SUBMISSION

TO

NEW SOUTH WALES LAW REFORM COMMISSION

REFERENCE ON

SECURITY FOR COSTS AND ASSOCIATED COSTS ORDERS

1. INTRODUCTION

This submission responds to the NSWLRC Consultation Paper *Security for costs and associated costs orders.* It addresses proposals for reform in four broad areas:

- grounds founding jurisdiction to order security for costs, and discretionary factors informing whether such orders are made, including security for costs against corporate plaintiffs;
- plaintiffs assisted by certain forms of costs arrangements;
- public interest proceedings and protective costs orders; and
- procedures and appeals in relation to security for costs orders.

The submission is founded on the view that the law and practice in respect of security for costs should reflect and balance the following principles:

- a party brought to court as a defendant, if successful, should not be exposed to the injustice of being unable to enforce a costs order in its favour;
- a plaintiff with a meritorious claim should not be denied access to justice by reason of impecuniosity;
- the arrangements by which a party finances its litigation is primarily a private matter for that party; and

- interlocutory applications to courts should be kept to the minimum in terms of frequency and complexity, by their outcomes being reasonably predictable, while justly accommodating the special characteristics of unusual cases, by preserving sufficient flexibility.

The submission is arranged in the same structure as the Consultation paper, and addresses the questions posed in it *seriatim*.

2. JURISDICTION TO ORDER SECURITY FOR COSTS

Jurisdictional grounds for ordering security

A broad ground for ordering security

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

(2) If so, should this be achieved by amending UCPR *42.21 or should such a provision be located in s 98 of (NSW)* Civil Procedure Act 2005*.*

No. I do not favour the express incorporation of such a jurisdictional basis in legislation. At present, the Courts' inherent and implied jurisdictions to make security for costs orders where it is 'reasonably necessary to do justice between the parties'[1] are resorted to only rarely, and they have always been treated as exceptional. The test of "reasonable necessity to do justice" is too indefinite to provide reasonable guidance as to the outcome. Including it with the other usual grounds referred to in UCPR 42.21 would place it on the same basis as the usual grounds, and thus convert it from an exceptional basis for relief to a standard one, and would encourage additional applications for security in uncertain cases, in which they would not otherwise be made, lacking the relative clarity provided by the other grounds. If such a ground

[1] *Philips Electronics Pty Ltd v Matthews* [2002] NSWCA 157.

must be included, then – for the same reasons - it would preferably be included in the Act, rather than in the Rules. But it would be better not included at all, remaining as an inherent or implied jurisdiction only rarely invoked.

Non-resident plaintiff

Q2.2 Should UCPR 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"?

Yes. As orders of NSW courts are now readily enforceable in other states, ordinary residence in another State of Australia ought not *prima facie* justify an order for security. Coupled with the constitutional question, this warrants amendment so as to limit UCPR r 42.21(1)(a) to plaintiffs 'ordinarily resident outside Australia'.

Enforcement procedures in the plaintiff's country of residence

Q2.3 (1) 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?

(2) If so, should UCPR r 42.21(1) be amended to reflect such a principle?

(3) If not, should r 42.21 be amended to provide that courts should not take into account the enforceability of an Australian costs order in the plaintiff's country of residence?

No. The enforceability of a costs order in the plaintiff's country of residence is, and should remain, a relevant consideration. If a costs order will be readily enforceable against a foreign plaintiff, that is in principle a good reason for being less inclined than otherwise to make an order for security, because the risk of a successful defendant being unable to enforce a costs order is thereby much diminished. While it is possible that foreign laws in respect of the enforceability of Australian judgments

may change, that possibility is a rare one, and can itself be taken into account. In many countries - particularly those with which reciprocal enforcement arrangements are in place - such a change is most unlikely.

Change of address

Q2.4 (1) Should the UCPR 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 UCPR r 42.21 as a ground for an application for security for costs?

Yes to (1), but No to (2). The Rules should require plaintiffs (and defendants) to not only to include their residential address in the originating process or appearance as the case may be, but also, in the event that their residential address changes, to file and serve notice of the change. However, I am unpersuaded that a mere failure to disclose such a change, the necessity for which might often be overlooked, should be a ground for ordering security. The current ground in r 42.21(1)(c) – a change of address *coupled with reason to believe that it was with a view to avoiding the consequences of the proceedings* – is the appropriate test.

Other issues relating to the grounds in UCPR 42.21(1)

Q2.5 Are there other issues relating to grounds for ordering security specified in UCPR r 42.21(1)?

No.

Discretionary factors

Q2.6 Should UCPR *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,*

(1) Should r 672 of (QLD) Uniform Civil Procedure Rules 2009 *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* UCPR *r 42.21?*

(2) 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?

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

(4) 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 UCPR, 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?

No. I do not favour the incorporation in the Rules of a list of discretionary considerations. The relevant factors are well-established by case law,[2] and well known to courts and practitioners. It will be impossible to encapsulate their complexity and flexibility in legislative form. They include:

- The plaintiff's prospects of success. This does not involve any detailed review or assessment of the plaintiff's prospects, but only the formation of a view whether the claim is bona fide or a sham. While a finding that a claim is a

[2] See, for example, *Equity Access Ltd v Westpac Banking Corporation* [1989] ATPR 40-972, 50,635 (Hill J); see also *KDL Building v Mount* [2006] NSWSC 474, [12]-[19].

sham would normally lead to an order for security, once it is established that the claim is bona fide, then it is appropriate to consider the other discretionary factors without too detailed a review of the strengths and weaknesses of the plaintiff's case. The defendants' prospects are also of some significance. If the defence appears to be, at first sight, plainly without merit, then that will be a strong indicator against making an order for security. But again, once it is established that the defence is bona fide, not too detailed a review of its merits is warranted.

- The magnitude of the risk that the plaintiff cannot satisfy an adverse costs order in the event that it fails. In other words, if it is thought that there is some, but only a slight risk that the plaintiff will be unable to satisfy an adverse costs order, then that tends against making an order for security, whereas if there is a very substantial risk that it will be unable to do so, that tends in favour of making an order for security.

- Whether the use of the power would be oppressive or would stultify the plaintiff's claim by preventing it from prosecuting a genuine claim. On this factor, an important subsidiary consideration is whether those who beneficially stand behind the impecunious corporation and stand to benefit if the claim succeeds are prepared to make their own assets available, if they have any of significance, to satisfy an adverse costs order.

- Whether the impecuniosity arises out of the conduct of the defendant in respect of which relief is sought in the proceedings. If the defendant has caused the plaintiff's impecuniosity, that may tend against the making of a costs order. But if all that has happened is that the defendant's conduct has exacerbated the condition of an already financially strapped plaintiff, then this ground will not be made out.

- Whether there are public interest aspects which affect whether or not an order for security should be made.

- Whether there are discretionary matters peculiar to the particular case which weigh one way or the other.

- Whether the application for security has been brought sufficiently promptly.

More importantly, prescriptive lists of discretionary factors tend to encourage the adducing of evidence and argument addressed to each one of them, though many are practically irrelevant in an individual case. This is a tendency particularly to be discouraged in applications of an interlocutory character, such as are applications for security for costs.

Proportionality is already, and should remain, a relevant consideration – both as to whether an order should be made, and as to the quantum of any order.[3] If there must be a list, it should be included.

The public interest or public importance of the litigation is, and should remain, as relevant factor. If there must be a list, it should be included.

Impecuniosity of itself should not be included as a relevant factor. Impecuniosity of a natural plaintiff is and ought not be of itself a ground for ordering security. Corporate impecuniosity is of course a ground, because of the significance of limited liability in the corporate context. A reference to impecuniosity as a relevant factor would be ambiguous, unless it were made explicit whether it told in favour of or against making an order. As in the case of a corporate plaintiff it tells in favour of making an order, reference to it in the context of a natural plaintiff would suggest the same consequence.

It would be inappropriate to enshrine in the rules that impecuniosity does not of itself attract a security order, because in the case of a corporate plaintiff it well may do so.

Relationship between the jurisdictional grounds and discretionary factors

Q2.7 (1) If UCPR 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 UCPR r 42.21(1)?

[3] *Maritime Services Board v Citizens Airport Environmental Association* (1992) 83 LGERA 107; *Coolangatta Property Pty Ltd v Emily Dyason* [2011] NSWSC 929, [13].

(2) Should such a relationship be stated in UCPR r 42.21 or should it be left for courts to develop?

I am firmly of the view that the current "two-stage" approach applicable in NSW should be maintained. Under current NSW laws, applications for security typically involve three elements:

- The jurisdictional ground – is one or more of the specified grounds on which security may be ordered established?
- The discretion factors – if so, do the relevant discretionary considerations taken as a whole favour making an order for security?
- The terms – in what amount, and on what terms, should security be ordered?

The two-stage approach appropriately requires attention first to be focussed on whether a ground for ordering security is established, before proceeding to consider the discretionary factors. Shorn of that, the process will become essentially a discretionary value judgment, lacking the relative certainty that current arrangements provide, and encouraging a proliferation of applications based on the "discretionary" considerations, where one the grounds cannot be plainly satisfied. The recent decision of the Supreme Court of Queensland referred to in the Consultation Paper, in which the majority held that ostensibly 'discretionary grounds' could be considered in determining whether the court's jurisdiction to make a security for costs order was enlivened, pertained only to the "broad general ground".[4]

Security for costs against corporate plaintiffs

Consistency between wording of UCPR 42.21(1)(d) and *Corporations Act* s 1335(1)

Q2.8 Should UCPR r 42.21(1)(d) should be amended to reflect the terms of s 1335(1) of (CTH) Corporations Act 2001?

[4] *Robson v Robson* [2008] QCA 36 per Muir JA and McMeekin J.

No. No difficulty has arisen in practice from the semantic differences between *Corporations Act* s 1335(1) and UCPR r 42.21(1)(d). Both attract precisely the same considerations.[5] In *Beech Petroleum NL v Johnson*,[6] Von Doussa J said (at 205):

> In my opinion the power of the Court under s 1335 arises if credible evidence establishes that there is reason to believe there is a real chance that in events which can fairly be described as reasonably possible the plaintiff corporation will be unable to pay the costs of the defendant on service of the allocatur if judgment goes against it. This will be so even if in other events which can also be fairly described as reasonably possible the plaintiff corporation would be able to pay the costs. The degree of likelihood of the plaintiff corporation being unable to pay the costs along with all the circumstances, actual and possible, about its financial position, would be then taken into account in the exercise of discretion, and in framing the orders of the Court if the decision is to order security.

If anything, the *Corporations Law* provision is narrower than UCPR, as the former requires "credible testimony", which could conceivably be interpreted as requiring testimonial as distinct from documentary evidence, whereas the latter requires only that there be "reason to believe". The UCPR terminology is more modern and apt, more readily understood, and not open to doubt. In the absence of any apparent problem from the semantic differences, it should be retained.

Different treatment of corporate plaintiffs

Q2.9 Should corporate plaintiffs continue to be treated differently from plaintiffs who are natural persons in relation to security for costs?

Yes. Corporate impecuniosity is by far the most common ground on which applications for security for costs are made. Whereas impecuniosity is not of itself a ground for ordering security against a natural plaintiff, because otherwise the impecunious could be denied access to justice, the same tenderness is not called for in the context of corporations, the members of which enjoy the benefit of limited liability.[7] If those who stand to benefit from corporate litigation wish to maintain their right to access to justice, they can do so by contributing the security if they can;

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[5] *Canberra Data Centres Pty Ltd v Vibe Constructions (ACT) Pty Ltd* [2010] ACTSC 20.

[6] (1992) 7 ACSR 203. See also *Hurworth Nominees Pty Ltd v ANZ Banking Group Ltd* [2005] NSWSC 1360, [25] (White J); *KDL Building Pty Ltd v Mount* [2006] NSWSC 474, [5].

[7] *Buckley v Bennell Design and Constructions Pty Ltd* (1974) 1 ACLR 301 per Street CJ at 303-304.

or making themselves amenable to any adverse costs order as guarantors,[8] or showing that they cannot do so and that an order will stultify the litigation:[9]

> It is not for the party seeking security to raise the matter; it is an essential part of the case of a company seeking to resist an order for security on the ground that the granting of the security will frustrate the litigation to raise the issue of the impecuniosity of those whom the litigation will benefit and to prove the necessary facts.

Proving the impecuniosity of corporate plaintiffs

Q2.10 Should UCPR 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 (rebuttable) presumption that the corporate plaintiff is impecunious, if the plaintiff refuses the request fro disclosure?

No. While the proposal - that a procedure be instituted whereby defendants, on applications for security for costs, be able to request that corporate plaintiffs disclose their current financial status, and that a failure to so disclose would give rise to a rebuttable presumption that the plaintiff is 'unable to pay costs' - is not without merit, the concern is that such an approach may shift the focus of what should usually be a relatively straightforward evidentiary inquiry into an examination of the sufficiency of disclosure. The effect of presumptions arising from inadequate financial disclosure can be seen in Family Law proceedings, where not atypically vast efforts are made to show that a party has not made a complete financial disclosure, in order to found an adverse inference that he or she could satisfy any reasonable order. Against that, the difficulties of proof in this area can be overstated. It has often been said that the test under s 1335(1) or r 42.21(1)(d) is a relatively undemanding one. If it is established that the plaintiff is a "two-dollar company", and notices to produce elicit no balance sheets or other evidence establishing financial capacity, the relatively undemanding

[8] *MA Productions Pty Ltd v Austarama Television Pty Ltd* (1982) 1 ACLC 404.

[9] *Bell Wholesale Co Pty Ltd v Gates Export Corp* (1984) 52 ALR 176, 179. See also *Caruso Australia Pty Ltd v Portec (Aust) Pty Ltd* (1984) 2 ACLC 286, 288; *Newtons Travel services Pty Ltd v Ansett transport Industries (Operations) Pty Ltd* (1982) 1 ACLC 521, 527.

test of reasonable basis to suppose that the plaintiff may be unable to satisfy an adverse costs order will usually be regarded as satisfied. On balance, I do not favour the proposed rebuttable presumption: it would tend to shift the focus of argument from whether impecuniosity was sufficiently established, to whether there had been adequate disclosure, thereby enlarging the scope of applications for security.

Where an insolvent corporate plaintiff sues its former directors, officers or shareholders

Q2.11 Should UCPR 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?

No. I do not agree that r 42.21(1)(d) should be inapplicable where an impecunious corporation is suing its former officers. The usual discretionary considerations (such as the defendant having caused the plaintiff's impecuniosity, and stultification), as well as the court's general discretion to not make an order for security of costs, provide adequate protection for meritorious cases in this respect. So too does the principle that security is not lightly ordered against a liquidator.[10] The application of s 1335, and by analogy 42.21(1)(d), to a case where the plaintiff is a company in liquidation (as distinct from one in which the liquidator personally is the plaintiff), was adverted to by Meagher JA, with whom Kirby P and Cripps JA agreed, in *Hession v Century 21 South Pacific Ltd* (1992) 28 NSWLR 120. Having observed that, at least ordinarily, an order for security for costs would not be made against a liquidator personally (although, if the proceedings failed, costs would be awarded personally against the liquidator), his Honour turned to the situation where the company in liquidation was the plaintiff, and said:

> Where the company in liquidation is the plaintiff, things are otherwise. In this case, obviously the Court has jurisdiction to order security for costs: that is what s 1335 says. The fact that the company has a deficiency of assets compared to liabilities (a not uncommon feature of companies in liquidation) is evidence of entitlement under

[10] *John Arnold's Surf Shop Pty Ltd (in liq) v Heller Factors Pty Ltd* (1979) ACLC 40-521, 32,098; *Spiel v Commodity Brokers Australia Pty Ltd (in liq)* (1983) 8 ACLR 410; *Re Pavelic Investments Pty Ltd* (1983) 8 ACLR 417; *Re Strand Wood Co Ltd* [1904] 2 Ch 1.

> the section to an order (*Northampton Coal, Iron, and Waggon Co v Midland Waggon Co* (1878) 7 Ch D 500 at 503), not (as his Honour seemed to imagine) evidence of immunity from an order. In this regard, it should also be noted that where a company in liquidation sues and fails, there is no jurisdiction in the Court to order the liquidators personally to pay the defendant's costs. Further, a company in liquidation against whom an order for security for costs is sought cannot successfully resist such an order merely by proving that it cannot fund the litigation from its own resources if an order for security is made; it must prove that it cannot do so even if it relies on the other resources available to it (the company's shareholders or creditors): *Bell Wholesale Co Pty Ltd v Gates Export Corporation* (1984) 2 FCR 1; 52 ALR 176. Finally, whilst it is both true and important that poverty must be no bar to litigation, what that means is that the courts must be astute to see that no person pursuing a claim which is not frivolous is precluded from doing so by the erection of obstacles which poverty is unable to surmount; it does not mean that proof of insolvency automatically confers an immunity from statutory provisions which deal with insolvent plaintiffs.

In *Green (as liquidator of Arimco Mining Pty Limited) v CGU Insurance Ltd* [2008] NSWCA 148, (2008) 67 ACSR 105, Hodgson JA, Basten JA and Campbell JA referred, with apparent approval, to what Meagher JA said in *Hession,* and added that the approach was supported by *Ferrier and Knight v Civil Aviation Authority* [1994] FCA 982 (Lockhart J) [13); *Re Pavelic Investments Pty Limited* (1983) 1 ACLC 1207; *Jonas v Rocklea Spinning Mills Pty Limited* [2000] VSC 93; and *Hellen and Fordyce v Alex G Grivas Pty Limited* [2002] NSWSC 1019. Later, Hodgson JA concluded (at [45]) that a Court considering applications for security for costs against liquidators should have regard to certain guidelines, relevantly:

> (2) Where the plaintiff is a company in liquidation, and not the liquidator, then security for costs will more readily be ordered, although the court's discretion is unfettered (*Bell Wholesale Pty Ltd v Gates Export Corporation* (No 2) (1984) 8 ACLR 588) and there is no presupposition in favour of granting security (*Bryan E Fincott Pty Ltd v Eretta Pty Ltd* (1987) 16 FCR 497. However, the court will not refuse to order security on the ground that this will frustrate the litigation unless the company proves that those who stand behind the company and would benefit from the liquidation are unable to provide security (*Bell Wholesale*).

Ordering security for costs against defendants

Q2.12 Should UCPR r 42.21 be amended to provide that courts have the power to order security for costs against a person who, although not designated as plaintiff, is making a claim? If so, how should such a provision be formulated?

No. In respect of a cross-claimant, such an amendment would be redundant in light of *Civil Procedure Act*, s 3, which provides that plaintiff 'includes a person by whom a cross-claim is made'. UCPR r 42.21(1), when read with s 3, has the effect that a court can make an order against a defendant who is a cross-claimant. Moreover, it would be difficult to encapsulate in legislative form the complexity of the test, carefully worked out by the courts to balance the interests of the parties, depending on whether the cross-claim is a defensive or offensive one, as described below.

In *Winnote Pty Ltd (in liq) v Page* [2005] NSWCA 362, (2005) 56 ACSR 35, Mason P (at [18]) observed that the Court had given the word "plaintiff" in the relevant provisions an expansive meaning, that extended to a defendant who had filed a cross-claim, for which proposition his Honour cited *Buckley v Bennell Design & Constructions Pty Ltd* (1974) 1 ACLR 301. However, in *Buckley v Bennell*, while the Court of Appeal held that the word "plaintiff" used in the predecessor of s 1335 should not be given a restrictive or technical meaning, Street CJ added that where the impecunious company is a defendant in an action and seeks to put forward a cross-claim which amounts in reality to a defence of the action, there was no occasion under the section to order security for costs against it, although the position might be different where the defendant advances a cross-claim which is in reality a separate and distinct claim – in which case it could be considered a plaintiff within the meaning of the section. Moffitt P doubted that latter qualification; on the other hand, Hutley JA took the view, contrary to the Chief Justice, that in the instant proceeding the defendant was a "plaintiff". Street CJ referred to *Washoe Mining Company v Ferguson* (1866) LR 2 Eq 371, which considered an equivalent section and held that the principle of not requiring a plaintiff in a cross suit to give security was founded on the concept that the cross bill was a mere defence to the original bill, and did not apply when the cross bill was more than that. Street CJ also referred to *Neck v Taylor* [1893] 1 QB 560, in which case Lord Esher had said (at 562):

> Where the counter-claim is put forward in respect of a matter wholly distinct from the claim, and the person putting it forward is a foreigner resident out of the jurisdiction, the case may be treated as if that person were a plaintiff, and only a plaintiff, and an order for security for costs may be made accordingly, in the absence of anything to the contrary. Where, however, the counter-claim is not in respect of a wholly distinct matter, but arises in respect of the same matter or transaction upon which the claim is founded, the Court will not, merely because the party counter-claiming is resident out of the jurisdiction, order security for costs; it will in that case consider whether the counter-claim is not in substance put forward as a defence to the claim, whatever

> form in point of strict law and of pleading it may take, and, if so, what under all the circumstances will be just and fair as between the parties; and will act accordingly.

Lopes LJ said (at 563):

> In cases of this kind we ought, I think, to have regard, not so much to the record, construed according to the strict rules of pleading, as to the substantial position of the parties to the record. Bearing that in mind, it seems to me that the facts set up in this counter-claim are in the nature of a defence, arising as they do out of the same set of circumstances as the claim; and therefore it would not be right to require the defendant to find security for costs, although she is resident abroad.

Lindley LJ said (at 563):

> The matters set out in the counter-claim appear to me to be of such a nature and so closely connected with the cause of action that, whatever according to legal technicalities they may be called, they are, in substance, in the nature of a defence to the action. The plaintiff sues for a debt for which he holds security. The defendant says, 'I owe you nothing; give me back my security.' Under these circumstances, it does not seem to me just or fair that the defendant should have to give security for costs as the price of being allowed to plead such defence.

In *Buckley v Bennell*, Street CJ also referred to the judgment of Vaughan Williams LJ in *New Fenix Compagnie Anonyme d'Assurances de Madrid v General Accident Fire & Life Assurance Corporation Ltd* [1911] 2 KB 619 (at 625-626), where his Lordship rejected the suggestion that whenever the cross-claim made by a defendant goes to any extent whatever beyond a mere matter of defence, then whether he sets up the claim as plaintiff in the cross action or by way of counter-claim, he ought to be ordered to give security for costs. With reference to *Macgregor v Shaw* (1848) 2 De G & Sm 360 and *Mapleson v Masini* (1879) 5 QBD 144, his Lordship said there was no such rule that where in such cases the cross-claim to any extent whatever overlaps mere defence, security for costs must always be ordered:

> One must look in each case to see whether in substance the claim set up by a defendant is set up by him by way of defence to the claim against him. I do not say that the true test is that which was suggested in the case of *Wild v Murray* 18 Jur 892, which was cited to us, ie, that one must ask oneself the question whether the cross-claim would have been set up if the original claim had not been brought, though the learned judge who made that suggestion was a great judge, namely, Wood VC, afterwards Lord Hatherley LC. As I have said, I do not think that there is any hard and fast rule on the subject. We have to consider whether, in substance, upon the facts of the particular case, the defendants in the original action are to such an extent plaintiffs in the cross-action, that they ought according to the general practice in the matter to be ordered to give security for costs, because they have taken up the position of plaintiffs, irrespective of defence to the original action. I think that each case of this kind must be judged on its own merits.

Reference might also be made to the judgment of the Court of Appeal in *Sykes v Sacerdoti* (1885) 15 QBD 423, in which the Court held that where a claim and counter-claim arose out of different matters so that the counter-claim was really in the nature of a cross action, a defendant residing out of the jurisdiction may be required to give security for the costs of the counter-claim, and if the only dispute remaining arose on the counter-claim that he should be so required.

In *Buckley v Bennell*, Street CJ concluded (at 307):

> I am of the view that where the impecunious company is a defendant in an action and seeks in that action to put forward a cross-claim, which amounts simply to a defence to the action, then there is no occasion under s 363 to order security for costs against it. The principles to be applied in determining whether an impecunious company defendant can properly be required to give the security for costs in respect of a cross-claim are, in my view, the same principles as those enunciated in the passages I have quoted from *Neck v Taylor*, *supra*.

The position therefore seems to be that, as a matter of jurisdiction, the reference in the section and the rule to "plaintiff" extends to encompass a cross-claimant. However, as a matter of discretion, the Court will not make an order against a cross-claimant where the cross-claim arises out of the same matters as the claim and is purely by way of defence. If it extends beyond being purely by way of defence, then the Court will have regard to the overall nature of the proceeding and the cross-claim to see whether it can be said that in truth the cross-claimant has become, in substance, a plaintiff. Thus, in *Specialised Building Materials Pty Limited v E U Occusted Pty Ltd* (1981) 58 FLR 270, the plaintiff claimed $16,000 and the defendant counter-claimed for $10,000. Both the claim and that counter-claim arose out of a contract to install plasterboard at the Mitchell archives in the Australian Capital Territory. In addition, the defendant counter-claimed for $4,650 relating to a different agreement at Belconnen, and for damages of $26,000 in respect of yet another agreement with one Jambrovic. On an application by the plaintiff for security for costs, the Supreme Court of the Australian Capital Territory held that the defendant was, in substance, a plaintiff, and the plaintiff was entitled to security, in respect of the Belconnen and Jambrovic cross-claims but not in respect of the Mitchell archives counter-claim.[11]

[11] See *Bevwizz Group Pty Ltd v Transport Solutions Pty Ltd* [2008] NSWSC 1399.

3. PLAINTIFFS ASSISTED BY CERTAIN COSTS AGREEMENTS

Litigation funding as a relevant discretionary factor

Q3.1 (1) Should the UCPR 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?

No. I do not think that the plaintiff's funding arrangements with third parties should of themselves be a relevant consideration. They may, however, be relevant to other, conventional discretionary considerations.

The typical case might be a "corporate impecuniosity" case, in which ordinarily a security order would be made. Does the circumstance that the plaintiff is in receipt of litigation funding affect that outcome? I cannot see why the defendant should be deprived of the security that would otherwise be ordered, just because the plaintiff has a litigation funder. Alternatively, if the plaintiff were able to establish that the litigation funder's responsibility extended to adverse costs orders, that may tend to rebut the argument that the plaintiff may be unable to satisfy an adverse costs order and would be relevant for that reason – but not just for the reason that there was a litigation funder. If a security order would otherwise be declined because of "stultification", should the presence of a litigation funder make a difference? In my view, the position is sufficiently covered by the rule that an order would not be refused on stultification grounds unless it were shown that those with an interest in the litigation (which would include the funder) are also unable to provide security.[12] Finally, should an order be available against an impecunious natural plaintiff, just

[12] *Bell Wholeale Co Pty Ltd v Gates Export Corp* (1984) 52 ALR 176; *Caruso Australia Pty Ltd v Portec (Aust) Pty Ltd* (1984) 2 ACVLC 286; *Newtons Travel Services Pty Ltd v Ansett Transport Induistries (Operations) Pty Ltd* (1982) 1 ACLC 521; *MA Productions Pty Ltd v Austarama Television Pty Ltd* (1982) 1 ACLC 404; cf *Spiel v Commodity Brokers Australia Pty Ltd (in Liq)* (1983) 8 ACLR 410.

because he or she is able to arrange litigation funding? This may be the strongest case, for extending the availability of such orders. The argument is that it is only fair that a funder who stands to benefit from the successful outcome of proceedings should be exposed to liability the opposing party's costs. But on balance, I incline to the view that the plaintiff's third party arrangements – whether with a funder, a family member, or their lawyers – should not affect whether or not a security order should be made.

The key elements of the concept are (1) financial assistance for the costs of the proceedings, (2) in consideration for an interest in the outcome. These are reflected in the Young Lawyers definition of 'litigation funder' as a person who provides financial assistance to a party in return for a financial benefit calculated by reference to the outcome of the proceedings, and who does not otherwise have any interest in the proceedings.

Disclosure of the terms of the litigation funding agreement

Q3.2 (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?

No. Prima facie, the arrangements by which parties fund their litigation are private matters for them. Where relevant, litigation funding arrangements can be ascertained by notice to produce and subpoena. I do not see the necessity nor desirability of adding a mandatory obligation to disclose such arrangements.

Power to order costs against litigation funders

Q3.3 (1) Should legislation be adopted to give courts the 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?

No. It may well be that the court has an inherent power to make costs orders against those who involve themselves in litigation in certain ways, but including an express power would simply invite a proliferation of applications (as has, for example, the express power to make costs orders against legal practitioners). If there is such a power, it ought to be rarely invoked, in extreme cases. If enacted, it should be exceptional. Ordinarily, a costs order should be made against a party, not against its funder under private arrangements.

Power to order security for costs against litigation funders

Q3.4 Should legislation be adopted giving courts the express power to make security for costs orders against litigation funders?

No. There is not utility in this approach. The court can order the plaintiff to provide security. If bound or willing to do, the security can be posted by the litigation funder. If the court orders the litigation lender to provide security, then the consequence of its failing to do so would presumably be that the proceedings are stayed: the consequence is no difference from ordering the plaintiff to provide security. In principle, a third party should not be exposed to a costs or a security order, except in exceptional circumstances of the kind that attract the inherent jurisdiction of the Court. As between the parties, it is for the party, not its funder, to meet costs orders and provide security. As mentioned above, the principles pertaining to the "stultification" doctrine provide sufficiently for the role of a litigation funder.

Conditional costs agreements

Q3.5 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?

No. Again, it is pointless to specify that a conditional costs agreement is a relevant discretionary consideration, unless it is known whether it is intended to weigh in favour of or against making a security order – otherwise, it adds nothing. In a "corporate impecuniosity" case, in which ordinarily a security order would be made, why should the circumstance that the plaintiff has a conditional costs agreement with its lawyers affect that outcome? I cannot see why the defendant should be deprived of security because the plaintiff has lawyers prepared to act on a conditional costs agreement. If a security order would ordinarily be declined because of "stultification", should the existence of a conditional costs agreement make a difference? Arguably yes, because the plaintiff is free to litigate with impunity as to his own costs, while the defendant is not. But the plaintiff remains liable for the defendant's costs if unsuccessful. On balance, I do not think that this warrants departure from the rule that a plaintiff's private funding arrangements should not be directly relevant to security for costs.

Representative proceedings

Q3.6 (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?

(1) Yes. It is not incongruous with the immunity of represented plaintiffs that the representative may be ordered to provide security. There is no particular injustice in represented plaintiffs having to bear some of the burden of a security order. The policy objectives secured by the immunity can be taken into account as a matter of discretion in determining whether or not an order should be made.

(2) Given the doubt that has arisen in the Federal Court, it is better that this be expressed in legislation.

Plaintiffs supported by legal aid

Q3.7 Does the law and practice on security of costs apply satisfactorily in the case of plaintiffs who are supported by Legal Aid?

Yes, in that Courts have power to order costs against legally aided plaintiffs as if they were not legally aided persons.[13]. Again, the plaintiff's private funding arrangements should not be directly relevant. The question rarely arises, as most legally aided plaintiffs are impecunious natural persons within the jurisdiction, against whom security would in any event not ordinarily be ordered. That a plaintiff is in receipt of legal aid should not be a ground to make an order where one otherwise would not be made. Nor should it be a ground to decline an order where one would otherwise be made.

Lawyers acting pro bono

Q3.8 (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?

No. It is necessary to distinguish between acting on a pro-bono basis, and acting on a contingency basis. Lawyers who act on the basis that they will recover costs only if and to the extent that a favourable costs order is ultimately made are acting on a contingency, not a pro-bono, basis. If it is made clear that they are acting on such a

[13] (NSW) *Legal Aid Commission Act*, s 42.

contingency basis, the indemnity principle does not prevent them from recovering under a costs order. This will also promote transparency of the basis on which lawyers are acting. Even where lawyers act pro-bono, costs orders can still be made; however, the indemnity principle will limit recovery to out-of-pocket expenses etc.

There would be significant impracticability in providing for costs or security orders in respect of pro bono work in the absence of scales, as there would be no objective standard against which to assess the costs.

Exemption from personal costs orders

Q3.9 Should s 99 of the CPA and s 348 of the Legal Profession Act be amended to include an exemption for legal practitioners who have provided legal services on a pro bono basis?

No. There is no reason to exempt lawyers acting pro bono from personal liability for costs where costs are incurred as a result of their 'serious neglect, incompetence or misconduct', or 'improperly, or without reasonable cause, in circumstances for which a legal practitioner is responsible'.[14] In the case of 'without reasonable prospects of success', the power is discretionary. The fact that a legal practitioner was acting pro bono for a client who would otherwise be unrepresented before the court would be a powerful discretionary consideration against making such an order. It is better to leave this to discretion, than to carve out an exception.

4. PUBLIC INTEREST AND PROTECTIVE COST ORDERS

Public interest costs orders

This topic is not a major focus of this submission, and is addressed in less detail. Further elaboration can be provided if desired.

[14] (NSW) *Civil Procedure Act*, s 99.

Q4.1 Is there a need for new legislation to give courts the power to make public interest costs orders, or is the current law adequate?

Although in the courts of general jurisdiction (as distinct from the Land and Environment Court), the existing case law largely provides sufficient discretion to mould appropriate costs and security orders in cases in which there is a "public interest" element, I would not oppose the introduction of legislation along the lines proposed by the ALRC.

Definition

Q4.2 (1) Should any proposed legislation establishing public interest costs orders define public interest proceedings?

(2) If so, what should the definition be?

Yes, in accordance with ALRC recommendation 45, to the effect that the proceedings will determine, enforce or clarify an important right or obligation affecting the community or a significant section of the community; will affect the development of law generally and may reduce the need for further litigation; or otherwise have the character of public interest or test case proceedings, and notwithstanding that one or more of the parties may have a personal interest.[15] Nonetheless, the presence of a personal interest ought to be relevant to the exercise of the discretion to make a PICO.

Timing of public interest costs orders

Q4.3 Should the legislation establishing public interest costs orders provide that courts may make an order at any stage of the proceedings, including at the start of the proceedings?

[15] Australian Law Reform Commission, *Costs Shifting – Who Pays for Litigation*, Report 75 (1995) [13.16].

Yes.

Discretionary factors

Q4.4 (1) Should the legislation giving courts power to make public interest costs orders contain a list of discretionary factors that courts may take into account when determining whether to make a public interest costs order?

(2) If so, what should these factors be?

Yes. As proposed, the factors should include the resources of the parties, including the extent to which a party could meet an adverse costs order; the likely cost of the proceedings to each party; the ability of each party to present their case properly or negotiate a settlement; and the extent of any private or commercial interest each party may have in the litigation. They should also include the prima facie strength of the case, the *extent* to which the public interest is involved, and the proportionality of the costs of the litigation to the importance of the issue. Query whether specific reference to the effect of the litigation upon marginalised and vulnerable people, or national security, adds anything, in the absence of an indication as to whether they tell in favour of or against making a PICO. Query also whether the fact that legal representation is *pro bono* should be a factor, and if so whether it tells in favour of or against a PICO: it is not necessarily apparent that a PICO should more readily be made in favour of a plaintiff who can litigate without even having to pay its own costs.

Types of orders

Q4.5 If a court is satisfied that there are grounds for making a public interest costs order, what are the types of orders that it should be able to make?

The types of orders should include those proposed in ALRC recommendation 47, namely that costs follow the event; each party bear their own costs; the party applying for the public interest cost order, regardless of the outcome of proceedings, will not be

liable for the other party's costs, only be liable for a specific proportion of the other party's costs, or be able to recover all or part of their costs from the other party. There should also be power order that the applicant bear all of the costs of the proceedings (a similar order is sometimes made in connection with grants of special leave to appeal to the High Court on points of importance where the respondent is not well-resourced). However, I would not support the proposed power to make an order that another person, group, body or fund (not being a party) pay the costs of one or more of the parties. This would risk procedural and natural justice complexities, and speculative applications.

Location of the provisions on public interest costs orders

Q4.6 Should the provisions giving courts power to make public interest costs orders be located in statute or in the UCPR.

Establishing PICOs is a matter of policy rather than of practice and procedure and would more appropriately be achieved by statute than by provisions in the UCPR.

Protective costs orders

Q4.7 (1) What is the appropriate scope and purpose of UCPR r 42.4?

(2) Should this rule be used more frequently in public interest proceedings?

The purpose of the rule is to provide a mechanism for ensuring that parties do not conduct proceedings without regard to the proportionality of the costs of doing so in the belief that they will recover most of such costs from the opposing party. Its scope is by no means limited to public interest proceedings, and it is apt for use in private litigation, such as family provision applications. I would be more supportive of its greater use in such litigation than in public interest proceedings.

Q4.8 Should the provisions on courts' power to specify the maximum costs that may be recovered by one party from another, which are currently located in UCPR *r 42.4, be relocated into* Civil Procedure Act, *s 98?*

No. The power to make such an order is an aspect of implementation of the general power in respect of costs under s 98, and is appropriately located in the rules.

Public interest litigation fund

Q4.9 Should NSW establish a public interest fund that will provide financial assistance to cover the legal costs of, and any adverse costs orders against, persons or organisations whose litigation raises issues that are in the public interest?

It is a policy decision as to whether better resourcing of Legal Aid would not be a preferable allocation of available resources than establishing such a fund.

5. PROCEDURES AND APPEALS

Determining the amount of security

Q5.1 (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 sued 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?

(1) While the assessment of the appropriate amount of security is a "broad-axe" judgment, it is not a particularly difficult one. Legal representatives plainly know what evidence and arguments are relevant. Typically, a solicitor with relevant experience, and/or a legal costing consultant provides an assessment by way of evidence. The example cases referred to in the consultation paper demonstrate the pragmatic approach of the Courts to this issue.

(2) No. There is no need for statutory guidance as to principles governing assessment. These are already well established by case law, as mentioned in the Consultation paper.

(3) Yes. Although scales of costs have not been used in NSW since the introduction of the Costs Assessment Scheme in 1993, the publication by the Courts of a scale according to which security would normally be calculated would save parties costs, provide greater certainty of outcome, reduce the scope of disputes, assist consistency, and establish an objective criterion. I strongly support it. Use of such a scale is not contra-indicated by the argument that security is not meant to be a complete indemnity; scales will not make them a complete indemnity. Nor do scales fetter the court's discretion; the amount awarded will remain discretionary, but a scale would much facilitate its calculation in normal cases. Assessment by reference to costs already incurred is no solution, as security orders are usually made in respect of future costs, not costs already incurred, and must be sought promptly, at the outset of proceedings.

(4) No. I do not agree with any proposal that a costs assessor sit alongside a judge when assessing the quantum of security. This will add an unnecessary complication and cost to proceedings that are usually reasonably straightforward. Judges need such assistance with legal costs less than with almost any other type of expert evidence – and they rarely need it with other types of expert evidence. It is preferable to leave it to the parties to adduce evidence of anticipated quantum in accordance with current practice.

Form of security

Q5.2 (1) Are there any problems relating to the form of security for costs that courts may currently order?

(2) Is it desirable to amend the UCPR by adding a list of the possible forms of security for costs that courts may order?

(3) Is it desirable to amend UCPR to provide requirements similar to the provisions set out in the Tasmanian rules?

(1) No. Typically, the order is for security "in a form acceptable to the registrar". That is usually cash, or a bank guarantee, but might be a mortgage or bond. I am not aware of any difficulties arising.

(2) No.

(3) Yes, as to payment into court. I do not support a bond given to the other party, as it is not then under the control of the Court, and would potentially lead to the problems associated with bank guarantees being called on beneficiaries when there is dispute as to an underlying condition.

Stay of proceedings until security is given

Q5.3 Should the UCPR 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?

No. It is entirely appropriate that the imposition of a stay, while usual, be discretionary. For example, security may be ordered in stages, or deferred, with the proceedings continuing in the meantime.

Dismissal of proceedings for non-compliance with order

Q5.4 Are there any problems relating to the power of courts to dismiss proceedings if the plaintiff fails to comply with a security for costs order?

No.

Appeal against order

Q5.5 (1) Should the UCPR set out a principle for dealing with appeals against security for costs orders? If so, what should that principle be?

(2) Are there any other issues relating to appeals against security orders that need to be considered?

No. Appeals against security orders are appropriately treated as other appeals against interlocutory and costs orders, and lie by leave of the Court of Appeal. It is undesirable to apply any special principle to appeals in security cases that does not apply to other interlocutory appeals.

Variation or setting aside of security for costs orders

Q5.6 (1) Should the UCPR 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 there is to be a standard, should it be (a) 'material change in circumstances' as developed in common law; (b) 'special circumstances' as specified in the ACT and QLD rules; or (c) some other standard?

(3) Should there be a 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?

(1) No. There is no necessity for such a provision. While the UCPR does not contain a provision specifically allowing courts to set aside or vary security orders, such applications are within the scope of UCPR r 36.16(3) (which permits applications to set aside or vary interlocutory orders). It is undesirable to make special provision for such applications in security cases that do not apply to other interlocutory orders.

(2) The power should be exercised on existing principles – a broad discretion which gives predominant weight, but is not constrained to, a material change in circumstances.

(3) No. Case law provides ample guidance and appropriate flexibility.

(4) No. There is insufficient reason to place such applications in a unique category requiring leave. And unlike in appeals, little would be achieved as presumably the application for leave and the substantive application would be dealt with concurrently by the same judge; if not, such a filter would add an extra unnecessary complexity and cost.

Finalising the security

Q5.7 (1) Should the UCPR be amended to incorporate the procedures for dealing with security for costs when the main proceedings are finalised?

(2) If so, how should such provisions be framed?

I am not aware of any problem arising from any lack of clarity in this area. However, I would not oppose such amendment, modelled on the ACT or QLD provisions.

Security for costs in appeal proceedings

Q5.8 (1) Should the 'special circumstances' requirement in appeals be removed?

(2) If not, should 'special circumstances' be defined, and how should they be defined?

No. The importance of "special circumstances" is that a security order is not a matter of course in an appeal – there has to be something special about the case to warrant such an order, but that is not so limited as, for example, the grounds in UCPR r 41.21(1). Removal of such a requirement would risk making a security order practically one of course in appellate proceedings. Definition is not required – and definition would risk unnecessarily constraining the power.

Q5.9 Should the provision relating to the courts discretion to make security for costs orders in appeals be located in the UCPR or in the Civil Procedure Act s 98?

It does not seem necessary for this power to be enshrined in statute, as distinct from its present location in UCPR.

Security in applications for leave to appeal

Q5.10 (1) Should legislation provide courts with power to order security for costs for leave to appeal applications?

(2) If so, should the provision be located in the UCPR or in the *Civil Procedure Act?*

Yes. UCPR r 51.50 should be amended by adding ", or of an application for elave to appeal".

Statutory power to dismiss an appeal for failure to provide security

Q5.11 Should courts have express legislative power to dismiss an appeal for failure to provide security for costs under an order to do so?

Yes. This, and a power to stay appellate proceedings until security is given, should be included in UCPR rr 50.8 and 51.50

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