

Article Information

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Security for Costs: Fish markets go begging? Felan's Fisheries Pty Limited [2016] NSWSC 1351

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In the matter of Felan's Fisheries Pty Limited [2016] NSWSC 1351, the Supreme Court of New South Wales decided that a company was not entitled to security for costs, whilst its directors who were sued in their individual capacity were. **Partner, Ian Nathaniel, Senior Associate, Ben Hartley, and Law Graduate, John Evans**, discuss further.

Felan's Fisheries (Felan's) brought a claim in the Supreme Court seeking injunctive relief against Sydney Fish Market Pty Ltd (SFM), two other companies (including SFM, the "Buyers"), and SFM directors. In addition Felan's sought leave to bring claims against the directors for breach of good faith obligations under section 181 of the Corporations Act 2001 (Cth). Buyers had served notices to quit on Felan's regarding its lease and licenced premises. By interlocutory process, SFM and the directors claimed security for costs.

Black J stated that the question to ask is a hypothetical one: Is there a real chance that a corporation will be unable to pay the costs of a future judgment?

SFM argued that if Felan's had judgment awarded against it, there was a real chance it would be unable to pay any costs that it was ordered to do so, because it:

1. was not presently trading;
2. had minimal cash in the bank;
3. no longer relied on an amount previously held on its balance sheet, which were funds deposited with its solicitors as it would be expended by its solicitors; and
4. its solicitor's had secured their costs in their trust account.

Felan's relied on a 25% share it held in Buyers in arguing that it could pay any order for costs. This produced some debate in the Court about the value of the shares and whether Felan's could rely on them to oppose the application. Under the Buyers constitution, share subscription in Buyers was limited to Sydney Fish Market tenants and share disposal was conducted by offering them to members at a certain price. That price would be dropped in successive steps until a member purchased the shares. Due to these restrictions, the true value of the shares was not certain and could not be relied upon by Felan's to oppose the application.

However, security for costs can be successfully opposed where a party illustrates that it has brought proceedings as a defensive measure. Ultimately his honour held that the proceeding had been brought in such a manner. SFM had undertaken a self-help remedy by issuing the notices to quit. This left Felan's with little options other than seeking to defend its position through litigation. His Honour agreed that to force Felan's to provide a substantial amount of cash as security would be oppressive in these circumstances.

This reasoning did not extend to the Directors' application for security for costs though. His Honour held that Felan's claim did not need to involve the directors in their individual capacity. Even though it was the directors who authorised the issuing of the notices to quit, Felan's objectives could have been served by proceeding solely against the defendant corporations. Security for costs is a useful tool in litigation against corporations which may not be able to pay a subsequent costs order. However as this case highlights, the Court will not entertain these applications lightly.