenced its legal action;
3. Any order for security for costs made against the owners corporation would stultify the proceedings; and
4. The owners corporation's dire financial circumstances was attributable to the builder's conduct.

### The Court's Decision

In coming to its decision, the Court weighed up a number of factors and concluded that it would not order security for costs against the owners corporation. In other words, the Court dismissed the builder's application.

The Court held that the case was finely balanced and those who stood to benefit from the litigation were exposed, albeit indirectly, through the burden of a costs order. The Court further said, if the builder was successful and obtained a costs order, it seemed likely that he would, perhaps after some delay, recover those costs.

### Lessons from the Saaib Case

An owners corporation needs to understand that it is not completely immune from a defendant bringing an application against it for security for costs in litigation.

Before commencing any legal action the owners corporation must ensure that it will be able to fund the litigation and be able to meet any adverse order for costs.

If a defendant in a clear case presents sufficient evidence to persuade a Court that security for costs should be ordered, then the Court is likely to make that order against an owners corporation. If any such order is made an owners corporation will be required to secure those costs within a short time frame before the litigation is able to continue. An inability to secure costs to the satisfaction of the court is likely to result in a delay and in some cases a dismissal of the proceedings.

The Court in *Saaib's* case stated very clearly that lot owners who stand behind the owners corporation and who stand to benefit from the fruits of the litigation, "*are exposed, albeit indirectly, to the burden of a costs order*". Every case will turn on its own facts but it is important to understand that an owners corporation can be ordered to give security for costs during the progress of litigation if an application is brought.

Therefore, prior to the commencement of any legal action, an owners corporation should consider its financial position carefully and obtain legal advice on the possibility of being ordered to give security for costs before deciding to litigate.



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