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A GAME CHANGER

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Adrian Mueller

Partner | Senior Lawyer

B.Com LLB FACCAL

[Email](#) | [LinkedIn](#)

JS Mueller & Co

02 9562 1266 | enquiries@muellers.com.au | www.muellers.com.au



A GAME CHANGER – CASE HALTED UNTIL OWNERS CORPORATION GIVES SECURITY FOR COSTS

The Supreme Court has ordered an owners corporation suing its former lawyers to give security for the costs the lawyers will incur defending the case and has halted the case until the owners corporation does so. This decision is a game changer. Read on to find out why.

Introduction

In Court cases, the loser is normally ordered to pay most of the winner's costs. But what happens if the eventual winner is fearful that the loser will not be able to pay its costs? Is there anything the winner can do to halt the case before it incurs substantial costs fighting the case? The answer is "yes" particularly where the winner is the party being sued by the loser.

Security for Costs

In those circumstances, the party being sued can apply to the Court for an order to require the party who is suing them to give security for their costs. Up until recently, owners corporations who had taken legal action were virtually immune from being ordered to provide security for the costs of parties they were suing. This is because owners corporations were considered capable of paying the costs of the other parties in the case if they ended up losing the case. However, a recent decision of the Supreme Court has turned all of that on its head.

The Serman Case

In *The Owners – Strata Plan No. 64415 -v- Serman* [2017] NSWSC 806, the Supreme Court recently ordered an owners corporation that is suing its former lawyers to give security in the amount of \$180,000 for the costs the former lawyers will incur defending the case. The Supreme Court also ordered that the case brought by the owners corporation against its former lawyers be stayed until it provides that security. In making those orders, the Court distinguished previous cases in which it had been held that it was not appropriate to order an owners corporation to give security for costs.

The Facts

In the *Serman* case, the plaintiff is an owners corporation of a block of apartments in Bellevue Hill, Sydney. The apartment building was constructed in about 2000. The building contains defects. In mid-2003, the owners corporation made a claim against a home warranty insurer, Vero, to cover the cost of repairing the defects. In January 2004, Vero rejected the claim.

In about 2009, the owners corporation consulted a solicitor, Mr Serman, to provide advice in relation to Vero's rejection of its insurance claim. Mr Serman, in turn, briefed a barrister to provide advice about that issue. The barrister advised that the owners corporation had reasonable grounds for taking legal action against Vero to claim compensation over its decision to reject the insurance claim.

In October 2010, the owners corporation sued Vero. In that case, the Court concluded that the owners corporation had run out of time to make its claim against Vero because its claim was statute



barred as it had been more than six years since Vero rejected the claim. The Court dismissed the owners corporation's claim against Vero and ordered the owners corporation to pay Vero's costs.

The Dispute

The owners corporation alleges that its former solicitor and barrister were negligent because they did not advise that legal action against Vero needed to be commenced by January 2010 before the owners corporation would run out of time to start that legal action. In 2016, the owners corporation sued its former lawyers in the Supreme Court claiming damages for negligence, breach of contract and breach of fiduciary duty. In the case, the former lawyers of the owners corporation have denied they were negligent or otherwise liable to pay any damages to the owners corporation.

Security for Costs

In the Supreme Court proceedings, the former lawyers became concerned that the owners corporation would not be able to pay their costs to defend the case if they were ultimately successful and the claim against them was dismissed. For that reason, they applied for the Court to order the owners corporation to provide security for their costs and to halt the case until the owners corporation did so. Ultimately, the lawyers were successful and the Supreme Court ordered the owners corporation to provide security for their costs in the sum of \$180,000 and ordered that the case against the lawyers be stayed until the owners corporation provides that security.

The Decision

The Court rules allow the Supreme Court to order, relevantly, an owners corporation that is a plaintiff to give security for the defendant's costs of the proceedings if there is reason to believe that the owners corporation will be unable to pay the costs of the defendant if ordered to do so.

The Court concluded that there was good reason to believe that the owners corporation would not be able to pay the costs of its former lawyers in the case if ordered to do so. This was for the following reasons:

- the owners corporation only held cash at bank of about \$45,950;
- the net asset position of the owners corporation was -\$422,985.12;
- net owners' funds held by the owners corporation was -\$23,782.59;
- creditors of the owners corporation were not paid on time and at one point there was nearly \$30,000 worth of outstanding invoices to multiple creditors;
- historically, lot owners had been slow to pay levies as a result of which the owners corporation had to repeatedly take steps to coerce some of the owners to pay their levies including by issuing letters of demand or taking legal action against them;



- even though the owners corporation would be obliged to raise a special levy to pay the costs of its former lawyers if it was ordered to do so, there was no guarantee that the levy would fall due within a reasonable period and the owners corporation could decide for the levy to be payable by installments over a lengthy period;
- the lot owners had not provided an undertaking to pay any levies as and when they fell due and within a reasonable time frame;
- the building was still littered with defects which would cost approximately \$750,000 to repair and the owners corporation had not struck a levy to raise funds to cover the cost of those repairs;
- the owners corporation had not raised a special levy to meet any adverse costs order that might be made against it in the case;
- the former lawyers would have difficulty recovering their costs from the owners corporation if the owners corporation chose not to pay those costs;
- the owners corporation did not own any real estate;
- the former lawyers would most likely incur over \$200,000 in legal costs to defend the case, most of which would be payable by the owners corporation if it was unsuccessful.

Conclusion

It was previously considered that an owners corporation would very rarely be ordered to provide security for costs in litigation initiated by it.

This is because previous decisions of the Supreme Court had indicated that an owners corporation would normally be able to pay any costs of the other parties in the litigation that it was ordered to pay unless it could be proven by the other parties that the owners corporation was not entitled to raise a special levy to pay their costs or, if it was able to do so, the special levy would not be paid by the owners because they had demonstrated a reluctance to pay special levies or were unable to do so due to their own financial circumstances.

The decision in the *Serman* case opens the door for parties that are sued by an owners corporation and who are fearful that the owners corporation will not be able to pay their costs to defend the case if ordered to do so, to apply to the Court to have the case against them halted until the owners corporation provides security for their costs.

About JS Mueller & Co

JS Mueller & Co has been servicing the strata industry across metropolitan and regional NSW for over 30 years. We are a specialist firm of strata lawyers with in depth and unmatched experience in, and comprehensive knowledge of strata law and levy collection.



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