IS IT POSSIBLE TO OBTAIN AN ORDER FOR SECURITY FOR COSTS IN THE FAIR WORK JURISDICTION OF THE FEDERAL COURT AND FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA

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Introduction

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THE SOURCE OF THE POWER

Section 1335(1) of the *Corporations Act 2001* provides:

- ”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.”

Rule 19.01 of the *Federal Court Rules 2011*

- “A respondent may apply to the Court for an order: (a) that an applicant give security for costs and for the manner, time and terms for the giving of the security; and (b) that the applicant's proceeding be stayed until security is given; and (c) that if the applicant fails to comply with the order to provide security within the time specified in the order, the proceeding be stayed or dismissed.”
- See also s.56 of the *Federal Court Act of Australia Act 1976*

THE SOURCE OF THE POWER

- FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2) (GENERAL FEDERAL LAW) RULES 2021 - RULE 22.01
- Security for costs (1) On application by a respondent, the Court may order the applicant to give the security that the Court considers appropriate for the respondent's costs of the proceeding.
- (2) In this rule:
- *"respondent"* includes an applicant if a cross - claim is made or the response to the application seeks orders in relation to matters not covered by the applicant.
- (3) An application must be made in accordance with the approved form and supported by an affidavit setting out the facts relied on.

The Threshold Question

- The discretion is unfettered but must be exercised judicially; and each application for an order for the provision of security turns on its own facts (*Bell Wholesale Co Ltd v Gates Export Corp (1984)* 2 FCR 1).
- Firstly, the application must be brought promptly (*KDL Building v Mount* [2006] NSWSC 474).
- To enliven the court's jurisdiction to award security, it must appear by credible testimony that there is reason to believe the cross applicant will be unable to pay the cross respondents' costs.
- That test is not a demanding one (*Fire Containment Pty Ltd v Robins* [2011] NSWSC 444) and is satisfied where the evidence establishes there is a reason to believe there is a real chance a corporate applicant/cross applicant will be unable to pay costs, even if, having regard to possible events, the cross applicant might be able to pay costs (*Beach Petroleum NL v Johnson* (1992) 7 ACSR 203).

The Threshold Question

- It is improper for a plaintiff/cross applicant to attempt to structure the proceedings for the purpose of avoiding potential liability for the other parties' costs. (*Bryan Fencott and Associates Pty Ltd v Eretta Pty Ltd* (1987) 16 FCR 497). Where the real plaintiff/cross applicant does not appear on the record, proceedings should be stayed until security for costs is given (*Evans v Rees (1892) 2 QB 334).*
- A corporate plaintiff/cross applicant that resides that outside Australia and has no assets in Australia is "a circumstance stance of great weight" (*P S Chellaram & Co Ltd v China Ocean Shipping Co* (1991) 102 ALR 321) favouring the discretion to order security and the Courts' practice has been to order security unless the plaintiff can point to other circumstances that overcome the weight of non-residency and the lack of assets within this jurisdiction.
- Authority shows that the court makes a security order as a matter of course if a corporate plaintiff/cross applicant' assets are out of the jurisdiction and has no accessible assets within the jurisdiction, because if a judgement for costs is later obtained against the plaintiff it cannot be enforced by the direct process of the court (Kohn v Rinson & Stafford (Brod) Ltd [1948] 1 KB 327)

The Threshold Question

- A corporate plaintiff/cross applicant's impecuniosity is not only the door that opens and enlivens the Court's jurisdiction under s1335(1) but is also *"a consideration of considerable weight"* in exercise of the discretion (*Jodast Pty Ltd v A & J Blattner Pty Ltd* (1991) 104 ALR 248 at 255 per Hill J (FCA)).
- Further, the failure by a corporate cross applicant to adduce admissible evidence in relation to its financial capacity will support a finding the threshold is met (*Narradine Pty Ltd v Mascot Steel and Tools Pty Ltd* [2012] NSWSC 385).
- The general principle is that the Court should not embark upon a detailed consideration of the merits of a case where it is evident that the claims made appear to have been made bona fide and to be arguable: see *Fiduciary Ltd v Morningstar Research Ltd* [2004] NSWSC 664; (2004) 208 ALR 564)
- However, in *Nalbandian v Commonwealth of Australia (Australian Bureau of Statistics)* [2015] FCCA 2094 a self- represented litigant who alleged he was impecunious and whose claim Judge Smith described as *"numerous and discursive"* and on the material before him found he could *not "properly assess the merits of those claims"* was none the less ordered to pay security even given the effect of s.570 of the FWA.

Section 570 of the Fair Work Act 2009

- **Costs only if proceedings instituted vexatiously etc.**

(1) A party to proceedings (including an appeal) in a court (including a court of a State or Territory) in relation to a matter arising under this Act may be ordered by the court to pay costs incurred by another party to the proceedings only in accordance with subsection(2) or section 569 or 569A.

(2) The party may be ordered to pay the costs only if:

(a) the court is satisfied that the party instituted the proceedings vexatiously or without reasonable cause; or

(b) the court is satisfied that the party's unreasonable act or omission caused the other party to incur the costs;

(c) the court is satisfied of both of the following:

(i) the party unreasonably refused to participate in a matter before the FWC;

(ii) the matter arose from the same facts as the proceedings.

THE EFFECT OF S.570 OF THE FWA ON SECURITY APPLICATIONS

- **FEDERAL COURT OF AUSTRALIA ACT 1976 - SECT 43**

  Costs

  (1) The Court or a Judge has jurisdiction to award costs in all proceedings before the Court (including proceedings dismissed for want of jurisdiction) other than proceedings in respect of which this or any other Act provides that costs must not be awarded. This is subject to:…

  (b) section 570 of the Fair Work Act 2009 ; and

THE EFFECT OF S.570 OF THE FWA ON SECURITY APPLICATIONS

- In *Dove v Xmeta Pty Ltd (formerly known as Everforex Financial Pty Ltd) (No 3*) [2023] FCA 1320 Goodman J held;

"Security for costs applications in the usual course proceed upon an assumption that an unsuccessful party will be liable for the costs of a successful party. However, that assumption is not a valid assumption in a case, such as the present, in which the exercise of the costs discretion is informed by s 570 of the FW Act. As White J explained in *Augusta Ventures Ltd v Mt Arthur Coal Pty Ltd* [2020] FCAFC 194; (2020) 283 FCR 123 at 161 [133], the operation of s 570 of the FW Act, when engaged, is a matter to be given prominence in the exercise of the costs discretion. The presence of s 570 as a factor informing the exercise of the discretion requires the Court not to assume that there will be an award of costs against the unsuccessful party, but instead to make an assessment based on the facts presently known to it, of the likelihood that the party against whom security is sought will be required to pay the costs of the party seeking security."

THE EFFECT OF S.570 OF THE FWA ON SECURITY APPLICATIONS

- In *Augusta Ventures* at 153 to 154 ([100] to [103] and [107]), White J (with whom Allsop CJ and Middleton J agreed) stated:

  "100. Section 570 operates as a qualification on the general discretion with respect to costs vested in the Court by s 43(1) of the FCA Act: *Melbourne Stadiums Ltd v Sautner* [2015] FCAFC 20; (2015) 229 FCR 221 at [140]. Section 43(1) makes it plain by stipulating that the Court's power with respect to costs is subject to s 570. **Instead of the usual rule that costs will follow the event, s 570 provides that parties in proceedings in relation to matters arising under the FW Act are not, in the absence of some form of unsatisfactory conduct, to be required to pay the costs of another party**.

THE EFFECT OF S.570 OF THE FWA ON SECURITY APPLICATIONS

101. As was noted by Jessup and Tracey JJ in *Australasian Meat Industry Employees' Union v Fair Work Australia (No 2)* [2012] FCAFC 103; (2012) 203 FCR 430 at [3], s 570 is the current iteration of provisions which, since 1973, have restricted the making of costs orders under Commonwealth industrial relations legislation…. The precise terms of the predecessors of s 570, and of s 570 itself, have varied, but the underlying effect has, in substance, been the same.

102. **The object sought to be achieved by s 570 is plain. It is the same as the object of s 347 of the WR Act as described by the Full Court (Black CJ, Tamberlin and Sundberg JJ) in *Commonwealth v Construction, Forestry, Mining and Energy Union* [2003] FCAFC 115; (2003) 129 FCR 271**:

[10] ... **The object that s 347(1) seeks to achieve is plain enough: it is to give effect to a policy choice about the controversial issue of whether costs should ordinarily follow the event or whether they should ordinarily be borne by the party incurring them…**

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THE EFFECT OF S.570 OF THE FWA ON SECURITY APPLICATIONS

103 **The evident legislative policy is that persons who seek by legal proceedings to vindicate rights or to obtain relief under the FW Act should be able to do so without exposing themselves to the risk of having to pay the costs of another party in the event that they are unsuccessful…**

107 **It is important not to lose sight of legislative policy which underpins s 570**. This can easily occur if one characterises it as being no more than a statutory fetter on the making of the usual order for costs. It is that, but it also reflects an attempt to address the underlying inequality of position commonly experienced by applicants in litigation for the enforcement of industrial entitlements."

THE EFFECT OF S.570 OF THE FWA ON SECURITY APPLICATIONS

- In *Dove v Xmeta Pty Ltd (formerly known as Everforex Financial Pty Ltd) (No 3*) [2023] FCA 1320 where it was conceded that the cross applicant had no "appreciable accessible assets in Australia" and the Court proceeded "on the basis that Xmeta will not be able to satisfy an adverse costs order if one were to be made" Goodman J when considering the effect of s.570 of the FWA observed;

  "The prima facie position is that there is no order as to costs; and costs are awarded only "in accordance with subsection (2)…". It follows that it is necessary for the Court to have regard to the likelihood that: (1) the discretion to award costs will be enlivened; and (2) if so, that it will be exercised adversely to the unsuccessful party. Of course, this assessment will vary from case to case as a function of the particular facts known at the time of the exercise of the discretion to order the provision of security for costs.

  As White J explained in Augusta Ventures at 160 [127]:

  First, and perhaps most obviously, the circumstances (if any) in which an applicant in proceedings in relation to a matter under the FW Act should be ordered to provide security for a respondent's costs are likely to be exceptional. An applicant should not ordinarily be required to provide security for costs which, in the absence of unsatisfactory conduct on his or her part, will never be payable."

THE EFFECT OF S.570 OF THE FWA ON SECURITY APPLICATIONS

- Despite the Cross Applicant having had five previous costs orders made against it under s.570(2)(b) of the FWA due to non-compliance with orders and the manner in which it had conducted the proceedings to date Goodman J went on to find;

  > "In the present case, and on the facts presently known, I am not satisfied that there is a likelihood that a costs order will be made against Xmeta if it is unsuccessful in the proceeding sufficient to require it to provide security for costs.
  >
  > The cross-respondents submit that the history of costs orders made against Xmeta provides a basis for concluding that it is likely that a costs order will be made against Xmeta at the conclusion of the proceeding.
  >
  > I do not accept this submission. A costs order, in the circumstances of the present case, will only be made if s 570(2)(a) or (b) is satisfied (and the discretion in s 570(1) is then exercised favourably to the cross-respondents).

THE EFFECT OF S.570 OF THE FWA ON SECURITY APPLICATIONS

"Sub-section 570(2)(a) appears unlikely to be satisfied. The cross-respondents have not suggested that Xmeta filed the cross-claim vexatiously and any contention that it was filed without reasonable cause would be difficult to maintain in view of the result of the strike out application.

Thus, for s 570(2) to be satisfied, the cross-respondents will need to establish that there have been unreasonable acts or omissions and that those acts or omissions caused the cross-respondents to incur costs, within the meaning of s 570(2)(b).

I accept that there have been past unreasonable acts and omissions of Xmeta in this proceeding and that these acts and omissions have caused the cross-respondents to incur costs, such that, in theory, s 570(2)(b) would be satisfied. However, there is in my view no realistic possibility that the discretion in s 570(1) would then be exercised favourably to the cross-respondents in circumstances where such costs have been: (1) the subject of previous costs orders; and (2) paid.

I also do not consider the fact that previous conduct of Xmeta has resulted in costs orders to provide a sound basis, as a matter of logic, for a conclusion that Xmeta will ultimately be ordered to pay the costs of its cross-claim."

IN CONCLUSION

- Security for Costs will only be ordered in cases commenced in the Fair Work jurisdiction of the Federal Court and Federal Circuit and Family Court of Australia in exceptional cases
- Even where there has been a history of non-compliance with orders of the Court and the acts and omissions of the applicant/cross applicant have caused the respondent/cross respondent to incur costs which have sounded in a number cost orders against the applicant/cross applicant under s.570(2)(b) of the FWA during interlocutory steps in proceedings this will not normally be sufficient to enliven the discretion for the Court to make an order for security.
- The exception would appear to be where previous costs orders have remained unsatisfied remembering that there is no requirement in the Federal jurisdiction that costs of interlocutory matters are not payable until the completion of the proceedings.
- More probably than not the only way to obtain an order for security in the Fair Work jurisdiction is to be able to make out the merits of the applicant/cross applicant's case are so low that they are very unlikely to succeed (See *Nalbandian v Commonwealth of Australia (Australian Bureau of Statistics)* [2015] FCCA 2094).

Questions

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