NEW SOUTH WALES

The Chief Magistrate of the Local Court

1 July 2011

Mr P McKnight
Executive Director
NSW Law Reform Commission
GPO Box 5199
SYDNEY NSW 2001

Dear Mr McKnight

Submission – Security for Costs

Thank you for your letter of 19 May 2011 inviting a submission from the Local Court in respect of the Law Reform Commission's consultation paper on security for costs and associated costs orders.

My comments are set out below. They are largely confined to the issue of the jurisdiction to order security for costs, as issues such as public interest and protective costs orders and costs in appeals generally do not arise in the Local Court jurisdiction.

1. Jurisdiction to order security for costs

a. *Jurisdictional grounds*

The Court supports the introduction of a broad legislative ground for courts to order security for costs where necessary in the interests of justice. Notwithstanding case law indicating the existence of an implied power in the Local Court to order security for costs in circumstances beyond the five specified heads in r 42.21 of the Uniform Civil Procedure Rules ('UCPR'), the clarity of the law would in my view assisted by the consolidation of that power in the rules.

I would suggest such an amendment be effected by adding a broad ground to s 98 of the *Civil Procedure Act* 2005 ('CPA') that the court has the power to order security for costs where it is of the view that the order is necessary in the interests of justice, including (but not limited to) the circumstances referred to in the UCPR.

If the UCPR are further amended to incorporate a list of discretionary factors that the court may take into account in deciding whether or not to order security for costs, it would also be preferable for that list to be referable to a clear legislative head of power that the rules may set out discretionary factors that the court may take into account when determining whether to make an order for security for costs.

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b. *Non-resident plaintiff*

The Court agrees with the suggestion that r 42.21(1)(a) should be amended to refer to a plaintiff ordinarily resident outside Australia, rather than New South Wales, to resolve the current constitutional uncertainty and align with provisions in other Australian jurisdictions.

c. *Enforcement procedures in plaintiff's country of residence*

The Court considers that the enforceability of an Australian costs order against a plaintiff who is ordinarily resident outside of Australia should be a relevant factor in determining whether to order security for costs. The availability of enforcement procedures and mechanisms in foreign jurisdictions is clearly a relevant consideration in an application against a plaintiff ordinarily resident outside Australia, as it goes to the issue of whether the plaintiff may be able to avoid complying with a possible costs order in the future.

If the addition of a list of discretionary factors in the UCPR is supported, it would be desirable for it to include provision that the court may taken into account whether or not any mechanism or procedure is available to aid the enforcement of an Australian costs order in the plaintiff's country of residence.

d. *Change of address*

The Court agrees with the proposal that the UCPR should require a plaintiff who changes his or her address in the course of proceedings to promptly notify the Court and all other active parties in the proceedings of the change. I would further add that this should be a general requirement of all parties to proceedings to prevent a change in address from being used as a tool to frustrate or avoid the consequence of the proceedings.

e. *Discretionary factors*

The Court supports the addition to the UCPR of a non-exhaustive list of discretionary factors that mirrors the factors already identified at common law as being potentially relevant to the determination of an application for security for costs.

On balance, it would be preferable to include as a factor the impecuniosity of the plaintiff. However, this factor would need to be carefully drafted to recognise the principle that of itself, impecuniosity is not a barrier to litigation. It may be more appropriate for impecuniosity to be considered in conjunction with other factors such as the strength of the plaintiff's case, or whether the plaintiff has a history of litigation or failure to comply with costs orders.

f. *Relationship between jurisdictional grounds and discretionary factors*

Should a list of discretionary factors be added to the UCPR for consideration by the courts in determining whether to order security for costs, the relationship of those factors to the jurisdictional grounds should be clearly articulated in the rules to avoid any scope for uncertainty as to their interaction.

It would seem sensible to adopt a systematic approach, such by setting out:

(i) The jurisdictional grounds which can activate the jurisdiction to order security for costs; and then

(ii) The discretionary factors that the court may, if satisfied that one or more of the grounds required to activate the jurisdiction has been met, consider in determining whether or not it is appropriate to order security for costs.

g. *Corporate plaintiffs*

With some qualifications, the Court agrees with most of the amendments suggested in the consultation paper relating to corporate plaintiffs under the *Corporations Act*, although it is noted that these would require action at the Commonwealth level rather than being an area for State law reform.

Section 1335(1)

As the case law appears to indicate that the substance of r 42.21(1)(d) of the UCPR and s 1335(1) of the Commonwealth *Corporations Act* is the same and there is no inconsistency between, there does not appear to be a need to amend the former provision.

A broader question is whether the UCPR should operate in the case of applications for security for costs against corporate plaintiffs to whom the *Corporations Act* applies. At present, it is not uncommon for a lack of clarity to be encountered from legal representatives as to the basis upon which an application is being pursued. Indeed, as the consultation paper notes, it is not uncommon for an applicant to seek security for costs under both r 42.21(1)(d) and s 1335(1).

Although the provisions in respect of corporate plaintiffs are essentially the same, one wonders whether it may be more appropriate in principle and to avoid confusion by having a single test apply. If thought desirable, this could probably be most simply achieved by having the UCPR depart from the field and provide that r 42.21 does not apply in respect of corporate plaintiffs subject to the *Corporations Act.*

Differential treatment of corporate plaintiffs and plaintiffs who are natural persons

The Court is of the view that current differences in treatment of corporate plaintiffs and plaintiffs who are natural persons in relation to security for costs are appropriate in light of the need to ensure that individuals are not able to hide behind the corporate shield in litigation.

Insofar as concern has been raised that the present treatment of corporate plaintiffs makes it too easy for a defendant to obtain security for costs against a corporate plaintiff without sufficient regard to the merits of the claim, the development of a simple procedure to reliably assess the financial position of a corporate plaintiff such as that suggested in the consultation paper may go some way to allay that concern.

Proof of impecuniosity of a corporate plaintiff

Accordingly, the Court supports the suggestion that a procedure be developed so that a defendant may request a corporate defendant to disclose its overall financial status and, if the request is refused, a rebuttable presumption arises that the corporate plaintiff is impecunious.

There appears to be a need for a time- and cost-effective alternative to current options in the rules that may be utilised by defendants to attempt to obtain information about a corporate plaintiff's financial position. At present, procedures such as discovery, notices of motion and subpoenas are often expensive to pursue and hard fought between the parties.

Insolvent corporate plaintiffs who sue former directors, officers or shareholders

Where an insolvent corporate plaintiff sues its former directors, officers or shareholders, there may be some cases in which it is appropriate that s 1335(1) of the *Corporations Act* should not apply to enable an order for security for costs against the corporation. If there is information available to the Court that indicates a basis for finding that a former director, officer or shareholder may have caused or contributed to the insolvency of the corporation, it may be appropriate for the usual rule not to apply.

At the very highest, there could be a presumption that s 1335(1) does not apply unless a defendant can demonstrate circumstances why it should. However, it would be preferable that it should not be mandatory or presumed that the section does not apply in these situations, but left to the court's discretion. There may be situations, such as where an insolvent corporation takes a "scattergun" approach by commencing proceedings against multiple former directors, officers or shareholders without a clear view as to who is the proper defendant, where an order for security for costs may nonetheless be appropriate.

h. *Ordering security for costs against defendants*

The Court agrees that, where a cross-claim is made by a defendant in proceedings, there should be a power to order the defendant to provide security for costs.

The Court has no firm view as to how such a provision should be formulated as the various options canvassed appear substantially similar, although for the sake of consistency between the *Civil Procedure Act* 2005 and the UCPR, it would appear sensible for the same definition of "plaintiff" to apply across both. Ultimately, this would be an issue for consideration by the Uniform Rules Committee.

2. Plaintiffs assisted by particular forms of costs agreements

In the Local Court, where the civil jurisdiction is capped at $100,000 (or $120,000 where the parties consent), the issue of third party litigation funding by commercial funders does not tend to arise, although the Court does see plaintiffs who represented by lawyers acting under conditional cost agreements or on a pro bono basis. My comments in relation to this section are therefore limited.

a. *Definition of litigation funding*

The Court agrees that, if a list of discretionary factors as to whether to order security for costs is inserted in the UCPR, it would be relevant to include the consideration of whether a plaintiff is receiving funding from a litigation funder.

I understand that the Standing Committee of Attorneys-General previously released a discussion paper in relation to litigation funding and more recently referred the issue of the possible regulation of litigation funding by the Australian Securities and Investments Commission to the Commonwealth Minister for Financial Services, Superannuation and Corporate Law. If national regulation of litigation funding is to be pursued, it may be prudent to consider what definition of "litigation funder" is proposed at that level.

b. *Disclosure of litigation funding agreement*

On balance, the Court supports a requirement that parties to litigation should be required to disclose any litigation funding agreement and an abrogation of client legal professional privilege to give effect to that requirement.

However, any impingement on client legal professional privilege should only be to the extent necessary for a defendant to determine whether an application for security for costs may be appropriate. Any provision requiring disclosure should thus be qualified so that a party need only disclose the parts of the agreement that go towards enabling an assessment of the existence and validity of provisions for indemnity in respect of adverse costs orders.

c. *Ordering costs and security for costs against litigation funders*

The Court agrees with the introduction of legislative provision to empower the courts to order costs against litigation funders. To the extent that a litigation funder seeks to share in the profits in the event of a plaintiff being successful, in principle it seems reasonable to expect a litigation funder to also assume the risk that a plaintiff will not be successful in proceedings. The same observation might be made in respect of empowering courts to order security for costs against litigation funders.

Thank you for the opportunity to make a submission in respect of this inquiry. Should the Commission wish to discuss any of the above with me further, please do not hesitate to contact my office.

Yours sincerely,

Judge Graeme Henson
Chief Magistrate