SECURITY FOR COSTS AND ASSOCIATED COSTS ORDERS

SUBMISSION TO THE LAW REFORM COMMISSION OF NSW

1. The contents of the Uniform Civil Procedure Rules (in Part 42 Division 6), as they concern security for costs, remain in substantially the same terms as the predecessor rules of court, which have regulated the New South Wales courts' jurisdiction in this respect, for many decades. They largely originate from the United Kingdom's rules of court and case law, going back at least to the 19th century.
2. Apart from the courts' exercise of this jurisdiction under the Rules, of more frequent importance is the jurisdiction arising under s1335 Corporations Act, where a *"corporation"* as defined in that Act *"is plaintiff in any action or other legal proceeding"*.
3. Practice and procedure throughout Australia is substantially uniform on questions of security for costs, because s1335 is Commonwealth legislation and because the rules of court of all courts – federal, and the states and territories – are in similar terms to UCPR42 – see, e.g. Federal Court Rules, Order 28.
4. Any departure from that general uniformity would be highly undesirable. The evils of forum-shopping to which it would be likely to lead, would almost certainly outweigh any improvement which may be capable of achievement, in a substantive revision in New South Wales alone, of the present UCPR Part 42. If that were to occur and there to emerge thereby, divergent regimes for security for costs , any plaintiff which might be susceptible to an order for security for costs, would, quite understandably, be impelled to institute its litigation in the court with the least rigorous requirements for cases for security, whether or not that was otherwise the most appropriate jurisdiction.
5. Obviously also, it is not open to the Parliament of New South Wales, as a matter of constitutional competence, to override the terms of s1335 Corporations Act or limit the availability of that jurisdiction, when invoked by defendants.
6. Accordingly any reform which is to be proposed to the current law of security for costs in New South Wales, should only take place under a regime such as produced *"harmonised rules of court"* for subpoenas and for corporations, from the committee of judges appointed by the Council of Chief Justices.
7. The balance which exists under the present law, between the legitimate rights and interests of plaintiffs and defendants, appears to be a generally fair one. The starting point is the general feature of litigation in Australia, whereby a plaintiff whose case ultimately fails, will normally be ordered to pay the legal costs of the successful defendant. In the case of an impecunious corporate plaintiff, by virtue of s1335, such a plaintiff will normally be susceptible to a requirement that, in advance of its case being heard, it provide security for that potential adverse costs order. Such a general rule would appear to be a reasonable corollary of the privileges, in particular the privilege of limited liability, which are available to corporations under the corporations legislation.

8. There would not seem to be any reason to think that the fairness of the balance, in the case of corporate plaintiffs, would be enhanced, by any change to the text of the current law, such as to attempt to differentiate on the basis of what may be the plaintiff's own legal funding arrangements. Such differentiation as may be appropriate to particular cases, is better made on a case-by-case basis under the existing discretionary regime.
9. In the case of natural person plaintiffs, there likewise seems to be a reasonable balance of fairness in the law, as currently applied, embodied in particular, in the normal principle that poverty, standing alone as a factor, is insufficient to justify a requirement for security for costs.
10. In the view of the writer therefore, there is no obvious area for major improvement in the current text of UCPR Part 42.
11. In the case of corporate plaintiffs, the writer suggests there may be room for improvement as the law currently operates under s1335.
12. The text of the section operates by reference to the provision of *"credible testimony"* by the applicant for security and thus casts an evidentiary onus on the defendant/applicant. That language, apparently dating back to the seminal United Kingdom Companies Act of 1862, puts a burden of proof on the applicant which was perhaps reasonable and justifiable, at a time when companies law made it the ordinary feature of the operation of a corporation that there be disclosure and verification of the corporation's financial position.
13. The regulation of financial record-keeping and disclosure, now laid down in the Corporations Act, no longer makes it a normal feature of a company's operation (apart from the case of public listed companies) that there be any revelation to outsiders, of the company's financial position. It is nowadays a frequent feature of litigation, that a defendant will be faced with a corporate plaintiff, about which he or she has no knowledge or means of knowledge as to the corporate plaintiff's financial position and thus its *"ability to pay costs"*, for the purposes of s1335.
14. In effect, a defendant is frequently faced with the problem of first ascertaining and then proving, what is essentially a negative fact: i.e. that the plaintiff corporation does not possess any financially valuable assets. The only tools which are available for it so to do, consist of the issuing of subpoenas and notices to produce.
15. In the view of the writer, the availability to the defendant of the right to issues subpoenas and notices to produce does not sufficiently protect the legitimate interests of a defendant which is sued by a corporate plaintiff, the financial position of which is not otherwise known to the defendant. In particular, this is so, in view of the limited value, as a matter of positive proof, of an incomplete or unsatisfactory answer to a subpoena or a notice to produce.
16. The writer suggests that a procedure could be considered, under which a defendant had the right to request, of a corporate plaintiff, that the plaintiff produce a specified form of current and verified disclosure of its overall financial status. Under that suggested procedure, while it would not be obligatory for the corporate plaintiff to comply with that request, its failure so to do would give rise to a (rebuttable) presumption that it is *"unable to pay costs"*, for the purposes of s1335.

17. The other possible area for law reform in the current operation of s1335, which appears to the writer to merit consideration, concerns that class of case in which an insolvent corporation, which has passed into the control of a liquidator or other insolvency administrator, wishes to pursue legal proceedings against the company's former controllers and proprietors, for the benefit of the company's creditors.
18. In the current state of the law, it is theoretically possible for an application for security for costs, such as one brought by former directors who are defendants, to be resisted on the grounds that it was the directors who brought about the corporation's impecuniosity. In practice, however, that ground for resistance will normally be unsuccessful – it will generally encounter the insuperable obstacle that to make out such a case, the impecunious corporate plaintiff's success in the overall proceedings would have to be either assumed or proved – neither of which is usually an available course for the court to take.
19. In the view of the writer, former directors and the like, who are sued by the insolvent companies over whose affairs they have presided, should not have the benefit of what used be called the *"predisposition"* to order security for costs, to which s1335 gives rise.
20. It is submitted that s1335 would preferably be made inapplicable to claims brought by insolvency administrators against former directors, controlling shareholders and their associates. This could be made so, while recognizing the availability of the security for costs procedure, in favour of such persons, in cases for which it is otherwise appropriate, under the general discretionary jurisdiction of the court, such as that under UCPR Part 42.

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