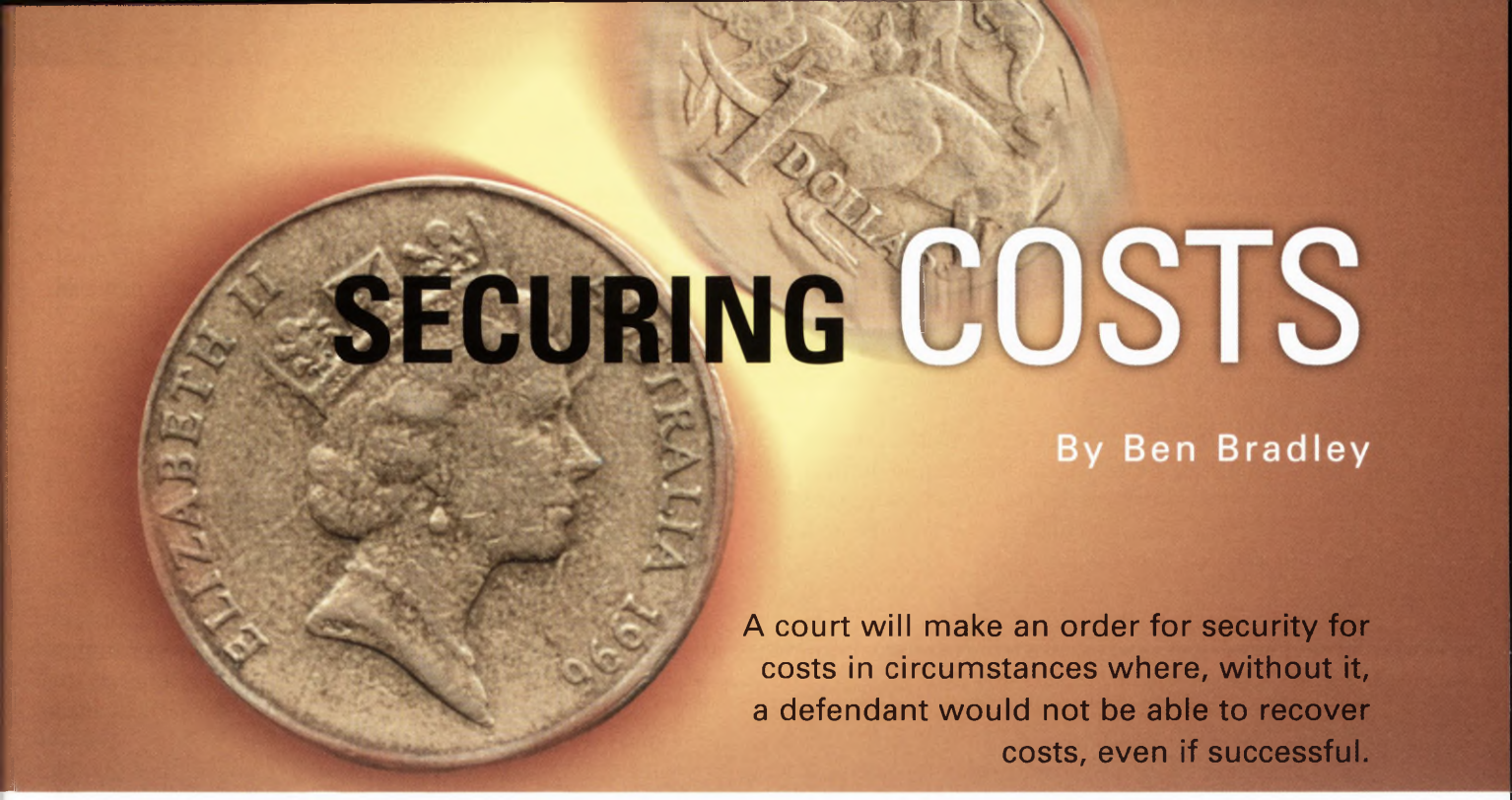

SECURING COSTS

By Ben Bradley

A court will make an order for security for costs in circumstances where, without it, a defendant would not be able to recover costs, even if successful.

The circumstances in which a court will grant an order for security for costs are set out in rule 42.21 of the *Uniform Civil Procedure Rules* 2005 (NSW) (UCPR).

UNIFORM CIVIL PROCEDURE RULES

Rule 42.21(1) provides that a court may make an order against a plaintiff on an application by a defendant for security for costs if:

- the plaintiff is ordinarily resident outside NSW (noting that s117 of the Constitution prevents interstate residence from providing a basis for ordering security against a natural person);
- the address of the plaintiff is not stated or is misstated in the originating process and there is reason to believe that the error was made with an intention to deceive;
- after proceedings were commenced, the plaintiff changed his or her address, and there is reason to believe that the plaintiff did so to avoid the consequences of the proceedings;
- there is reason to believe that the plaintiff (who is a corporation) will be unable to pay the costs of the defendant if ordered to do so; or
- the plaintiff is suing, not for his or her benefit, but for the benefit of others and there is reason to believe that the plaintiff will be unable to pay the costs of the defendant if ordered to do so.

Rule 42.21(3) provides that if a plaintiff fails to comply with an order to give security, the court may dismiss the proceedings.

GENERAL PRINCIPLES

Three issues arise on any application for security for costs. The first is whether the defendant has established a ground for making such an order in accordance with rule 42.21(1). The second is whether the court should make the order in accordance with its discretion. The third is the amount and on what terms the order should be made.[1]

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Has a ground been established?

This is a matter of fact.

In relation to the various grounds in rule 42.21(1), the courts have held the following:

- If the plaintiff resides outside the jurisdiction, it is unfair to require the defendant to go to the extra expense of executing judgment for costs in the foreign jurisdiction without protection.[2]
- The mere fact that the address of the plaintiff is misstated in the originating process is not sufficient grounds to grant an application for security for costs. The defendant will also need to establish that the misstatement was made with an intention to deceive.[3]
- The general rule – that poverty is no ground for requiring security – does not apply to corporate plaintiffs. The defendant needs to establish that the corporate plaintiff would not be able to meet a costs order in favour of the defendant if ordered to do so. Any such order will be made only at the discretion of the court.[4]
- If a plaintiff has technical standing to bring an application, but the court is satisfied that the plaintiff is bringing the application for the benefit of another party, security may be ordered against the plaintiff.[5]

Once a ground has been established, the court will then have regard to various discretionary factors in determining whether to grant the order for security for costs.

Discretionary factors

Just because a ground in rule 42.21(1) has been made out by a defendant, an order for security for costs will not necessarily be given.[6] In exercising its discretion to make an order, the court will have regard to the following factors:

- whether the plaintiff's claim is made in good faith and appears to be reasonably arguable;
- the status of the defendant;
- whether the plaintiff's lack of funds has been caused, or contributed to, by the conduct of the defendant;
- whether the plaintiff's proceedings are merely a defence against 'self-help' measures taken by the defendant;
- whether the order would unduly frustrate the plaintiff's ability to pursue the proceedings;
- the extent to which it is reasonable to expect creditors or shareholders (or other persons financially involved in the conduct of the proceedings, such as litigation funders) to make funds available to satisfy any order for security made; and
- the likelihood of a costs order being made at the conclusion of the proceedings and the public interest nature of the litigation.[7]

Amount of security

Courts have been provided with a wide power to order security, including an order for security for costs on an indemnity basis.[8]

While the discretion to order security for costs is wide enough to include an order based on indemnity costs, it is very rare for such an order to be made.

The amount of security that may be ordered is in the discretion of the court and should be such sum as the court thinks just, having regard to all the circumstances of the case.[9]

POWELL v AYMKONE PTY LIMITED & ANOR [2005] NSWSC 1261

The plaintiff alleged that he had suffered loss as a result of a number of investments in Australia made through a Mr Camm. The plaintiff successfully sued Mr Camm in the Supreme Court of Queensland. Unfortunately for the plaintiff, Mr Camm was bankrupt.

The plaintiff brought subsequent proceedings against the first and second defendants, alleging that Camm was an agent of one or both of them when he conducted his nefarious operations.

The defendants maintained that it was not their conduct that impoverished the plaintiff, rather it was the conduct of Camm. The defendants also argued that a considerable portion of the plaintiff's loss was unrelated to the activities of the defendants or Camm.

The plaintiff lived in California and had no assets. The defendants brought an action for security for costs. The plaintiff maintained that it had no assets as a result of the negligence of the conduct of the defendants.

At first instance, the Registrar granted the order for security for costs in the amount of $30,000.

On appeal, Young CJ held the following:

- The plaintiff resides in California and outside the Commonwealth of Australia.[10]
- In exercising his discretion to award security for costs, his Honour stated:
  'One of the matters which guides the court in the exercise of its discretion is that it should not stultify litigation by shutting out valid claims merely on the ground of the poverty of the plaintiff and a fortiori where there appears to be some dishonesty, breach of trust or other public interest involved in the case.
  ... one must always take into account, together with the alleged poverty of the plaintiff, the assessment (such as one can make at an early state of the proceedings) of the strength of the plaintiff's case.

His Honour found that while the plaintiff was justified in complaining about Mr Camm's conduct, the plaintiff had significant difficulties in his claim against the defendants. Accordingly, his Honour did not overturn the Registrar's decision to allow the defendants security for costs.

- In calculating the amount of security to be provided, his Honour noted the following:
  'Accordingly, it seems to me that looking at the relevant factors, the learned Registrar was right in the decision she reached. The order for $30,000 will have no relation at all to the total costs of the suit which will probably run into hundreds of thousands of dollars, if it runs its full course, but the evidence from Baker & McKenzie, which I prefer to the evidence of the American lawyer, is that $39,000 will be the costs of registering any order for costs in California.'

His Honour dismissed the appeal with costs.

FIORENTINO (AS LIQUIDATOR OF FOX HOME LOANS PTY LIMITED) (IN LIQ) v MOHAMED [2005] NSWSC 1177

Fox Home Loans Pty Limited (Fox) was a mortgage broker which had gone into liquidation. The liquidators embarked on part 5.9 examinations in an attempt to obtain information in relation to a proof of debt of $1.815m and a contention by a third party that the third party was not liable to pay trailer commissions to Fox.

By way of interlocutory process, Mr Mohamed sought to prevent the liquidator from pursuing such examinations. Mohamed was associated with persons involved in 13 loans originated through Fox. He was also known to Mr D'Angelo, a solicitor upon whom an examination summons had been served and who had unsuccessfully sought to stay that examination.

Mohamed claimed standing as a creditor of Fox because he acquired a debt of $2,420 owed by Fox to a barrister by way of deed of assignment dated 26 October 2005. The assignment was by way of a gift. Mohamed brought his application for a stay of the examinations two days later. The liquidators subsequently sought security for costs associated with that application.

Barrett J held the following:

- Mohamed was not a person the liquidators had sought to examine; he had acquired the debt solely for the purpose of giving himself a standing to bring the application.
- His Honour was satisfied that Mohamed brought the proceedings not for his own benefit but for the benefit of other persons.
- His Honour found that Mohamed's case was weak. While acknowledging that an order for security for costs would most likely stultify the application, His Honour concluded: 'Because he is acting in the interests of one or more other persons, it may be assumed that other financial resources are available to him, so that no finding of undue stultification should be made.'
- As to the amount of security, his Honour accepted the estimate provided by the defendants in the sum of $27,570, as it was not challenged by Mohamed.

TRIPLETAKE PTY LIMITED v CLARK RUBBER FRANCHISING PTY LIMITED [2005] NSWSC 1169

Clarke Rubber Franchising Pty Limited (Clarke Rubber) commenced proceedings against Tripletake Pty Limited (Tripletake) alleging that Tripletake was in breach of obligations it owed under a master co-ordinator agreement (MCA) made on 14 March 1995.

In those proceedings, Tripletake sought a declaration that the MCA had been effectively renewed and sought an injunction restraining Clarke Rubber from granting to any third party those rights Tripletake had under the MCA.

On 5 September 2005, Clarke Rubber filed an application for security of costs. By that time: >>

(a) Clarke Rubber had filed its defence and cross-claim.
(b) Discovery and inspection of documents had taken place.
(c) Tripletake had filed and served its evidence in chief.
(d) Clarke Rubber had filed and served its evidence (comprising 17 affidavits, including one of 100 pages in length and with 200 exhibits).
(e) On 22 June 2005, Tripletake successfully sought orders to restrain Clarke Rubber from terminating the MCA pending the determination of the proceedings.
(f) On 24 August 2004, Tripletake and Mr Brooks commenced proceedings in the Industrial Relations Commission seeking relief in relation to the MCA under s106 of the *Industrial Relations Act* 1996.
(g) On 11 May 2005, Tripletake and Mr Brooks commenced proceedings in the Federal Court of Australia, seeking relief under ss51AA and 51AC of the *Trade Practices Act* 1974.
(h) On 8 July 2005, the Federal Court proceedings were cross-vested to the Supreme Court.
(i) On 29 July 2004, all three matters were set down for hearing for three weeks, commencing 30 January 2006 (with evidence in each proceedings to be evidence in the other).

His Honour concluded that this case was a 'paradigm example' of the principle that an application for security of costs should be made promptly, stating that:

(a) An application for security should be made promptly.[11]
(b) If a plaintiff has spent money preparing the appeal for hearing and the matter is ready for hearing, it would be patently unjust to permit a defendant who stood by and allowed that work to be done to ask for security.[12]
(c) The reason why delay may lead the court in the interests of justice to refuse an application for security of costs, which would otherwise be valid, is that it is unfair to lull the plaintiff into a situation where it invests a large sum of money to prepare for a hearing and then to frustrate that expenditure by a last-minute application.[13]

His Honour found that there was no satisfactory explanation advanced by Clarke Rubber for the delay in making its application for security for costs.

CONCLUSION

The overriding purpose of an order for security for costs is to protect a defendant in circumstances where unsuccessful proceedings would occasion an injustice to the defendant in the absence of such an order.

Once a ground for making the order has been established, the defendant must convince a court that it should exercise its discretion in favour of making the order. Simply establishing a ground to make the order is not enough. In exercising its discretion, the court will have regard to several factors including the plaintiff's prospects of success, and whether such an order would stultify the bringing of a claim.

Courts will not look favourably on a defendant who brings an application after the plaintiff has incurred substantial costs in preparing the matter for hearing. ■

Notes: **1** *KDL Building Pty Limited v Mount* [2006] NSWSC 474. **2** *Powell v Aymkone Pty Limited* [2005] NSWSC 1261. **3** See *Business Sampler (WA) Pty Limited & Anor v Brocorp Pty Limited* (unrep, Fed Court No. VG 736 of 1995, per Olnex J on 18 March 1996). **4** *KDL Building Pty Limited v Mount* [2006] NSWSC 474. **5** *Fiorentio (as liquidator of Fox Home Loans Pty Limited (in liq)) v Mohamed* [2005] NSWSC 1177. **6** *Barton v Minister for Foreign Affairs* (1984) 2 FCR 463. **7** These are the notes to UCPR 42.21 in *Ritchies' Uniform Civil Procedure NSW* Vol.1, cited with approval by Simpson J in *Jazabas Pty Limited v Haddad* [2006] NSWSC 559. **8** *Emanuel Management Pty Limited (In liq) v Forsters Brewing Group Limited* [2003] QCA 552. **9** *Allstate Life Insurance Co & Anor v Australia and New Zealand Banking Group Limited & Anor* (No. 19) (1995) 134 ALR 187. **10** This satisfies the grounds set out in Rule 42.21(1)(a). **11** Citing Priestly J in *KP Cable Investments Pty Limited v Meltgow Pty Limited* (1995) 56 FCR 189. **12** *Smail v Burton* [1975] VR 776. **13** *Avner Pty Limited v Dimopoulos* (unreported) 12 February 1997 per Young J.

Ben Bradley *is a reader at State Chambers.*
PHONE *(02) 9223 1522* **EMAIL** *bcabradley@gmail.com*

Australian Government

Centralised Management of personal injury Asbestos Claims against the Commonwealth

The *Asbestos-related Claims (Management of Commonwealth Liabilities) Act 2005* transfers the common law personal injury asbestos liabilities of the Commonwealth and, with certain exceptions, Commonwealth authorities to Comcare.

The Act gives Comcare exclusive authority to manage claims (that is to respond to and defend or settle and to pursue contributions or recoveries from other tortfeasors) in respect of the transferred liabilities.

For that purpose a Commonwealth authority is a body corporate established by a law of the Commonwealth or of a Territory (not being the ACT, Norfolk Island or the Northern Territory) or a company in which the Commonwealth (directly or through a statutory body corporate) has a controlling interest. The exceptions are the Australian Postal Corporation and Telstra Corporation Ltd and their respective subsidiaries.

A claim can be served by delivery to a Comcare office, but the claim will need to identify the Commonwealth agency or controlled company that is alleged to have negligently caused or contributed to the asbestos-related condition or disease the claim relates to.

Claims against the Department of Defence, or against the Australian Postal Corporation, Telstra Corporation Ltd or their subsidiaries will continue to be managed by those bodies and should not be referred to Comcare.

There are no changes to the lodgement of claims for statutory workers' compensation benefits.

Comcare has established the Australian Government Asbestos Litigation Unit to carry out the new function. The unit will be responsible for responding to claims, and pursuing contributions and cross claims and instructing lawyers to assist it to do so. The Director, Ken Whitcombe, can be contacted on (02) 6275 0099.

Comcare has established a special page on its website www.comcare.gov.au/asbestos/asbestos-law.html with further information for claimants and their lawyers.

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