SUBMISSION IN RELATION TO QUANTIFYING SECURITY FOR COSTS

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Chapter 5 of the Consultation Paper addresses, inter alia, the question of how Courts determine the amount of security to be ordered, in the light of the many uncertainties of litigation.

The examples cited in paragraphs 5.8 to 5.15 illustrate the difficulty faced by the Court where the estimates propounded by the defendant and those by the plaintiff are manifestly different.

Although based on anecdotal evidence it has been the experience of most litigants that, generally speaking, most sums ordered for security for costs are substantially less than the amount of costs ultimately incurred or recoverable by the defendant.

The question must be asked whether, notwithstanding the rationale that security is not meant to give a "complete and certain indemnity", it would seem antithetical to the purpose of awarding security to allow a figure which is no indemnity, or a largely insufficient indemnity, leaving the successful defendant, at the end of the matter, greatly out of pocket for its costs.

While it is necessary to ensure that security does not stifle the litigation, it is also necessary to make the award meaningful and not illusory.

Question 5.1 – what problems arise in the assessment of the amount of security?

The first problem arises because authority suggests an application for security for costs should be made promptly and before the Plaintiff has embarked on the litigation to any real extent. No issue is taken with what authority suggests. The problem is, in order to convince the Court as to an appropriate amount to be provided for security, an opinion has to be provided as to what the litigation might involve. Depending upon the particularity with which the Plaintiff has pleaded the claim it may not be easy without seeking further and better particulars to estimate what might be involved. This would necessarily delay the ability to make the application in a timely manner.

The second problem is how to weigh up the evidence before the Court in respect of the likely costs of a matter.

It is usual for both parties to put forward evidence from the solicitor with conduct of the matter, in respect of the likely work to be done by the defendant, and an opinion by a cost expert on the "reasonable" costs of that work. The defendant's evidence will, generally, put the claim at its highest and the plaintiff's evidence seek to show the claim at its lowest.

Unfortunately, in a jurisdiction where there are no objective tests in relation to the type of work allowed, inter partes, or the rates at which that work will be allowed, it is not easy, even for an expert, to provide "scientific" opinion on the reasonableness of costs claims.

The evidence required can also be expensive to prepare, a fact which seems to fly in the face of the purpose of security, that is, to protect the defendant against incurring "unsecured" costs.

At paragraph 5.7 there is reference to the provision of a "skeleton bill of costs" as being a method "preferred" by the Court. It is not clear what type of document is referred to here; however, in practical terms the preparation of any form of itemisation of costs is an expensive task which may lead to an unwarranted distraction in the conduct of the substantive matter, including having to provide the file to a cost consultant.

Furthermore, a detailed itemisation may invite a "de facto" taxation of particular items which is time consuming and premature, in the security context where the reasonableness of work undertaken and costs incurred might only be fairly determined in the light of the final outcome. Additionally the delivery of such a document might expose the defendant to explanations of work which would expose its tactics in the litigation.

If possible, the best solution would be to provide a method to assist the Court to make an award appropriate in the circumstances, without putting the parties to great expense to quantify it.

One way of doing this would be to standardise the form in which the evidence should be presented which streamlines the amount of material which the Court has to consider.

A further problem arises when a defendant makes more than one application for security which no doubt ensues because of the first problem identified in this response.

Question 5.2 – Should guidance be given by statute or regulations?

The advantage of providing a guideline, for example, by way of a Practice Note, such as the Federal Court's "National Guide to Counsel's Fees", would be to provide a cheap and easy way for the Court to quantify the security to be ordered.

A guideline should not be in the form of rates, which would not avoid the cost and time taken preparing evidence of how those rates should be applied, but could have a range of gross amounts to be allowed in different types of cases and could be structured to take into account the length of hearing, number of parties etc, with the onus on practitioners to give accurate estimates of evidence to be led in the substantive proceedings. Any failure could militate against further applications unless the conduct of the Plaintiff could excuse any such failure.

Another reason for avoiding the setting of rates for such a guideline should not be by way of a range of hourly rates, which is dangerous in circumstances where this range might come to have the status of a "de facto" scale, but should allow a lump sum or a range of lump sums.

The disadvantage of introducing a guideline would be the infrastructure required to keep the guideline up to date. The Federal Court Practice Note is updated every year.

Notwithstanding the difficulties, a guideline would have the advantage of objectivity, so that a defendant who is conducting the defence in a "no-holds barred" manner would not be protected for its luxurious conduct, and a plaintiff would have some certainty and predictability of the amount it might have to "stake".

For example, a one day hearing with junior counsel only where there has been discovery and up to five witness statements/affidavits for each party might, hypothetically, be fixed at $100,000.

If a party considers that its case falls outside the guideline it could be permitted to make submissions to the Court on why the guideline should not apply.

Question 5.3 – Should there be non-binding scales to be used for determining security for costs?

For the reasons set out above in answer to the preceding question, the setting of non-binding "scales" by way of security presents problems where the nature of proceedings and the legal representation of the parties can be widely different. Any judicial approval of a rate of charge, even in the context of an application for security for costs, creates a dangerous precedent in the circumstances of the deregulation of costs in New South Wales.

Also, as noted above, the setting of a range of rates would not avoid the costs of presenting the additional evidence of how those rates should be applied in any particular matter to the work projected. If the object of assisting the Court is to fix amounts for security for costs to avoid the expense and time in interlocutory hearings, this would not be achieved by setting a range of rates.

The additional problem arises, as noted in the answer to question 5.2, that any indicative rates would have to be fixed in consultation and a system for updating developed.

Question 5.4 - Should cost assessors sit with judges for the purposes of fixing the amount of security?

The role of a cost assessor, appointed by the Manager, Cost Assessment, is to determine reasonable costs at the end of a matter, when all of the factors affecting costs have been determined.

It is difficult to imagine how a costs assessor would provide an ex tempore view given the material usually considered by assessors in reaching a determination.

Assessors have no better ability to predict what may happen in a case and how much it will cost, than the solicitors or cost consultants, or the Judge presiding.

To include yet another viewpoint in addition to those of each of the parties and their experts and the Judge is to introduce a further complexity and, probably, uncertainty into the exercise.

The adoption of a streamlined basis of presenting evidence as to costs or a guideline range of gross amounts would assist the Court more than adding another opinion to the matters which the Court has to take into consideration.