Security for costs against impecunious corporate plaintiffs

By Hugh Stowe

Applications for security for costs may not excite the passions of the advocate (or the judge before whom they appear), but they can be of substantial practical and strategic significance in the conduct of litigation. This article addresses the principles and practicalities of applications for security for costs against impecunious corporate plaintiffs.

Jurisdiction

Jurisdiction arises under section 1335(1) of the Corporations Act, the rules of court,[1] and the court's inherent jurisdiction.

Although there may be 'subtle differences' between the formula and operation of the court rules and section 1335 in relation to the application for security against impecunious corporate plaintiffs,[2] for practical purposes the test is the same: *first*, the defendant must satisfy the jurisdictional threshold that there is 'reason to believe' that the plaintiff corporation will be unable to meet an adverse costs order; *second*, the court must be satisfied that its discretion should be exercised in favour of ordering security.[3]

There is no equivalent right for a defendant to obtain security for costs against impecunious natural persons: 'a natural person who sues will not be ordered to give security for costs, however poor he is'.[4]

The justification for the ordering of security against impecunious corporate plaintiffs has been described as follows: 'An individual who conducts his business affairs by medium of a corporation without assets would otherwise be in a position to expose his opponent to a massive bill of costs without hazarding his own assets. The purpose of an order for security is to require him, if not to come out from behind the skirts of the company, at least to bring his own assets into play'.[5]

Jurisdictional threshold: 'reason to believe' plaintiff 'unable to pay costs'

The applicant for security bears the burden of proving there is a 'reason to believe' the plaintiff is unable to meet an adverse costs order. Mere speculation as to the insolvency or financial difficulties likely to confront the plaintiff company is not sufficient.[6] However, it is not necessary to establish that incapacity to meet a costs order 'as a matter of probability'. It is sufficient 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'.[7] 'The testimony suggesting an inability to pay must have some characteristic of cogency or, to put it another way, must be sufficiently persuasive to permit a rational belief to be formed'.[8] The testimony need not positively exclude the possibility that the company may be able to meet a costs order.[9]

'The court is required to form an opinion about what the financial position of the plaintiff will be at the time of judgment and immediately thereafter. The financial position of the plaintiff at the time when the application is made will be an important guide, but is not the sole consideration'.[10] Other factors include the impact of the outcome of the trial, the costs associated with the trial, and the success or otherwise of the applicant's business and investments in the meantime.[11]

'A corporation 'will be unable to pay' the costs within the meaning of the section if it can only do so if given extended time to realise assets which might be difficult to realise...The company will also be unable to pay the costs within the meaning of the section if the payment would be one that will amount to a preference of the defendant over other creditors such that the payment would be liable to be set aside either as a preference or as a fraudulent disposition….in the event of the plaintiff corporation later going into liquidation…'[12]

The formal accounts of a company may constitute credible testimony for the purpose of this rule.[13] Unaudited financial reports of the company may be admissible on this issue, so long as they are signed by the directors. However unaudited reports will be of limited probative value, and reports unsigned by the directors may be properly excluded entirely as evidence.[14] The failure by a party resisting security to adduce relevant and available evidence in relation to its financial capacity to meet an adverse costs order will strongly support a finding that the threshold test is satisfied.[15]

A suggested strategy for the preparation of applications

for security: first, investigate whether publicly available information gives rise to a suspicion of plaintiff's inability to meet adverse costs order (e.g., accounts, evidence of default to creditors, cessation of trade, general business difficulties, absence of property holdings); second, if there is sufficient evidence to raise a suspicion of insolvency, write to the plaintiff with concerns, and invite the provision of information which would address those concerns; third, if no adequate reply, then commence application for security; fourth, if necessary, seek production of documentation corroborating financial difficulties after motion for security has been filed (e.g., financial statements, management accounts, bank statements).

Discretion to grant security

Establishing a 'reason to believe' that the corporate plaintiff will be 'unable to pay' an adverse costs order does not dictate that security will be ordered. It is merely a jurisdictional threshold, which triggers the exercise of the discretion to grant security. However, once the defendant crosses that threshold, the evidentiary burden then shifts to plaintiff to satisfy the court that security should be refused for some reason.[16]

'The law is now settled that the discretion to order security for costs is unfettered and should be exercised having regard to all the circumstances of the case without any predisposition in favour of the award of security'.[17] 'The only limitation is that the discretion must be exercised judicially,[18] which itself militates against self-imposed rigid rules or restrictions.'[19]

'As in any case involving the exercise of an unfettered judicial discretion, the court's determination rests upon the balancing of the interests of the litigants in question; the court determines whether 'the balance of the relevant considerations' favours an order for security.[20] Hence, one way to approach the issue is to balance the hardship the defendant is likely to suffer if successful and there is no security for its costs against the hardship the plaintiff may suffer if ordered to give security.[21'22]

Criteria guiding exercise of discretion: *KP Cable Investments*

Notwithstanding the unfettered nature of the discretion, 'there are a number of well established guidelines which the court typically takes into account'.[23] The most commonly cited set of guidelines comes from the decision of Beazley J in *KP Cable Investments Pty Ltd v Meltglow Pty Ltd* (1995) 56 FCR 189, at 196-198.[24] The factors enumerated in that case are addressed below.

1. That such applications should be brought promptly

In determining what is 'prompt', 'defendant is entitled to some little time to try to estimate the ambit of the case they have to meet' before being required to apply for security.[25]

In considering whether delay should militate against the grant of security, a critical issue is 'whether the plaintiff has, by his inaction and standing by, placed the defendant or a third party in a situation in which it would be inequitable and unreasonable to place him if the remedy were afterwards to be asserted'.[26] Many recent authorities affirm that if a plaintiff has suffered no material prejudice because of the delay, 'the significance of delay reduces or may substantially disappear'.[27] The relevant prejudice generally relates to the fact that 'during the period of delay, the plaintiff would have spent money on the litigation which would be wasted if the proceedings are brought to an end because security cannot be provided'.[28] The occurrence of such prejudice logically presupposes that the ordering of security would thereafter stultify the further conduct of the proceedings. In order to demonstrate such prejudice, it is generally necessary to prove that 'not only will the plaintiff be unable to provide the required security from its own resources, so that costs incurred during the period of delay would have been wasted, but also that those standing behind the plaintiff who could be expected to benefit from the litigation are unable to provide the required security'.[29] However, some authorities suggest that delay may be relevant even in the absence of proven prejudice.[30]

The fact of delay and prejudice is only one factor in the discretionary balance and is not necessarily fatal to an application for security.[31] The 'longer the delay, the proximity of the hearing and the more acts done during the interval, the greater the significance of the delay'.[32]

Other factors relevant to the materiality of delay are whether the intention to seek security had been earlier foreshadowed,[33] and whether a reasonable explanation has been proffered for the delay.[34] While an application for security for costs after a trial has commenced may succeed, it has been suggested that such instances will be 'rare'.[35]

2. That regard is to be had to the strength and bona fides of the applicant's case are relevant considerations

'There is no doubt that the bona fides of the claim and its merits, at least to the extent that it must be reasonably arguable, are material factors'.[36] However, it is recognised that it is a 'rare' case in which a court is even able to form any view as to the strength of the respective parties' cases on an application for security, in view of the early stage at which applications are made and the interlocutory nature of the application.[37] Many authorities caution against the appropriateness and practicality of the conduct of a mini-trial in relation to the application for security for costs.[38] Consequently, beyond determining that there should be a 'bona fide and arguable claim', 'it seems doubtful whether...it is usually appropriate for the Court to canvas the merits of the litigation in any detail'.[39] 'As a general rule, where a claim is prima facie regular on its face and discloses a cause of action, in the absence of evidence to the contrary, the court should proceed on the basis that the claim is bona fide with a reasonable prospect of success'.[40] Therefore, once the court is satisfied that the claim is bona fide with a reasonable prospect of success, the merits of the underlying claim will generally be regarded as a neutral factor.[41] This is particularly so when it is simply impossible for the court to form any realistic view of the prospects of success.[42] However, in the rare case where prospects can be meaningfully assessed on the application for security, they may still be relevant in the discretionary balance: an assessment that the prospects of success are poor will weigh in favour of a grant of security,[43] and a determination that the prospects of success are high will weigh against security if proceedings would otherwise be stultified.[44]

3. Whether the applicant's impecuniosity was caused by the respondent's conduct the subject of the claim

If it were established that the defendant's conduct were the cause of the plaintiff's impecuniosity, that would be a matter 'most relevant' to the exercise of discretion.[45] However, this is difficult to establish.

The plaintiff carries the onus of establishing that the defendant was the cause of impecuniosity. To discharge that onus, the plaintiff must establish 'both the adequacy of their financial position before their dealings with the opponents and that the opponents' actions have caused or at least materially contributed to the claimants' inability to meet an order for security for cost'. This will require demonstration that the company would have been in a position to meet any costs order but for the defendant's conduct.[46] 'The plaintiff must be able to support the allegation with relatively straightforward and unambiguous evidence of a fairly compelling nature, because otherwise the hearing of the issue of security might become a trial within a trial'[47]: i.e., courts reluctant to entertain complex and contentious evidence. It is not sufficient: (a) to 'rely merely on the pleadings, unless there are relevant admissions in the pleadings obviating the need to call evidence. If there are no such admissions, the plaintiff is required to call evidence to discharge its onus':[48] (b) that the defendant's conduct merely 'contributed' to the impecuniosity. There must be a 'real causal connection' or a 'material contribution';[49] (c) that it is possibly 'arguable' that the defendant's conduct contributed to the impecuniosity;[50] (d) that the defendant's conduct merely diminished an opportunity to cure the plaintiff's original impecuniosity.[51] The courts are particularly cautious in finding a 'causal connection', when the claim is based upon a loss of profit, rather than the 'infliction of damage' (which cause out-of-pocket losses).[52] Where the evidence shows the plaintiff always to have been in a poor financial position, it may be difficult to draw the causative link necessary for a conclusion that its lack of funds has been caused or substantially caused by the defendant.[53] Proof that the defendant was the cause of the impecuniosity will be material only when the order of security would stultify proceedings.[54]

4. Whether the respondent's application for security is oppressive

The concept of oppression is used in two senses. First, it relates to circumstances in which the application for security is brought for 'improper purposes'. In the 'rare' cases where that could be established, it would preclude security being ordered.[55] Second, the expression most often used to describe circumstances where the ordering of security would stultify or stifle the conduct of the hearing.

The fact that the grant of security would stifle or stultify proceedings is a 'powerful factor' to be taken into account,[56] but does not mandate that security be refused[57]. 'A plaintiff who wishes to submit that an order for security would stifle the litigation bears the onus of showing that this is so'.[58] It is a heavy onus.

Mere impecuniosity of the corporation does not of itself establish that proceedings would be stultified. The courts take a pragmatic approach, and recognise that funding from third party sources may in a practical sense be available.[59] Consequently, 'a court is not justified in declining to order security on the ground that to do so will frustrate the litigation unless [the corporate plaintiff] establishes that those who stand behind it and who will benefit from the litigation if it is successful (whether they be shareholders or creditors or, as in this case, beneficiaries under a trust) are also without means'.[60] Therefore, 'a proceeding cannot be regarded as stultified unless those who stand behind the impecunious plaintiff are unable (not unwilling) to provide the requisite security for costs'.[61] An assessment of the claim of stultification will therefore 'require an examination of the various sources that the plaintiff might have available to it for the provision of security. That, in turn, requires an analysis of who it is that might benefit from the litigation if it is pursued to a successful conclusion'.[62] If the company does not adduce such evidence, the claim of stultification will fail.[63] Those who relevantly stand behind the company for the purpose of this rule include (at least) shareholders, those beneficially entitled under a trust of which the plaintiff is trustee[64] and significant creditors of a company.[65] A company in liquidation should also demonstrate the absence of available litigation funding.[66]

The inability to provide security must be positively substantiated. A mere assertion in an affidavit that a person is 'unable to provide security for costs' is not probative, and will be struck out.[67] Generally, the plaintiff should adduce documentary evidence which substantiates the party's financial position.[68] 'A court may infer financial ability to meet an order for security where the plaintiff adduces no or insufficient evidence of their financial position or willingness to contribute,[69] or where such persons do not put forward hardship on financial grounds.[70,71]

The failure to prove stultification does not necessarily mandate that security should be ordered.[72] Further, if it can be shown that those persons who may benefit from the litigation 'are reasonably unwilling, even though possibly able, to provide the security, that may be a factor that would be taken into account' in assessing whether security should be ordered.[73]

5. Whether there are any persons standing behind the company who are likely to benefit from the litigation and who are willing to provide the necessary security

'An important factor informing the exercise of the discretion is the existence of persons who stand behind an impecunious plaintiff who seek to take the benefit of our system of justice (i.e. share of the proceeds of victory) without the corresponding burden (i.e., a potential adverse costs order)'.[74] 'Ultimately...the question to be determined by the court is whether it is fair that the person being sued by the company should be in the position of having to incur substantial costs… and being at risk of liability for the company's costs, and yet have no real chance of recovering costs even if the action is unsuccessful, when there are persons who would benefit from the proceedings, who face no risk of liability for costs themselves and are either unwilling or unable to provide security'.[75]

6. An issue related to the last guideline is whether persons standing behind the company have offered any personal undertaking to be liable for the costs

The provision of personal undertakings by those who stand behind the company (irrespective of whether

the persons have sufficient means to meet an adverse costs order) is a material factor in the discretionary balance which may 'weigh heavily' in the discretionary balance.[76] There is an unresolved question as to whether the provision of such personal undertakings precludes security for costs being ordered. The matter has been left open in the Court of Appeal.[77] The conflicting caselaw on this point is summarised in *Prynew Pty Ltd and Anor v Nemeth and Ors* [2010] NSWCA 94, at [32]-[37].

7. Security will only ordinarily be ordered against a party who is in substance a plaintiff, and an order ought not to be made against parties who are defending themselves and thus forced to litigate.[78]

There have been a number of principles developed to determine when a plaintiff is properly characterised as being 'in substance the defendant' (and therefore not liable to provide security for costs): (a) when the plaintiff commences proceedings to halt or resist 'self help' measures resorted to be the other party;[79] (b) when the plaintiff had no practical alternative but to commence proceedings to defend its property (or otherwise preserve certain other valuable rights);[80] (c) when the other party should have been the one to commence proceedings if it had acted 'in the appropriate way';[81] (d) when the defendant took the first material step in the legal disputation (albeit by a process other than the actual commencement of litigation: e.g., service of a statutory demand);[82] (e) there is some authority for the proposition that, when claims and cross-claims are on, a party's claim may be characterised as being in substance defensive 'if the circumstances are such that either party could just have easily been the plaintiff'.[83] There is some uncertainty as to whether the characterisation of the plaintiff as in substance the 'defender' (rather than 'attacker') precludes security being ordered as a matter of principle,[84] or is simply a powerful factor sitting in the balance[85].

Other discretionary factors

There are a number of other factors recognised as weighing in the discretionary balance.

Impecuniosity of the corporate plaintiff

Although there is no predisposition in favour of the granting of security, the inability of the plaintiff to meet the costs of the successful defendant not only triggers the jurisdiction for security for costs, but also constitutes an important (and sometimes decisive) role in the discretionary balance.[86] Nonetheless, there is certainly no automatic rule to the effect that an impecunious or insolvent company will be ordered to provide security except in special circumstances.[87]

Magnitude of risk of inability to satisfy costs order. It is relevant to assess the magnitude of the risk that the plaintiff would not be able to satisfy an adverse costs order.[88] This contemplates both an assessment of the plaintiff's prospects of success, and the likelihood that the plaintiff will not be able to meet an adverse costs order.

Co-plaintiffs

There is a general rule that security will generally not be ordered against an impecunious corporate plaintiff, if (a) there is a co-plaintiff against whom no security for costs will not be ordered; and (b) there is a complete overlap (or 'interlocking') between the claims brought by the co-plaintiffs, such that both plaintiffs will be liable for the whole of the defendants costs (if the plaintiffs fail in the proceedings). The rationale for this rule is that the defendant in that situation has no entitlement to security against the co-plaintiff, and is 'really in no worse position' by reason of being sued by the impecunious corporate plaintiff. Consequently, the defendant should not be entitled to the privilege of security for its costs, merely because of the fact that an impecunious corporate plaintiff happens also to be joined as a plaintiff.[89]

However, security may be ordered against a corporate co-plaintiff where there is no complete overlap or 'interlocking' between the claims of the co-plaintiffs (so that the co-plaintiffs will be jointly liable for the whole of any adverse costs order). Therefore, 'where the various plaintiffs' claims have different elements and aspects, so that they will not all necessarily succeed or fail together, although the existence of individual plaintiffs is a factor that diminishes the defendant's

claim to be entitled to security against the corporate plaintiff, it does not extinguish. And where the degree of overlap between the claim of the individual and corporate plaintiffs is comparatively small, such that separate orders for costs might be made in respect of each of the plaintiffs, it is usually appropriate that an order for security be made'.[90]

There are a number of further qualifications to the rule about co-plaintiffs, by operation of which security may be ordered against an impecunious corporate plaintiff, notwithstanding the presence of co-plaintiff against whom security could not be ordered: *first*, if the natural person has been joined as a co-plaintiff for the purpose of avoiding the necessity of providing security;[91] *secondly*, if the natural co-plaintiff is otherwise involved in some form of abuse of process;[92] and *thirdly*, many authorities recognise that the existence of co-plaintiffs (against whom security could not be ordered) is not dispositive of an application for security for costs, but it is simply one of the factors to weigh in the discretionary balance.[93] In other words, it should be seen as 'a factor diminishing the defendants' claims to security, but not extinguishing it'.[94]

...the extent of the interest of the funder in the litigation will be relevant to determine the proportion of costs for which security should be required. However, if the plaintiff and the funder do not disclose the extent of the interest, then the court may make no discount in relation to the proportion of costs for which security is required.

Company in liquidation

When a company is in liquidation and the cause of action is brought by the liquidator in his personal capacity (rather than by the company), security will generally not be ordered against the liquidator[95] (e.g., unfair preference claims, insolvent trading claims). However, in such cases the liquidator will be personally liable for an adverse costs order. There is no restriction on the ordering of security in relation to proceedings brought by a company in liquidation.

Litigation funding

The existence of a litigation funder is a matter which strongly favours an order for security for costs. 'Although litigation funding is not against public policy…the court system is primarily there to enable rights to be vindicated rather than commercial profits to be made; and in my opinion, courts should be particularly concerned that persons whose involvement in litigation is purely for commercial profit should not avoid responsibility for costs if the litigation fails.'[96] This principle applies if the party funded is a liquidator.[97]

There are a number of qualifications to this principle. First, security will not be ordered if:[98]the funder is contractually bound to indemnify the party in relation to an adverse costs order; the party undertakes to the court to enforce that indemnity; and the party undertakes to the court to inform the opposing party if the funding agreement is terminated (so that an application for security can be made). Secondly, the extent of the interest of the funder in the litigation will be relevant to determine the proportion of costs for which security should be required. However, if the plaintiff and the funder do not disclose the extent of the interest, then the court may make no discount in relation to the proportion of costs for which security is required.[99]

Nature of the defendant

'The nature of the defendant may be relevant to the exercise of the discretion to make an order. The courts are reluctant to make an order which would have the effect of shutting out a small company from making a genuine claim against a large well-resourced and amply funded body such as the State, a council or a major corporation'.[100]

Public interest

It is relevant to consider whether there is particular public interest in the litigation.[101] 'Typical case scenarios where the public interest may operate against an order for security are those likely to involve curial determinations on areas of law that require interpretation or

clarification – thus potentially benefiting more than just the plaintiff on the record – and where the claim is otherwise brought by the plaintiff to pursue, uphold or maintain some interest common to other members of the community.'[102] The question of public interest 'may have greater weight with a claim which can be seen to have some merit on its face, rather than being merely arguable'.[103] The question of public interest is 'likely to arise only in circumstances where a prima facie case of stultification has been made out'.[104] In other words, the argument loses force, if security would not stultify proceedings. The 'nature of the public interest, the circumstances in which it arises in particular litigation and the basis on which an application for security is made would all be relevant in determining the role of a claim that litigation promotes the public interest'.[105] Some authorities caution against public interest unduly overriding the interests of the parties.[106]

Cross-claims

Security for costs in respect of cross-claims

The court has jurisdiction to grant security of costs in respect of a cross-claim: a 'plaintiff' is construed as including cross-claimants.[107] A court will not order security against a cross-claimant where the cross-claim arises out of the same matters as the plaintiff's claim, and is properly characterised as being purely 'defensive',[108] in the sense that it is 'either directly resisting proceedings already brought or seeking to halt self help measures'.[109] By way of apparent extension of this qualification, it has recently been held that no security for costs will be ordered in relation to a cross-claim, if it is 'reflexive' of the claim brought by the plaintiff, meaning that positive relief (in the nature of damages or the like) is sought in relation to subject matters and issues arising from the plaintiff's claim.[110] Generally, if a cross-claim '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'. A cross-claimant may be ordered to give security if (and to the extent) it is in substance the 'attacker' with respect to the cross-claim.[111] However, the mere fact that the cross-claim may introduce some new issues does not of itself justify the ordering of security against the cross-claimant, if the cross-claim arises from substantially the same facts as the plaintiff's claim, and is essentially defensive.[112] Even if the cross-claim is partly offensive, the court may decline to order security, if there is no evidentiary basis upon which the court can determine the costs attributable to the offensive dimension of the cross-claim.[113]

Relevance of cross-claim to a defendant's entitlement to seek security

The mere fact that the defendant presses a cross-claim does not deprive the court of the power to order security in favour of the defendant in respect of the plaintiff's claim. It is merely a matter which may feed into the court's discretion as to whether security should be granted, and (if so) the quantum that is appropriate.[114] If the defendant's cross-claim arises from substantially the same facts as the plaintiff's claim and is properly characterised as 'defensive', the mere fact of the cross-claim should not materially weigh against security being ordered against the plaintiff.[115] A consideration which provides powerful support for the ordering of security for costs against a plaintiff (despite the defendant bringing a cross-claim) is the defendant's undertaking not to press its cross-claim if the plaintiff's claim is stayed or dropped.[116] On the other hand, if a cross-claim is properly characterised as offensive in character, and the offensive dimensions of the cross-claim overlap the issues traversed by the defence, security for costs will generally not be ordered against the plaintiff.[117] However, the facts that a cross-claim is in part offensive and arises from substantially the same facts as the plaintiff's claim, do not preclude security being ordered in the proper exercise of the court's discretion. These are merely factors which weigh in the court's discretionary balance.[118]

In circumstances where security is ordered against a plaintiff, notwithstanding that the defendant is pressing a cross-claim, the court may make appropriate deductions in the amount of security awarded to reflect the portion of costs which are referable (exclusively or in part) to the cross-claim.[119]

Security for costs on appeal in NSW

UCPR r50.8 provides that security may only be ordered under the direct authority of the rules 'in special circumstances'. However, the application of section 1335(1) to the granting of security for costs on appeal is not constrained by the requirement to establish 'special circumstances' under UCPR r 50.8. In other words, security for the costs for an appeal can still be obtained against an impecunious corporate appellant (without the need to establish 'special circumstances' under UCPR r 50.8).[120] Security against an individual can also be obtained under UCPR 50.8.

The concept of 'special circumstances' in relation to orders for the provision of security for costs has been summarised as follows:[121] (1) no order for security should be made in the absence of 'special circumstances'; (2) consideration of what may constitute special circumstances should not be fettered by some general rule of practice; (3) impecuniosity, without more, will usually be insufficient;[122] (4) an order may be appropriate if the appeal is shown to be hopeless, unreasonable or of an harassing nature; (5) where a bona fide and reasonably arguable appeal would be stifled by an order for security, such an order should usually not be made, and (6) the subject matter of the appeal, including an issue as to the liberty of the individual, or a public interest may provide a reason for not imposing a security order which would stifle the continuation of the appeal.

Quantum of security

The court typically does not 'set out to give a complete and certain indemnity to a respondent'.[123] It has been held that 'The effect of this principle is that the Court has a discretion to fix such amount as it thinks fit in all the circumstances of the case. The amount will not exceed the estimate of party and party costs, but it may be less'.[124] Contrary to what may once have been the case, there is no fixed practice requiring the amount of security for costs to be at approximately two-thirds of the estimated inter parties costs on a party and party basis.[125] The Court of Appeal has recently held that:[126] 'it is common practice in accordance with authority to make an appropriate reduction for uncertainties such as a trial concluding earlier than anticipated or for changes in the approach of one or other of the parties to the litigation (such as settlement)'; and 'it is usual to fix an amount by way of security which is below the applicant's estimation, so as not to impose an undue burden on the corporate appellant or plaintiff and so that the applicant will bear the risk of over-estimation'. However, security is frequently ordered by reference to the court's best estimate of the defendant's likely recoverable costs.

Contrary to what may once have been the case, there is no fixed practice requiring the amount of security for costs to be at approximately two-thirds of the estimated inter parties costs on a party and party basis... security is frequently ordered by reference to the court's best estimate of the defendant's likely recoverable costs.

There are inevitably significant difficulties in estimating the appropriate quantum of security, because applications for security are generally made early in the proceedings when precise estimate of future costs is impossible. The only feasible approach is 'educated guesswork'. The exercise of estimation is a 'speculative one'. 'It is impossible to calculate the amount for security with any exactitude'. 'The Court usually takes a 'broad brush' approach to the determination of the amount'.[127] 'The process of estimation embodies to a considerable extent, reliance upon the 'feel' of the case after considering relevant factors'.[128] The Court is not bound to accept a party's estimate, notwithstanding it is the only evidence.[129] In estimating costs, the courts will typically not 'descend into the minutiae of the claims'. It has been observed that a judge on a security for costs application does 'not sit as a taxing officer to determine the amounts'.[130] However, the courts will nonetheless frequently closely critique aspects of the estimate, and discount the quantum where the courts conclude the estimates were unreasonably high.[131] Any adjustments made by the court in relation to the parties' estimates will generally be done in a 'broadbrush way'.[132] In circumstances where there are opposing estimates of

future costs from the parties, and no reasonable basis for preferring one over another, the court sometimes simply splits the difference.[133] However, in one case, when the court was faced with competing estimates, and no cross-examination, and no basis upon which to prefer one estimate over the other, the judge concluded that he was left with two courses: 'One is to leave it to the parties to seek to agree on the amounts that should be given by way of security. The other, if the parties cannot agree, is to send that matter to a costs consultant for inquiry and report'.[134] If the claim is quantified at the time of the application, a court may attempt to quantify security on the basis of estimating a 'reasonable expenditure for costs by reference to the amount at stake, as there should be a proportion between the monies spent preparing a case, and what is in issue'.[135]

It is important that the solicitor who prepares the affidavit possesses (and evidences) general experience and expertise in the conduct of litigation and costs assessment, but also an 'intimate familiarity' with the proceedings in question.

In assessing quantum, it has been held that 'there is to be a balance between ensuring that an impecunious corporation or other applicant does not use the impecuniosity in order to put unfair pressure on another party on the one hand and, on the other hand, between shutting out an impecunious applicant on its entitlement to pursue a legitimate case'.[136] It may be relevant to take into account the 'quantum of the risk' that the corporate plaintiff will be unable to satisfy a costs order when determining the amount of security.[137]

Past costs

There is uncertainty about the scope for security being granted in relation to costs already incurred. 'The court's discretion is not restricted to making an order for security in respect of only future costs that may be incurred. It can extend to an order in respect of costs already incurred…A court is nonetheless reticent to order security for costs incurred to date, for in the ordinary case the defendant has chosen to incur those costs without seeking the protection of an order for security. The case may be otherwise where, aside from the defendant's lack of diligence, the plaintiff's impecuniosity has only just come to the defendant's knowledge'.[138] In some cases the court has ordered security in a sum that includes an allowance for past costs.[139] Some authorities support the general rule that security not be granted for past costs,[140] others repudiate it,[141] and others are ambivalent with respect to the application of that general rule.[142] On an appeal, the court will not order security for costs which include the costs already incurred in the trial.[143]

Period covered by security

In many cases, security is ordered for the period up to the end of the hearing.[144] Some cases hold that where accurate estimation of duration and expense of the hearing are too difficult at the time of application, the court may order security only for preliminary phases of the litigation, on the basis that further applications be made when the parties and the court are in a better position to estimate the length of the hearing.[145]

Tranches

It is very common for security to be ordered to be paid in 'tranches', staged at times and for amounts to reflect when the defendant will incur costs.[146]

Evidence in support of quantum

The applicant for security bears the burden of putting before the court material that will enable the court to make an estimate of the costs of the litigation.[147] There should be evidence as to what would be recoverable on assessment. This is frequently done by solicitors stating the percentage discount which is typically made on solicitor-client costs in the course of an assessment.

It is important that the solicitor who prepares the affidavit possesses (and evidences) general experience and expertise in the conduct of litigation and costs assessment, but also an 'intimate familiarity' with the proceedings in question.[148] However, even if that

expertise and experience is not evidenced, the court may still seek to quantify the appropriate sum for security, but will probably significantly discount the estimate.[149] The solicitor should set out in his or her affidavit: general experience in litigation; experience with cost assessment process; a detailed list of the tasks required to be undertaken in relation to the conduct of the matter;[150] a specification and substantiation of the time estimated to be involved in the tasks; and the basis for charging. If quantum is disputed, the court is assisted by an estimate from the party disputing costs.[151] In larger cases, evidence may be adduced from an independent expert costs consultant in relation to estimates of recoverable costs. However, most applications are run without such evidence.[152] A contested and controversial aspect of an estimate may not be accepted without expert opinion from a costs assessor.[153] The quantum of security should include a component for GST.[154]

Although deponents of affidavits in support of competing estimates are sometimes cross-examined, it is not always so. It has been held that no inference should be drawn from the election not to cross-examine, because it is not 'generally appropriate to embark in cross-examination in these matters'.[155]

Method of security

The basic principle guiding the court in determining the form of security is that '[s]o long as the opposite party can be adequately protected, it is right and proper that the security should be given in a way which is the least disadvantageous to the party giving that security'.[156]

Hence, security for costs can take one of many forms in addition to payment into court, including payment in to court[157], enforceable personal undertaking,[158] bank guarantee,[159] bond or charge,[160] payment into a controlled money account,[161] lodgement of title to real or intangible property with solicitors,[162] 'any method agreed in writing between the parties, or in the absence of such agreement, [method]',[163] security 'in such form as the Registrar determines'.[164] 'Provided it is adequate to achieve its object, its form is immaterial'.[165]

Costs in a security for costs motion

Costs on the security for costs motion are generally awarded to the party who succeeds on the motion.[166] However, if the defendant is successful (and an order for security is made) the costs of the application are often reserved or declared to be costs in the cause.[167] If an order for security is not opposed, and the only contested issue is quantum, if the amount granted is substantially less than the amount claimed, an appropriate costs order might be 'costs in the proceedings'.[168] However, the matter remains in the discretion of the court. The circumstances in a particular case may justify the trial judge making no order as to the costs of the application for security.[169]

Effect of failure to provide security

If security is ordered, it is usual for there to be an order that proceedings be stayed until the order is complied with.[170] The court rules provide that proceedings may be dismissed if there is non-compliance with an order for security.[171] However, the mere failure to comply with an order for the provision of security does not automatically cause or justify a dismissal. In considering an application for dismissal, the ultimate decision reflects the 'interests of justice' on the facts. The following (non-exhaustive) criteria are relevant to the exercise of discretion:[172] (1) the period that has elapsed since security was ordered; (2) the fact that the plaintiff has been on notice of the application for dismissal; (3) the seeming inability of the plaintiff to further fund the proceedings; (4) the prejudice to the defendants; (5) the position of the court. The court is likely to dismiss proceedings if the plaintiff is in default in the provision of security, if there is no explanation provided, and no evidence of the means or intention to remedy the default.[173]

Applications for further security

Security may be ordered at an amount below the defendant's estimate of costs, on the explicit basis that the defendant is entitled to make further applications if the amount ordered proves inadequate.[174] However, general restrictions on the right to apply for variations of interlocutory relief apply specifically to application to vary security: i.e., an 'application to vary an order

for security for costs must be founded on a material change of circumstances since the original application was heard, or the discovery of new material which could not reasonably have been put before the court on the hearing of the original application holding that'.[175] If a party makes an application for further security which exceeds the original order, it will likely fail if there is no explanation for the mistaken original estimate.[176] Courts are reluctant to entertain applications for variations of orders for security made on the eve of hearing.[177] The fact that the original order for security was by consent may weigh against (but does not preclude) applications by either party to vary the order for security.[178]

Endnotes

1. UCPR, Rule 42.1, Federal Court Act, sect 56(1), Federal Court Rules, Order 28(3).
2. *Soul Pattinson Telecommunications Pty Ltd v Subex Americas Inc* [2009] FCA 651, [6].
3. *15 Management Pty Ltd v Newstar Sports Management Pty Ltd* [2009] NSWSC 1208, [29]; see also *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 744, [20]; *Polstead Pty Ltd (In Liq) v Sandip Shah* [2009] NSWSC 560, [4].
4. *Pearson v Naydler* [1977] 1 WLR 899 at 902; *Green (as Liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd* (2008) 67 ACSR 105, at [29].
5. *Harpur v Ariadne Australia Ltd* [1984] 2 Qd R 523, 532; see also *Jazabas Pty Ltd and Ors v Haddad and Ors* [2007] NSWCA 291, [12].
6. *Warren Mitchell Pty Ltd v Australian Maritime Officers Union* (1993) 12 ACSR 1, 5.
7. *Beach Petroleum N.L. v Johnson* (1992) 7 ACSR 203, 204; see also Idoport, fn 3, [60]; 15 Management, fn 3, [31]; Warren, fn 6, 5; *Reinsurance Australia Corporation Limited v HIH Casualty and General Insurance (in liquidation)* [2003] FCA 803, [15], [21].
8. e.g., *Soul Pattinson*, fn 2, [8]; *Reinsurance Australia Corporation*, fn 7, [17], [19], [20].
9. *Soul Pattinson*, fn 2, [8]; *Reinsurance Australia Corporation*, fn 7, [15]
10. *Beach Petroleum*, fn 7.
11. *Idoport*, [58]; noted with approval in *Strategic Financial* and *Project Services Pty Ltd v Bank of China Ltd* [2009] FCA 604, [16]; *Reinsurance Australia Corporation*, fn 7, [17].
12. *Beach Petroleum*, fn 7, at 205.
13. *Reinsurance Australia Corporation*, fn 7, [52].
14. *Strategic Financial*, fn 11, [34]-[35].
15. *15 Management*, fn 3, [36]-[38]; *Jazabas*, fn 5, [47]; see also *Strategic Financial*, fn 11, [13]; *FFE Minerals Australia Pty Ltd v Mining Australia Pty Ltd* (2000) 156 FLR 116 at 123(cf at 126-8); *Combined Property Industries (Qld) Pty Ltd v Pullenvale Estates Pty Ltd* (2001) 19 ACLC 765, 768.
16. *Idoport*, fn 3, [60]-[61]; *Fiduciary Ltd v Morningstar Research Pty Ltd* (2004) 208 ALR 564, [35]–[36]; *Baycorp Capital Ltd v Dex Consulting Pty Ltd* [2010] NSWSC 156; *Strategic Financial*, fn 11, [17]; *Reinsurance Australia Corporation*, fn 7, [25]; *Prynew Pty Ltd and Anor v Nemeth and Ors* [2010] NSWCA 94, [16].
17. *KP Cable Pty Ltd v Meltglow Pty Ltd* (1995) 56 FCR 189, 13 ACLC 437; *Idoport*, [48]; *Merrag Pty Ltd v Khoury* [2008] NSWSC 1286, [7]
18. *Bell Wholesale Co Ltd v Gates Export Corporation* (1984) 2 FCR 1, 3.
19. *Dal Pont*, fn 139, 947.
20. *Buckley v Bennell Design and Constructions Pty Ltd* (1974) 1 ACLR 301, 304; *Rhema Ventures Pty Ltd v Stenders* [1993] 2 Qd R 326, 333.
21. *Dictating Machine Centre v Combe* (1981) 26 SASR 316, 320.
22. *Dal Pont*, fn 139, 953; see also *Tradestock Pty Ltd v TNT (Management) Pty Ltd (No 1)* (1977) 30 FLR 343, 348.
23. I*nternational Greetings (UK) Ltd v Stansfield* [2010] NSWSC 461, [24]
24. *Jazabas*, fn 5, [74], [33]; *Pioneer Park*, fn 56, [47]
25. *Litmus Australia Pty Ltd (In Liq) v Paul Brian Canty and Ors* [2007] NSWSC 670, [26].
26. *Orr v Ford* (1989) 167 CLR 316, at 341; see *Idoport*, fn 3, [74].
27. *Idoport*, fn 3, [70]; *15 Management*, fn 3, [45]; fn 23, [24]; *Rusiti v Alkhoshaibi* [2007] NSWSC 1374, [52]; *Laderma International v Taurean Systems* [2009] NSWSC 905; *Ravi Nominees Pty Ltd v Phillips Fox* (1992) 10 ACLC 1313, 1318.
28. *Litmus*, fn 25, [26]; *Idoport*, fn 3, [70]; *15 Management*, fn 3, [45]; *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* [2009] NSWSC 563, [28]; *Karl Suleman Enterprizes Pty Ltd (in liq) v Pham and Ors* [2010] NSWSC 886, [57].
29. *Litmus*, fn 25, [26].
30. *Corbett v Nguyen and Ors* [2008] NSWSC 1265, [46].
31. *Idoport*, fn 3, [70], *15 Management*, fn 3, [45]; *Dee-Tech Pty Ltd v Neddam Holdings Pty Ltd* [2009] NSWSC 1095, [12]; *Rusiti*, fn 27, [52].
32. *Liberty Grove (Concord) Pty Ltd v Mirvac Projects Pty Ltd* [2008] NSWSC 48, [7]; *Karl Suleman Enterprizes*, fn 28, [57].
33. *Crypta Fuels Pty Ltd v Svelte Corp Pty Ltd* (1995) 19 ACSR 68, 71; *Idoport*, fn 3, [71].
34. *Dee-Tech*, fn 31, [12]; *PG Gabel Pty Ltd (in liq) v Katherine Enterprises Pty Ltd* (1977) 29 FLR 108, 110.
35. *Dee-Tech*, fn 31, [12].
36. *Jazabas*, fn 5, [18]: *Bryan E. Fencott and Associates Pty Ltd v Eretta Pty Ltd* (1987) 16 FCR 497 at 514.
37. *Litmus*, fn 25, [26].
38. *MA Productions Pty Ltd v Austarama Television Pty Ltd* (1982) 7 ACLR 97, 100; *J & M O'Brien Enterprises Pty Ltd v The Shell Company of Australia Ltd* (1983) 7 ACLR 790, 793; *Equity Access Ltd v Westpac Banking Corporation* (1989) ATPR 40-972, 50-636; *Ariss & Anor v Express Interiors Pty Ltd* [1996] 2 VR 507, 514; *Print Management Australia v Pasupati* [2009] NSWSC 964, [15]; *Jazabas*, fn 5, [18]
39. *Jazabas*, fn 5, [18].
40. *KP Cable*, fn 17, at 439; see also *Bryan E Fencott*, fn 37, 514; *Jazabas*, fn 5, [18].
41. *Fiduciary*, fn 16, [37]; *Jazabas*, fn 5, [30], [83]-[84].
42. e.g., *Litmus*, fn 25, at [28], *15 Management*, fn 3, at [42].
43. *Sent v Jet Corporation of Australia Pty Ltd* (1984) 2 FCR 201; *Bryan E Fencott*, fn 37, 510.5; *Public Transport Ticketing Corporation v Integrated Transit Solutions Ltd and Anor* [2009] NSWSC 54, [22]; *Epping Plaza Fresh Fruit & Vegetables Pty Ltd v Bevendale Pty Ltd*: [1999] 2 VR 191, 199; *Print Management Australia*, fn 39, [15], [18], [30].
44. *Merrag*, fn 17, [8].
45. *PM Sulcs & Associates Pty Ltd v Daihatsu Australia Pty Ltd* (Unreported, SCNSW, Kirby J, 22/8/2000, BC200005039), [42]; *Lynnebry Pty Ltd v Farquhar Enteprises Pty Ltd* (1977) 3 ACLR 133, 136.
46. *Jazabas*, fn 5, [94]; *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Management Ltd* [2003] NSWSC 609, [96]; *Fiduciary*, fn 16, [87]; *Jazabas*, fn 5, [94]; *Rusiti*, fn 27, [57].
47. G E Dal Pont, 'Law of Costs'; quoted with approval in *Jazabas*, fn 5, [95].
48. *Pyrmont Raw Materials Pty Ltd (in liq) (Receivers Appointed) v Peter*

Meier and Anor [2009] NSWSC 227, [19]-[20].

49. See *Dalma Formwork Pty Limited (Administrator Appointed) v Concrete Constructions Group Limited* [1998] NSWSC 472; *Jazabas*, fn 5, [94].
50. *Modern Woodcraft Pty Ltd v Nott* (Unreported, SCNSW, Young J, 7/3/97, BC9700735), at 10.
51. *Tradestock*, fn 22, 59; quoted with approval in P M Sulcs, fn 46, [43].
52. *Jazabas*, fn 5, [33]; See further *Baycorp Capital*, fn 16, [16].
53. *Sabaza Pty Ltd vv AMP Society* (1981) 6 ACLR 194, 198; *Impex Pty Ltd v Crowner Products Ltd* (1994) 13 ACSR 440, 444, 445.
54. *Litmus*, fn 25, [28], citing *BPN Pty Ltd v HPM Pty Ltd* (1996) 131 FLR 339 at 346; *Fiduciary*, fn 16, [101].
55. *Pioneer Park Pty Ltd (In Liq) and Ors v Australia and New Zealand Banking Group Limited* [2007] NSWCA 344, [55] *Yandil Holdings Pty Ltd v Insurance Co of North America* (1985) 3 ACLC 542, 545.
56. *Yandil Holdings*, fn 56; see *Idoport*, fn 3, [50].
57. *Yandil*, fn 56; see *Idoport*, fn 3, [50].
58. *Rusiti*, fn 27, [56].
59. *Hastings v Hastings* [2009] NSWCA 294, [14]; *Pioneer Park*, fn 56, [51].
60. *Bell Wholesale*, fn 18, 591; Quoted with approval in *Hession v Century 21 South pacific Ltd* (Unreported, NSWCA, 11 September 1992); *Yandil Holdings*, fn 56, 545; *Pioneer Park*, fn 56, [43], [51]; *Jazabas*, fn 5, [32], [77]; *Dae Boong International Co Pty Ltd v Gray* [2009] NSWCA 11, [23].
61. *Green*, fn 4, [12].
62. *Sharjade v Darwinia Estate and Anor* [2006] NSWSC 708, [25].
63. *Sharjade*, fn 63, [26]-[28]; *Jazabas*, fn 5, [91].
64. *Fodare Pty Ltd v Shearn* [2009] NSWSC 1140, [6].
65. *Fodare*, fn 65, [14].
66. *Kavcor Pty Ltd v Kavanagh* [2005] NSWSC 1163, [10]–[11]; *Karl Suleman*, fn 28, [46].
67. *Fodare*, fn 65, [8].
68. *Marks-Isaacs v Fowler & Ors* [2005] NSWCA 37, [24]-[25].
69. *Newtrend Pty Ltd v Oceanic Life Ltd* [1990] WAR 1, 3-4; *MHG Plastic Industries Pty Ltd v Quality Assurance Services Pty Ltd* (FCA, Sackville J, 28 June 2002, unreported), at [22].
70. *Attorney-General v Transport Control Systems (NZ) Ltd* [1982] 2 NZLR 19, at 20.
71. *Dal Pont*, fn 139, 963.
72. *Dae Boong*, fn 61, [26].
73. *Dae Boong*, fn 61, [26].
74. *Green*, fn 4, [12]; see further *BPM Pty Ltd v HPM Pty Ltd* (1996) 14 ACLC 857, 861.
75. *Dae Boong*, fn 61, [27].
76. e.g., *KP Cable*, fn 17; 104 *Alice Street Pty Ltd v Jabamak Pty Ltd* [2009] NSWSC 162, [48]; *Instyle Contract Textiles Pty Ltd v Good Environmental Choice Services Pty Ltd* [2009] FCA 1422, [53]-[67]; *Maggbury Pty Ltd v Hafele Australia Pty Ltd* [2001] 2 Qd R 187, 192; *Gentry Bros Pty Ltd v Wilson Brown & Associates Pty Ltd* (1992) 8 ACSR 405, 415.
77. *Jazabas*, fn 5, [3], [78]-[80]; *Prynew*, fn 16; *Pioneer Park*, fn 56, [52].
78. See also *Aquatown Pty Ltd v Holder Stroud Pty Ltd* (1995) 18 ACSR 622, 623 & 626; *Interwest*, fn 80, 626; *Townsend Controls Pty Ltd v Gilead and Anot* (1989) 14 IPR 443, 447; *Australia Corp Ltd v HIH Casualty and General Insurance Ltd* (in liq) [2003] FCA 803, [82].
79. *Heller Factors Pty Ltd v John Arnold's Surf Shop Pty Ltd (in liq)* (1979) ACLC 32,446; *Riviera Development Co Pty Ltd v Tantalite Pty Ltd* [1981] 27 SASR 161, 164; *Interwest Ltd v Tricontinental Corporation Ltd* (1991) 5 ACSR 621, 626; *KP Cable*, fn 17.
80. *Willey v Synan* (1935) 54 CLR 175, 180, 184–5; *Re Travelodge Australia Ltd* (1978) 21 ACTR 17; *Amalgamated Mining Services Pty Ltd v Warman International Ltd* (1988) 19 FCR 324, at 328-9; *Classic Ceramic Importers Pty tld v Ceramic Antiga SA* (1994) 13 ACSR 263, 267; *Aquatown*, fn 79, 624-5; *Australia Corp*, fn 79, [80]-[81]; *Morlea Professional Services Pty Ltd v Richard Walter Pty Ltd* [1999] FCA 764, [6]; but see *Deep Sea Oils Ltd v K M Corporation Pty Ltd* [2000] FCA 944.
81. *Classic Ceramic Importers*, fn 81.
82. *Classic Ceramic Importers*, fn 81, 267; See also *Amalgamated Mining Services*, fn 81.
83. *Public Transport Ticketing Corporation*, fn 44, [45] (This appears to be loose test, difficult to apply).
84. *Aquatown*, fn 79, 625; *Morlea*, fn 81, [2].
85. *Aspendale Pastoral Co Pty Ltd v WJ Drever Pty Ltd* (1983) 7 ACLR 937, 941; *HIH Casualty and General Insurance Ltd (in liq)* [2003] FCA 803, [82].
86. *Rosenfield Nominees Pty Ltd v Bain and Co* (1988) 14 ACLR 467, 470; *Idoport*, fn 3, [56]; *Ariss*, fn 39, at 513-14; *Bryan E Fencott*, fn 24, 510.5; *Public Transport Ticketing Corporation*, fn 44, [22]; . See also *Jodast Pty Ltd v A&J Blattner Pty Ltd* (1991) 104 ALR 248, at 255; *Interwest*, fn 80, 624.
87. *Webster v Lampard* (1993) 112 ALR 174; *Idoport*, fn 3, [47]; see also *Tradestock*, fn 22.
88. *Polstead*, fn 3, [15]; *Bryan E Fencott*, fn 37, 510.5; and *Public Transport Ticketing Corporation*, fn 44, [22].
89. *Harpur*, fn 5, 841; *Maples v Hughes* [2002] NSWSC 617, [18]; *Pioneer Park*, fn 56, [53]; See *Drake v Hunter Douglas Ltd* (1983) 8 ACLR 39; *James and Ors v ANZ Banking Group Ltd* (1985) 9 FCR 442, 447.
90. *Street v Luna Park Sydney Pty Ltd* [2006] NSWSC 1317, [28]-[29]; see also *Ingot Capital Investments*, fn 47, [84]; *K and J Acquisitions Pty Ltd and Anor v Manauzzi and Anor* [2009] NSWSC 279, [48].
91. E.g.,*Australian Building Construction Employees' and Builders' Labourer's Federation v Commonwealth Trading Bank* [1976] 2 NSWLR 371, 373.
92. *Rajski v Computer Manufacture and Design Pty Ltd & Ors* [1982] 2 NSLWR 443.
93. *Pearson v Naydler* [1977] 3 All ER 531; *Interwest*, fn 80, 625; *Ravi Nominees*, fn 27, 1317.
94. *Interwest*, fn 80, 625.
95. *Green*, fn 4, [45], [65] [82].
96. *Green*, fn 4, [51]-[53]; [85]-[86]; Basten JA (in dissent) at [66]-[80].
97. *Green*, [49]-[53], [84].
98. *The Australian Derivatives Exchange Ltd v Doubell* [2008] NSWSC 1174.
99. *Green*, fn 4, [53], [86].
100. *Jazabas*, fn 5, [76]; *Pioneer Park*, fn 56, [56].
101. *Byron Shire Business for the Future Inc v Byron Shire Council and Holiday Villages (Byron Bay) Pty Ltd* (1994) 83 LGERA 59; *KP Cable*, fn 17; *Pioneer Park*, fn 56, [57].
102. *Dal Pont*, fn 139, 1010.
103. *Pioneer Park*, fn 56, [57].
104. *Pioneer Park*, fn 56, [57]; see also *Aussie Airlines Pty Ltd v Australian Airlines Ltd* (1995) ATPR 41-444, at 41,006.
105. *Pioneer Park*, fn 56, [57].
106. See *Pioneer Park*, fn 56, [57].
107. *Bevwizz Group Pty Ltd v Transport Solutions Pty Ltd* [2008] NSWSC 1399, [11]-[18].
108. *Interwest*, fn 80, 626; *Bevwizz*, fn 108, [18], [20]; *Neck v Taylor* [1893] 1 QB 560, 562, 563; *Buckley*, fn 20, 307.
109. *Interwest, fn 80*, 627.
110. *Walton Construction Pty Ltd v Illawarra Hotel Co Pty Ltd* [2008] NSWSC 1248, [52]-[54].
111. See *Bevwizz*, fn 108, [18]-[20]; *New Fenix Compagnie Anonyme d'Assurances de Madrid v General Accident Fire & Life Assurance Corporation Ltd* [1911] 2 KB 619, 625-6: *Interwest*, fn 80, 626; *Saint-*

Gobain RF Pty Ltd v Maax Spa Corporation Pty Ltd [2004] VSC 335, [43]; *KP Cable*, fn 17; *Laderma*, fn 27, [21].
112. See *Bevwizz*, fn 108, [18]-[20].
113. *Walton Construction*, fn 111, [55]-[56].
114. *Putney Group Pty Ltd v The Royal Rehabilitation Centre Sydney* [2009] NSWSC 424, [64]-[65].
115. *Western Export Services Inc v Jireh International Pty Limited* [2008] NSWSC 601, [89]; *Demag-Lauchhammer Maschinenbau Und Stahlbau GmbH v John Holland (Constructions) Pty Ltd* [1966] 2 NSWR 3, 7; see also authorities at fn109.
116. *Concrete Constructions v Dalma Formwork Pty Ltd* [1999] NSWCA 16, [16].
117. *Sydmar Pty Ltd v Statewise Developments Pty Ltd* - (1987) 11 ACLR 616, 627, 629; *Concrete Constructions*, fn 117, [15], [24]; *Putney Group*, fn 115, [75].
118. *Putney Group*, fn 115, [75].
119. *KDL Building v Mount* [2006] NSWSC 474, [31], [34]; *Bevwizz*, fn 108, [20], [31]-[32]; *Putney Group*, fn 115, [62]-[63]. [77], [89]; *Interwest*, fn 80, 627.
120. *Pioneer Park*, fn 56, [2], [22].
121. *Preston v Harbour Pacific Underwriting Management Pty Ltd* [2007] NSWCA 247, [18]; quoted with approval in *Hastings v Hastings* [2009] NSWCA 294,at [12]; see also *Transglobal Capital Pty Ltd v Yolarno Pty Ltd* (2004) 60 NSWLR 143, and *Porter v Gordian Runoff Ltd* [2004] NSWCA 171.
122. See further: *Transglobal Capital*, fn 122; Green, fn 4, [45], [65],[82].
123. *Brundza v Robbie & Co* (1952) 88 CLR 171, 175; often quoted with approval, e.g. *Lynx Engineering Consultants Pty Ltd v The ANI Corporation Ltd t/as ANI Bradken Rail Transportation Group (No 3)* [2010] FCA 32, [7].
124. *Reinsurance Australia Corporation*, fn 7, [94].
125. *Lynx*, fn 124, at [24].
126. *Pioneer Park*, fn 56, [8], and [66]; applied *International Greetings*, fn 23, [24]; see also *Sagacious Procurement Pty Limited (ACN 003 753 526) v Symbion Health Limited (ACN 004 073 410)* [2007] NSWCA 205, [14].
127. *Fodare*, fn 65, [16]; *Litmus*, fn 25, [44]; *Wainter Pty Ltd v Freehills (A Firm) (No 2)* [2009] FCA 770, Barker J at [9].
128. *Reinsurance Australia Corporation*, fn 7, [94].
129. *Baycorp Capital*, fn 16, [24]; *M A Productions Pty Ltd v Austarama Television Pty Ltd* (1982) 7 ACLR 97 at 100.
130. *Reinsurance Australia Corporation*, fn 7, [71].
131. *Sagacious*, fn 127, [14]; *Litmus*, fn 25, at [39]ff; *Wainter*, fn 128, [22] ff; *April Fine Paper v Moore Business Systems* [2009] NSWSC 867.
132. *Litmus*, fn 25, [47]; *Reinsurance Australia Corporation*, fn 7, [96].
133. *Fodare*, fn 65, [22].
134. *Sharjade*, fn 63, [52].
135. *Litmus*, fn 25, [45].
136. *Capital Webworks Pty Ltd v Adultshop.com.Ltd* [2008] FCA 40, at [14].
137. *Reinsurance Australia Corporation*, fn 7, [71].
138. Dal Pont, *Law of Costs Australia*, Butterworths, 2003, para 28.35; see *Sagacious*, fn 127, [52].
139. *Massey v Allen* (1879) 12 Ch D 807; *Southern Cross Exploration NL v Fire and All Risks Insurance Co Ltd* (1985) 1 NSWLR 114 at 122; Bryan E Fencott, fn 37, 515.
140. *Antonias Pty Ltd v Matthew Lepouris Pty Ltd* [2004] NSWSC 654, at [7].
141. *Litmus*, fn 25, [44]; *ICETV Pty Ltd v Ross* [2007] NSWSC 1232 at [17].
142. *Djz Constructions Pty Ltd v Paul Pritchard t/as Pritchard Law Group* [2009] NSWSC 359, at [10].
143. *Sagacious*, fn 127.
144. *Sharjade*, fn 63, [51]-[51].
145. *Litmus*, fn 25, [45]; See also *Aspendale Pastoral*, fn 86, 942; *Drumdurno Pty Ltd v Braham* (1982) 42 ALR 563; *Artex Industries Pty Ltd v Autofab (Australia) Pty Ltd* [2005] FCA 589, [6].
146. *Ingot Capital Investments*, fn 47, [101]; *Transocean Capital*, fn 124, [42]; *Baycorp Capital*, fn 16, [27]; *Sharjade*, fn 63, [54]; *Reinsurance Australia Corporation*, fn 7, [114]; *April Fine Paper*, fn 132.
147. *Sagacious Procurement Pty Limited* (ACN 003 753 526) *v Symbion Health Limited* (ACN 004 073 410) [2007] NSWCA 205, per Mason P at [14]
148. *Nicholls v Michael Wilson & Partners Ltd* [2010] NSWCA 100, at [11].
149. *Capital at Call Ltd v Toumpas* [2009] QCA 313, at 6.
150. *Strategic Financial and Project Services*, fn 11, [25] (example list of tasks).
151. *Baycorp Capital*, fn 16, [23].
152. *Shepherds Producers Co-Operative Ltd (in liq) v Lamont* [2009]. NSWSC 798, at [10] (costs consultant); *April Fine Paper*, fn 132; *Laderma*, fn 27, [25].
153. *Litmus Australia*, fn 25, [41].
154. *Litmus Australia*, fn 25, [55].
155. *Shepherds Producers*, fn 153, [6].
156. *Rosengrens Ltd v Safe Deposit Centres Ltd* [1984] 3 All ER 198 at 200.
157. *National Biofuels Group Pty Ltd v Elbow River Marketing* [2009] FCA 613.
158. *Ingot & Anor v Macquarie & Ors* [no 5] [2006] NSWSC 255, at [18]; *Billiva Pty Ltd v Eastbrook Estate Pty Ltd, Eastbrook Pastoral Pty Ltd and Monezt Developments Pty Ltd* [2009] NSWSC 209, at [42].
159. *Gurtler v Finance Now Pty Ltd* [2009] FCA 631; *Djz Constructions*, fn 143.
160. See, for example, *Aoun v Bahri* [2002] 3 All ER 182, at 193.
161. *International Greetings*, fn 23, [31].
162. See, for example, *Green v Australian Industrial Investment Ltd* (1989) 25 FCR 532, 545.
163. *Hunter Business Finance Pty Ltd v Australian Commercial and Equipment Finance Pty Ltd* [2010] NSWCA 133.
164. *Fodare, fn 65; Snedden v Nationwide News Pty Ltd (No 2)* [2010] NSWCA 117.
165. *Dal Pont*, fn 139, at 930.
166. *Fodare*, fn 65; *Snedden v Nationwide News Pty Ltd* (No 2) [2010] NSWCA 117; *MGH Plastic Industries Pty Ltd v Quality Assurance Services Pty Ltd* (FCA, Sackville J, 28 June 2002, unreported), at [38].
167. *Collingnon Developments Pty Ltd v Wurth* (1975) 1 ACLR 314, at 316.
168. *April Fine Paper*, fn 132, [35].
169. Cf *Combined Property Industries*, fn 15, 765, 769.
170. *Philips Electronics Australia Pty Ltd v Matthews* (2002) 54 NSWLR 598, at [47].
171. UCPR, r42.21; Federal Court Rules, 56(4).
172. *Idoport Pty Ltd v National Australia Bank Ltd* [2002] NSWSC 18, at [24]; *Idoport Pty Ltd v N Australia Bank Ltd* [2002] NSWCA 271, at [28]; see also *Lawrence Waterhouse Pty Ltd v Port Stephens Council* [2008] NSWCA 235, at [21]; *Owners of Strata Plan 61732 Pty Ltd v T R Druce Pty Ltd* [2009] NSWSC 1024, [21]; *Porter v Gordian Runoff Ltd (No 3)* [2005] NSWCA 377, at [24]–[27]).
173. *Austcorp International Ltd v Owers (No 2)* [2009] FCA 1112.
174. *Baycorp Capital*, fn 16, [24]; *International Greetings*, fn 23, [29]; *Maggbury*, fn 77, 195; *Check-Out Pty Ltd v Eagle Eye Inspections Pty Ltd* (FCA, Emmett J, 21 September 2001, unreported), at [32].
175. *Gurtler*, fn 160, [12]; *Wainter*, fn 128, [21]; *International Greetings*, fn 23, [30].
176. *International Greetings*, fn 23, [31].
177. *Williams v Abbott Australia Pty Ltd* [2003] NSWSC 425, at [21].
178. *Pampered Paws Connection Pty Ltd (on its own behalf and in a representative capacity) v Pets Paradise Franchising (Qld) Pty Ltd (No 7)* [2010] FCA 626, [17].