
Security for Costs



The power on the part of a Plaintiff to issue proceedings can be significant. In most cases, Defendants are left with little option but to engage lawyers to act on their behalf irrespective of the meritorious nature of the Plaintiffs claim. James Meighan provides an overview of the role of security for costs in the litigation process is, which he says in some cases, is to recalibrate the relationship between Plaintiff and Defendant

Security for costs arises where the court directs a party to lodge a sum of money into the court to meet the costs of the other party to the proceedings, should the party ordered to lodge the money be unsuccessful in their action.

Security against Individual Plaintiffs

In the context of natural persons, Order 29 of the Rules of the Superior Courts provides *inter alia*:

“When a party shall require security for costs from another party, he shall be at liberty to apply by notice to the party for such security; and in case the latter shall not, within 48 hours after service thereof, undertake by notice to comply therewith, the party requiring the security shall be at liberty to apply to the Court for an order that the said party do furnish such security.”

The jurisdiction of the courts to make orders for security for costs as regards individual Plaintiffs has evolved significantly since the application of European law in this jurisdiction. Traditionally, security was granted against individuals outside the jurisdiction on the basis of the potential difficulty of recovering costs against an unsuccessful Plaintiff. However, obstacles which could potentially have been placed in the way

of a successful Defendant seeking to recover on foot of a costs order have essentially been removed by instruments such as the Brussels Regulations which levels the playing field in the area of European private international law. The modern position is that Security for costs will not be ordered against an individual Plaintiff who is a national of and resident in another member state of the European Union in the absence of very cogent evidence of substantial difficulty in enforcing a judgment.

For a Defendant to secure an order for security for costs, they must demonstrate the following to the court:

- (a) The Plaintiff must be ordinarily resident out of the jurisdiction, the European Union or a contracting state of the Lugano Convention; and
- (b) The Defendant must have a *prima facie* defence to the merits of the Plaintiffs claim.

On the defence of the action, Order 29, rule 3 provides that “[n]o Defendant shall be entitled to an order for security for costs by reason of any Plaintiff being resident out of the jurisdiction of the Court, unless upon a satisfactory affidavit that such Defendant has a defence upon the merits.” The term ‘satisfactory affidavit’ has been considered in a number of cases and it is not sufficient for the Defendant



to merely assert that they have a defence to the action, they must go further and set out evidence establishing some specific or ascertainable defence. On the residence of the Plaintiff, Order 29, rule 4 provides that “[a] Plaintiff ordinarily resident out of the jurisdiction may be ordered to give security for costs though he may be temporarily resident within the jurisdiction.” There has been judicial consideration of the term ‘ordinarily resident’ and the courts have found that the issue of citizenship is irrelevant, the court must consider the practical position as regards residency and whether, considering all the circumstances, the Plaintiff could be said to be ordinarily resident outside the European Union.

An obvious concern on the part of a Defendant is a Plaintiff's ability to meet a potential order for costs, where the Plaintiff resides within the jurisdiction or within the European Union. There has been several attempts to extend the jurisdiction as regards security for costs to include potential impecunious Plaintiffs however the courts have resisted these attempts. Courts have always pointed out the original purpose of the relief, to protect Defendants, with a *prima facie* defence from being in the position where they were left with no real ability to enforce

an order for costs against a foreign (now outside the European Union) Plaintiff.

Procedure for Seeking Security against an Individual Plaintiff

Order 29 sets out the court's jurisdiction for the granting of security for costs and the procedure to be applied when seeking an order. The procedure is as follows:

1. A request for security must be made on a voluntary basis,
2. The party against whom the security is sought, must provide the security or confirmation that it will provide security within 48 hours of the request,
3. If the security is not provided on a voluntary basis, the party seeking the security may issue a notice of motion, grounded on affidavit which should set out a background to the matter, the applying party should confirm that they have a bona fide defence to the proceedings, an averment that the Plaintiff resides outside the jurisdiction (and the European Union) and that the applying party first sought security on a voluntary basis.
4. The grounding affidavit must be sworn by the Defendant and not the Defendant solicitor.



Quote



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Security against Companies and Corporate Entities

Section 52 of the Companies Act 2014 (previously section 390 of the Companies Act 1963) provides:

“Where a company is Plaintiff in any action or other legal proceeding, any judge having jurisdiction in the matter, may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the Defendant if successful in his or her defence, require security to be given for those costs and may stay all proceedings until the security is given.”

There are a number of restrictions on the application of Section 52 including that its scope does not extend to companies registered outside the jurisdiction or unlimited companies incorporated within the State. There is a marked distinction between the requirements of the Defendant insatisfying the court between applications for security against individuals and companies. Hogan J in *CMC Medical Operations Limited .v. Voluntary Health Insurance Board* [2015] IECA 68 distinguished security for costs against an individual from a corporate entity. To satisfy the requirements of section 52, the applicant must show:

1. That the Defendant has a prima facie defence to the Plaintiffs action; and
2. That the Plaintiff will not be in a position to pay the Defendants costs if the defence is successful.

Section 52 only applies to companies incorporated under the Companies Act 2014 or an existing company. The exercise of the jurisdiction under Section 52 is not mandatory on the court therefore, the court may use its discretion in deciding whether it is appropriate for the granting of such an order. When considering whether an order is appropriate in the circumstances, the court may have regard to factors such as whether the Defendant may potentially be responsible for the Plaintiffs inability to meet such an order and whether a potential issue of public importance arises in an action. The nature of the proceedings which can potentially attach an order for security for costs is broad in the context of Section 52, “or other legal proceedings”. It has been held that these other legal proceedings may include decisions of the Taxing Master or judicial review proceedings.

Procedure for Seeking Security against a Corporate Plaintiff

A party seeking security against a corporate entity should first attempt to agree the security on a voluntary basis. If security cannot be agreed, a notice of motion, grounded on affidavit should issue seeking the necessary relief. The grounding affidavit must be sworn by the Defendant and not the Defendant solicitor. The affidavit should set out an outline of the nature of the proceedings, an averment that the Plaintiff will be unable to meet the Defendants costs if the Plaintiff is unsuccessful, that the Defendant has an arguable defence to the proceedings and that the applying party sought to agree the security on a voluntary basis.

As noted, the provisions of Section 52 do not apply to companies incorporated outside the State or unlimited companies incorporated within the State. However as with commerce and other aspects of modern life, litigation in Ireland is not a solely indigenous exercise or restricted to limited companies

incorporated under the Companies Acts and is often deployed by entities incorporated in other countries and unincorporated companies within the State. Defendants are not precluded from seeking security for costs against such Plaintiffs and the court's jurisdiction to grant orders against these Plaintiffs derives from Order 29 of the Rules of the Superior Courts. Over time a practice has developed where a Defendant seeking security against a Plaintiff of this nature would rely upon Order 29 and Section 52 (previously Section 390). In such applications, the court relies upon its jurisdiction under Order 29 and applies the principles which have developed under Section 390/Section 52 in determining such applications.

A Balancing Act

While the rational for the provision of security, in certain cases is clear, the provision of the security must be weighed up against a Plaintiff's right to litigate. A Plaintiff's right to litigate was defined by the Supreme Court in *Tuohy .v. Courtney* [1994] 3 IR 1 as follows, “the right to achieve by action in the courts the appropriate remedy upon proof of an actionable wrong causing damage or loss as recognised by law.” The right to litigate should not be confused or understood as the right to access to the courts, these are two distinct and separate rights. In *Farrell .v. Bank of Ireland* [2012] IESC 42 the Supreme Court considered the delicate balancing act which must be applied by the court and they commented that the default position with regard to security for costs is that, in the absence of some significant countervailing factor, the balance of justice as between the litigants will require that no security be given. In his judgment in *Farrell*, Clarke J emphasised that the starting point must always be that the Plaintiff has a constitutional right to litigate and while it is possible to compromise the Plaintiffs right, the courts exercise of their jurisdiction to grant security should only be ordered when they are satisfied that the Defendant has established the minimum requirements for the granting of such security. The constitutionality of Section 390 of the Companies Act 1963 (now Section 52) has been considered by the courts in a number of cases and in commenting on the balancing of the Plaintiffs right to litigate as against the Defendants right to seek security, Peart J noted Section 390 had a reasonable and objective justification and that its aim was the legitimate one of balancing the rights of access to court with the right of a Defendant to resist unstateable claims (*Superwood Holdings plc .v. Ireland* [2005] 3 I.R. 398).

If a Plaintiff can make out a *prima facie* case against a Defendants application for security, that the Plaintiffs inability to give security is as a result of a wrong committed by the Defendant, the court may refuse the application. In such an application, the onus of proof rests on the Plaintiff to bring forward *prima facie* evidence of the Defendants responsibility in the act complained of. A significant advantage accrues to a Defendant who secures an order for security for costs. An order of this nature can for all intents and purposes bring the case to an end if the Plaintiff cannot comply with the order. Therefore,



a question arises whether a Plaintiff can obtain security from a Defendant. The traditional position on security being ordered against a Defendant was that it “would be almost a mockery of justice” (*Leonard .v. Scofield* [1936] I.R. 715) to require a Defendant to provide security where a Plaintiff has commenced the action. However, limited situations have arisen where courts have granted security against Defendants, for example, costs of an appeal to the Supreme Court and where a counterclaim bearing no connection to the Plaintiffs action is put forward by the Defendant. The exercise of this jurisdiction against Defendants would be deployed very sparingly indeed.

The Amount of the Security

A further noticeable distinction between security pertaining to individuals as against corporate entities concerns the amount of security which may be required to be paid by the Plaintiff. With regard to individual Plaintiffs, a rule of practice has developed that the security would amount to approximately one third of the estimated costs to be incurred by the party against whom the security has been granted. However, in the case of a corporate entity, full security will usually be required this is however at the discretion of the court. Order 29, rule 7 provides that the Master of the High Court determines the amount of security to be ordered. Therefore it is a mathematical exercise which will

usually require evidence from cost accountants as to the quantum of the potential costs.

Order 86, rule 9 and Order 58, rule 11 provides that the Court of Appeal and Supreme Court, respectively, may direct the deposit of security with regard to appeals in special circumstances. With regard to discovery, Order 31, rule 12(2)(b) provides that on the hearing of an application for discovery, the court may make orders for security.

Conclusion

There is a marked distinction between security concerning individuals and corporate entities. The most noticeable distinction is that for individuals, the Plaintiff must be ordinarily resident outside the European Union and for companies, the Plaintiff cannot be incorporated outside the State. A second variation between individual and corporate security is that with companies, the court may have regard to the ability of the Plaintiff to meet a costs order in the action however such consideration does not generally arise in the context of individual Plaintiffs.

The potential outcome of security for costs being awarded against a Plaintiff is that it may stay the proceedings indefinitely if the Plaintiff is not in a position to meet the security. Applications for security for costs can be commenced in the context of litigation strategies and the courts are mindful of this and their responsibility to balance the rights of the parties in the given case. ☐