CLAYTON UTZ

NSW Law Reform Commission's Consultation Paper 13

Security for costs and associated costs orders

Clayton Utz Submission

Clayton Utz provides its responses to the questions set out in Chapters 2, 3 and 5 of the Consultation Paper.

Introduction

The Litigation and Dispute Resolution department (**LDR**) of Clayton Utz is regularly retained by clients to advise on aspects of applications for security for costs.

We have had the considerable advantage of reviewing advance draft copies of the submissions of the Law Society of NSW Costs Working Group and Cost Unit (**LS Costs Submission**) and that of the Law Society of NSW Young Lawyers Civil Litigation and Environmental Law Committees (**Young Lawyers Submission**). In part, there are aspects of both those submissions that this firm would support and we refer to relevant passages of those submissions in order to avoid any duplication in this paper.

Clayton Utz is grateful for this opportunity to comment on these important issues and thanks the NSW Law Reform Commission for the invitation to do so.

We should be pleased to offer any further clarification or assistance going forward and a list of contact lawyers at Clayton Utz appears on the final page of this submission.

Chapter 2 - Jurisdiction to order security for costs

Question 2.1

Should legislation provide a broad ground for courts to order security for costs where the order is necessary in the interests of justice?

If so, should this be achieved by amending *Uniform Civil Procedure Rules 2005* (NSW) r42.21 or should such a provision be located in s 98 of the *Civil Procedure Act* 2005 (NSW)?

Our response is yes, the legislation should be amended to include a general, broad ground where security for costs is in the interests of justice. We consider that although the court's jurisdiction to order security is unfettered, there is still an apparent limitation imposed through the specific requirements set out in UCPR 42.21, in that it requires the court to take into account certain specified matters in the exercise of its power to order security. A broad general power in the interests of justice will enhance the rule and confirm that the court's powers are unfettered.

We believe the ground should be added to UCPR 42.21.

Question 2.2

Should *Uniform Civil Procedure Rules 2005* (NSW) r 42.21(1)(a) be amended so that, instead of referring to a plaintiff ordinarily resident outside New South Wales, it provides 'that a plaintiff is ordinarily resident outside Australia'?

Our response is yes, UCPR 42.21(1)(a) should be amended to refer to a plaintiff ordinarily resident outside Australia. We consider, in effect, this is the way the rule already operates because of the effect of section 117 of the Federal Constitution, that prohibits against the discrimination of Australian residents on the basis of the state in which they live. Therefore the current wording of rule 42.21(1)(a) should be amended to match the constitutional position.

Question 2.3

Where the plaintiff is ordinarily resident outside Australia, should the enforceability of an Australian costs order in the plaintiff's country of residence be a relevant factor that courts may consider in assessing an application for security for costs? If so, should *Uniform Civil Procedure Rules 2005* (NSW) r 42.21 be amended to reflect such a principle?

Yes. We believe the enforceability of a costs order in the plaintiff's country of residence should be taken into account and we support an amendment to UCPR 42.21 to reflect this. That said, it should only be one of the factors that a court may take into account and should not be a deciding factor.

Question 2.4

(1) Should the *Uniform Civil Procedure Rules 2005* (NSW) be amended to require the plaintiff to ensure his or her address as specified in the originating process is kept accurate, and to notify the defendant within a reasonable period of time of any change of address?

(2) If so, should failure to comply with such requirement be specified in *Uniform Civil Procedure Rules 2005* (NSW) r 42.21 as a ground for an application for security for costs?

We think there should be a general requirement that all parties to proceedings be under an obligation to provide an accurate address throughout all proceedings and not just in relation to applications for security of costs. To this end, we believe that parties should also be under an obligation to notify other parties and the court of any change in their residential address, place of business or registered office, in addition to their address for service. We do not consider that failure to provide an accurate residential address on its own should amount to a sufficient ground for an application for security of costs. Further we consider that

UCPR 42.21(b) is a factor so that the fact that a plaintiff has changed its address should only be viewed in conjunction with a suspicion that the plaintiff has done so with the intention to deceive.

Question 2.6

Should *Uniform Civil Procedure Rules 2005* (NSW) r 42.21 be amended to provide a list of discretionary factors that courts may take into account when deciding whether or not to order security for costs? If so,

(a) Should r 672 of the *Uniform Civil Procedure Rules 2009* (Qld) be used as the basis for such a list? If so, do you agree or disagree with any of the factors listed in r 672? Are there factors that are not listed in r 672 which should be included in *Uniform Civil Procedure Rules 2005* (NSW) r 42.21?

(b) Should the list include the proportionality principle, that is, whether the security for costs applied for is proportionate to the importance and complexity of the subject-matter in dispute?

(c) Should the list include public interest? If so, should the provision refer to "public interest" or "public importance"?

(d) Should the list include the impecuniosity of the plaintiff regardless of whether the plaintiff is a natural person or a corporation? Alternatively, would it be preferable to adopt a provision in the *Uniform Civil Procedure Rules 2005* (NSW), separate from the list of discretionary factors, stating the general rule that security for costs shall not be ordered merely on account of the poverty of the plaintiff or the likely inability of the plaintiff to pay any costs that may be awarded against him or her?

We have had the benefit of the detailed submission from the Young Lawyers on this question (at page 9 and 10 of the Young Lawyers Submission). We largely agree with the views expressed and consider there would be utility in the addition of the Queensland factors to rule 42.21 but only on the basis that these additional discretionary factors are non-exhaustive. We also consider that impecuniosity of the plaintiff whether a corporation or natural person should be a factor that the court takes into account and we agree with the Young Lawyers Submission, that this should be a discretionary factor and considered against the backdrop of other factors as an indication that may support the granting of security in a relevant case. We consider that the impecuniosity of a natural person is relevant and while that fact should not on its own be a determinative factor, it is a relevant and fair consideration where protection against a costs order is thought to be appropriate. We view the availability of commercial litigation funding to both natural and corporate plaintiffs to have levelled the playing field in some respects and wonder if it is still necessary to continue to differentiate between natural persons and corporations in this regard.

Question 2.7

(1) If *Uniform Civil Procedure Rules 2005* (NSW) r 42.21 were amended to include a list of discretionary factors that courts may take into account when deciding whether or not to order security for costs, what should be the relationship of those factors with the jurisdictional grounds listed in *Uniform Civil Procedure Rules 2005* (NSW) r 42.21(1)?

(2) Should such a relationship be stated in *Uniform Civil Procedure Rules 2005* (NSW) r 42.21 or should it be left for courts to develop?

We submit that the court should go on to consider the discretionary factors after the jurisdictional threshold has been established.

Question 2.8

Should *Uniform Civil Procedure Rules 2005* (NSW) r 42.21(1)(d) be amended to reflect the terms of section 1335(1) of the *Corporations Act 2001* (Cth)?

We consider that it is appropriate that UCPR 42.21 reflect the position established under s. 1335 (1) of the Corporations Act 2001. It will be of some benefit and will generally assist for there to be a link to the provisions under the Corporations Act by including a direct reference to them in rule 42.21. We also support the inclusion of the s.1335(1) concept of "credible evidence" in determining the impecuniosity of a corporate plaintiff.

Question 2.9

Should corporate plaintiffs continue to be treated differently from plaintiffs who are natural persons in relation to security for costs?

Our view is reflected in our answers to question 2.6 above.

Question 2.10

Should *Uniform Civil Procedure Rules 2005* (NSW) r 42.21 be amended to include:

(a) a procedure allowing defendants to request a corporate plaintiff to disclose its overall financial status; and

(b) a presumption that the corporate plaintiff is impecunious, if the plaintiff refuses the request for disclosure?

We consider that there should be a mechanism through which it would be possible for a defendant to seek access to accurate financial data of the plaintiff and we wonder if there should be a reference to the general power given under section 68 of the Civil Procedure Act 2005 included in rule 42.21 that might achieve this? In principle this power should exist but not so as to impose an onerous obligation on a large corporate structure to provide detailed financial information about the entire corporate structure when the expressed concern as to finances lies only with a subsidiary company.

We do not offer a view on (b).

Question 2.11

Should *Uniform Civil Procedure Rules 2005* (NSW) r 42.21(1)(d) be amended to make it inapplicable in cases where a corporation is suing former directors, controlling shareholders or officers of the corporation where the corporation is under administration or liquidation?

We do not consider that there should be a blanket exception in the case of a corporation in administration or liquidation. However, we do think that there should be a discretionary factor added to rule 42.21 to apply where there is an allegation in the proceedings that the directors, controlling shareholders or officers of the corporation have caused or contributed to the company's financial status.

Chapter 3 – Plaintiffs assisted by particular forms of costs agreements

Question 3.1 (litigation funders)

(1) Should the *Uniform Civil Procedure Rules 2005* (NSW) be amended to include, as part of a list of discretionary factors relevant to the court's exercise of the power to order security, the consideration that the plaintiff is receiving funding from a litigation funder?

(2) If so, how should "litigation funder" be defined?

The UCPR should be amended to include a specific discretionary factor relevant to an order for security for costs where the plaintiff is receiving litigation funding. This should be in respect of commercial funders only, not those litigants who are being directly financially assisted by friends and relatives. We note the Costs Working Group submission does not support amending the rules to include a discretionary factor of whether a plaintiff is being funded.

We further note that UCPR 42.3 has been repealed and therefore the Court does have the discretion to order costs against any person (which could include a litigation funder). Consistent with this power, the UCPR should include a specific reference to litigation funders in the context of security for costs applications.

We do not offer a suggested definition of 'litigation funder' but note the Young Lawyers Submission suggests one.

Question 3.2

(1) Should legislation be adopted to provide that, at the initial stage of a case management process, each party should disclose any agreement by which a litigation funder is to pay or contribute to the costs of the proceeding, any security for costs or any adverse costs order?

(2) If so, should the client legal privilege be expressly abrogated in relation to the disclosure requirement?

In relation to (1), we agree that the existence of funding is a matter that should be disclosed at the initial stage of a case management process, if a disclosure request is made by a party to the proceedings. However, we do not consider that the actual terms of the agreement need be disclosed.

In addition, so that the Court can properly consider security for costs applications, and potential costs orders against litigation funders, the party receiving funding should disclose basic details of the funding arrangement including the benefits they are receiving in exchange for litigation funding (this may need to be expressed in a range).

We do not offer an opinion in relation to (2).

Question 3.3

(1) Should legislation be adopted to give courts power to order costs against litigation funders?

(2) If so, should the legislation provide the circumstances under which the power may be exercised, or should the case law be allowed to identify such circumstances?

Question 3.4

Should legislation be adopted giving courts the power to make security for costs against litigation funders?

Yes - while the UCPR already permits costs orders against third parties there should be an explicit power to order both costs and security for costs against a litigation funder. In circumstances where litigation funders have made a commercial decision to back litigation, the "loser pays" principle ought to extend to litigation funders. Litigation funders generally conduct a thorough and commercial review of the merits of each case they agree to fund, and it is appropriate that the potential for an adverse costs order be factored into this decision making process. In our view, it is unlikely that funders will be discouraged from providing funding simply because of the fact they may be ordered to provide security for costs or have to satisfy an adverse costs order.

Question 3.5 (conditional costs agreement)

Should the court, in determining applications for security for costs, be able to take into account the fact that the plaintiff's lawyer is acting pursuant to a conditional costs agreement?

We do not consider this is a relevant factor to take into account. There may be many reasons for conditional costs agreements being entered into.

Question 3.6 (representative plaintiffs)

(1) Should courts have power to order security for costs against representative plaintiffs?

(2) If so, should such power be expressed in legislation or should it be left for the case law to develop?

No. There should not be a rule which prohibits security being ordered against a representative plaintiff. However, the Court's usual discretionary factors would then be taken into account in determining any such application.

We do not offer an opinion in relation to (2).

Question 3.8 (pro bono litigants)

(1) Is it desirable to permit costs orders to be made in favour of pro bono litigants on an indemnity basis?

(2) If so, should costs awarded be recouped by the practitioner or given to a pro bono litigation fund?

(3) Should courts be able to order security for costs in favour of a party whose lawyer is acting on a pro bono basis?

Yes - it is desirable that successful pro bono litigants have costs orders made in their favour. There is no reason those orders should not also be made on an indemnity basis in appropriate cases and made payable to the pro bono lawyer. In our experience, it is only the rare pro bono case which proceeds to a final determination by a Court and the assessment of costs orders. In such circumstances, there is no reason why the unsuccessful party, who has forced a matter through to determination, should receive the bonus of departing from the ordinary circumstances of costs following the event.

We do not support the establishment of a pro bono fund into which those costs orders should be paid. The experience of the Access to Justice Foundation in the UK established under section 194 of the Legal Services Act 2007 has not been a positive one, and shows that the maintenance of a pro bono litigation fund supported through pro bono costs awards has been highly expensive relative to the actual volume of pro bono costs received and distributed.

When a pro bono litigant receives a costs order, such order should be paid to the pro bono lawyer to support that lawyer's pro bono work. If costs orders were to be paid into a fund for distribution to other pro bono lawyers or firms it would only seek to reduce the quality of the better pro bono programs and provide perhaps an unexpected bonus to those firms who do not genuinely run pro bono matters or do so for less altruistic reasons.

We do not express a view on the order of security for costs.

Question 3.9

Should s 99 of the *Civil Procedure Act 2005* (NSW) and s 348 of the *Legal Profession Act 2004* (NSW) be amended to include an exemption for legal practitioners who have provided legal services on a pro bono basis?

We do not support this suggestion. A pro bono lawyer should be acting to the best of his or her ability whether acting on a pro bono or fee basis - there should be no difference.

Chapter 5 – Procedures and Appeals

Question 5.1 (assessing the amount of security)

(1) What problems arise in the assessment of the appropriate amount of security? Do courts have difficulties in determining the amount, particularly in complex cases? Do legal representatives know what arguments or evidence they are allowed to provide to the court?

(2) Should guidance be provided in statute or regulations, or is the matter one most appropriately left to judicial discretion?

(3) Should there be non-binding lawyers' fee scales that may be used in determining the amount of security for costs?

(4) Should costs assessors be permitted to sit alongside a judge in hearings on the amount of security?

In relation to (1), we acknowledge that applications for security for costs may lead to lengthy and costly hearings because of the evidence that needs to be adduced in order to support or justify the level of security that is relevant in a particular case, particularly in relation to complex cases. However, this is often ameliorated by the occurrence of the award of tranches of security and the ability of the defendant to return to court and seek further security as the case progresses and there is new evidence to support the level of costs that have been incurred and likely to be further incurred.

In relation to (2), we agree that this should be left to judicial discretion as there is a substantial body of case law on the topic.

In relation to (3), generally we would not support the imposition of fixed scales to determine the level of security to be provided. It is necessary for evidence to be adduced as to the likely level of costs in each case - proportionality is a key factor and this needs to be assessed against known facts. That said, where it would be possible for the court to adopt a known range of costs derived from regularly up-dated sources such as costs assessors and costs consultants to enable the court to inform itself on likely ranges of costs that could be used to determine the appropriate level of security. We think this could have considerable merit and we would support the further investigation of how this might be achieved.

Question 5.3

Should the *Uniform Civil Procedure Rules 2005* (NSW) be amended so that, if the court orders the plaintiff to give security for costs, there is an automatic stay of proceedings until the plaintiff provides security?

Yes. In our view, there can be little point to the award of security for costs, if there is not a stay in place while the security is actually provided. Without a stay, the costs of the proceedings would continue to be incurred and there would be little incentive to the plaintiff to deal with the need to provide the security with any degree of urgency if the proceedings were allowed to continue. In our experience there is nearly always an order for a stay until such time as the plaintiff provides the security.

Question 5.5 (appealing against security for costs orders)

Should the *Uniform Civil Procedure Rules 2005* (NSW) set out a principle for dealing with appeals against security for costs orders? If so, what should that principle be? Are there any other issues relating to appeals against security for costs orders that need to be considered?

Question 5.6 (revocation of or varying of security for costs orders)

(1) Should the *Uniform Civil Procedure Rules 2005* (NSW) be amended to provide courts power to set aside or vary security for costs orders?

(2) If so, should the power be in broad terms or should it provide a "standard" for assessing when the court may exercise this power? If so, should it be:

(a) "material change of circumstances" as developed in common law;

(b) "special circumstances" as specified in the Australian Capital Territory and Queensland court rules; or

(c) some other standard?

(3) Should there be a list of list of factors for determining whether the standard has been met?

(4) Should leave be required to seek an order varying or setting aside security for costs?

Under the current rules, an order for security for costs may be appealed as an interlocutory order and therefore leave is needed to bring an appeal against it. We do not think there is any need for the UCPR to include an express appeal provision against a security for costs order. We consider that the discretionary factors that govern whether a general interlocutory order should be appealed are sufficient and there is no need for an automatic right of appeal to be added to the rules. We think that a right of appeal will be of limited assistance and may also lead to unnecessary delay and further expense.

That said, we do consider that there may be circumstances where (for example, following material change of circumstances) it might be appropriate to review the level of security or indeed the merits of that security continuing. If the rules are to be amended, we think that such an amendment should be limited to requiring proof (to be adduced by the plaintiff providing the security) that there has been a material change of circumstances to justify the set aside or revocation of the security for costs order.