Application for Security for Costs

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Legal costs are of importance to all parties to litigation, though in practice the risk of an unfavourable costs order is not equally shared. While a plaintiff has a choice whether or not to litigate, a defendant is in a less advantageous position, for in order to avoid default judgment, the defendant is compelled to litigate or settle, whether the plaintiff has available assets sufficient to pay the costs of a successful defence or otherwise. Courts have sought to redress this imbalance, and any consequential abuse of process, by ordering security for costs.[1]

Security for costs may be defined as the security which a defendant in an action may require from the plaintiff for payment of the costs that may be awarded to the defendant.[2] The procedure for seeking security for costs is one of a species of procedure[3] founded upon the courts' inherent jurisdiction to curtail abuse of process[4] by ensuring payment of legal costs.

The purpose of security for costs is twofold:

1 to provide protection for a defendant by ensuring an available fund to defray costs incurred by the defendant in defending a frivolous claim; and
2 to discourage the filing of unmeritorious and frivolous claims[5] which may amount to vexatious harassment.[6]

The twin purposes of security for costs are reflected in the traditional categories of case in which orders for security for costs may be made. The categories include:

(a) where the plaintiff is ordinarily resident out of the jurisdiction;
(b) where a nominal plaintiff, not being a plaintiff who is suing in representative capacity, is suing for the benefit of some other person and there is reason to believe that the nominal plaintiff will be unable to pay the costs of the defendant if ordered to do so;
(c) where the plaintiff's address is not stated in the writ or other

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1 N J Williams, 'Security for costs against a company' (1979) *LIJ* 577; 'Security for costs' (1923) 87 *JP* 711. Mareva injunctions also assist in ensuring assets are not divested and remain available for execution.

2 *Black's Law Dictionary,* 4th ed Rev, 1970, p 416.

3 Further species include proceedings for contempt, striking out, Mareva Injunctions and Anton Piller orders: P de Jersey, 'The Inherent Jurisdiction of the Supreme Court' (1985) *QLSJ* 325.

4 *Bahr v Nicolay* (1987) 163 CLR 490, (1987) 61 ALJR 437, [1987] ACLD 689 per Toohey J.

5 J L Ellington, 'The Security for costs requirement in California — a Violation of Procedural Due Process?' (1978) 6 *PLR* 191.

6 A W Renton, *Encyclopedia of the Laws of England,* 2nd ed, Sweet & Maxwell Ltd, London, 1908.

originating process or is incorrectly stated in such process, unless the court is satisfied that the failure to state the address or the misstatement was made innocently and without intention to deceive;

(d) where the plaintiff changed address during the course of the proceedings with a view to evading the consequences of the litigation;

(e) arbitration proceedings; and

(f) where the plaintiff is a limited liability company and there is reason to believe the company will be unable to pay the defendant's costs.

Having defined and identified the circumstances in which the discretion to order security for costs may arise, the focus of this article is to discuss the making and defending of an application for security for costs.

While the method of initiating an application is prescribed by the rules of court, being an exercise of statutory jurisdiction, the discretionary factors involved in the exercise of the discretion are largely based upon inherent jurisdiction. The objective of the discretionary rules based on either statutory or inherent jurisdiction is to satisfy the functions identified by Mason,[7] namely, to achieve convenience and fairness in legal proceedings, to prevent steps being taken which would render judicial proceedings inefficacious, and to prevent abuse of process. These objectives are essentially what Jacob[8] describes as control over process which enables the court to redress the balance in competing claims to justice between the parties and prevent procedural law from operating to the advantage of one party or to the prejudice of the other.

Prior Demand

Before initiating an application for security for costs solicitors for the applicant should approach the other side by letter, asking for security to be furnished and outlining the basis for the request.[9] A summons for security for costs should issue when that request is either refused or ignored.[10] Any reasonable offer received, without doubt, should be accepted. In the event of the application proceeding, failure to approach the other side, or failure to accept a reasonable offer does not influence the discretion whether or not to order security for costs, but may have the unfortunate result of the applicant being ordered to pay the costs of the application.[11] Evidence should be led of the demand and the failure or

7 K Mason, 'The Inherent Jurisdiction of the Court' (1983) 57 *ALJ* 449.

8 I H Jacob, 'The Inherent Jurisdiction of the Court' (1970) *Current Legal Problems* 23.

9 A specific form of security may be requested: S R Budd, A P Ryan, 'Security for costs – A Practitioner's Guide' (1990) 20 (3) *QLSJ* 215. Illustrations of the form of correspondence: J Delaney, *Security for Costs*, Law Book Company, Sydney, 1990 p 190; *Aspendale Pastoral Co Pty Ltd v W J Drever Pty Ltd* (1983) 7 ACLR 937 at 939; *Export Packers Ltd v Blue Moon Fruit Co-operative Ltd* (1984) 2 ACLC 419.

10 *APEP Pty Ltd v Smalley* (1983) 8 ACLR 260, (1984) 2 ACLC 49.

11 'Security–II' (1950) 94 *SJ* 187; 'Costs–Security for Costs' (1934) 78 *SJ* 92 at 93.

refusal of the plaintiff to provide the security for costs requested.[12] If the applicant is clearly entitled to security for costs, a reasonable amount should be offered and accepted.

Initiating the Application

An application for security for costs may be brought upon a motion,[13] summons[14] or application,[15] depending on the jurisdiction. The rules place no limit on the number of applications,[16] however, it is unusual to have more than two applications.

An application for security for costs may be made at any time, after the defendant has entered an appearance,[17] but if the application is not made promptly in the circumstances, resulting in prejudice to the respondent, it will fail. Delay is a significant discretionary factor militating against a successful application for security for costs. Delay is assessed from the point in time in which the applicant became aware of the necessary facts supporting the application for security for costs. The right to security for costs is not waived by service of the defence.[18]

In making the application the defendant should first establish the basis of the jurisdiction upon which the application is based,[19] then proceed to outline submissions on discretionary factors, then deal with any difficulties likely to arise in relation to enforcing a costs order, the general nature of the case, the means of the deponent's knowledge, any allegation as to the merits of the defence, account for any delay, outline the stage which proceedings have reached,[20] and in what amount and form in which security for costs is sought. The right to and the amount of security may be agreed without an order or alternatively may be embodied in a consent order, and the application may be heard in camera.[21] The application should include a request for the amount in which security is to be ordered and the mode of furnishing the security should be stated in the order, otherwise a further application may be

12 *Ballance v Smith* (1895) 1 ALR 144.

13 RFC (1976) O 28, r 2, *Bell Wholesale Co Pty Ltd v Gates Export Corporation (No 2)* (1984) 52 ALR 176, (1984) 2 FCR 1, (1984) 8 ACLR 588 form 27, returnable before a judge; RSC (NSW) (1970) Pt 60, r 1, Sch D, returnable before a judge or master of a division of the court, Street, op cit 5165.

14 RSC (Qld) (1900) O 65, r 2, RSC (Vic) (1987) 46.02(1), form 46A, returnable before a master; RSC (NT) (1987) 46.02(1); RSC (ACT) (1937) O 56, r 1; RSC (Tas) (1965) O 60, r 3; RHC (1953) O 52, r 4.

15 RSC (SA) (1987) r 67.01.

16 *Merton v Times Publishing Company Limited* (1931) 48 TLR 34. Cf: *Weiss v 'Sunday Press' Newspaper Co* (1903) 5 WAR 157.

17 An application may be made by one of several defendants who has appeared, although the other defendants have not yet appeared: *Carr v Shaw and Price* (1795) 6 TR 496; 101 ER 667.

18 Jacob, op cit 421 citing *Smith, Re Bain v Bain* [1896] WN 88, (1896) 75 LT 46.

19 In *Olda Holdings Ltd v Witwah Pty Ltd* (Supreme Court of New South Wales, Master, 11.2.76, unreported) the master held that he did not have jurisdiction to hear the application when the application was made under the general rules rather than under the companies legislation. See also W E Patterson, H H Ednie, *Australian Company Law*, 2nd ed, Butterworths, Sydney, 1972 p 3180.

20 *Huntley v Bulwer* (1838) 6 Dowl 633.

21 *Estates Property Investment Corporation Limited v Pooley* (1975) 3 ACLR 256.

necessary. Both the summons, and resulting order if obtained, should be served on the plaintiff respondent. Bear in mind, also, that an application for security for costs will waive any objection that may be taken as to service of the writ.[22]

Affidavit Material

An application for security for costs should be supported by affidavit material evidencing prerequisites for the order and any factors relevant to discretionary arguments. An affidavit is, however, unnecessary where the facts upon which the application is based appear on the face of the process initiating the action, for example, where the plaintiff is resident outside the jurisdiction and that fact appears on the writ.[23] The affidavit should set out the substantive grounds and the factual basis of the application,[24] including any evidence in support of those facts.

Affidavits on information and belief are generally accepted in most jurisdictions provided the source of the information and the grounds of belief are stated in the affidavit.[25] Failure to state the grounds of the belief is not necessarily fatal to the success of the application.[26] The affidavit should be confined to material relevant to the application otherwise the court in its discretion may give directions disallowing any costs in respect of irrelevant evidence.[27] It will also be inappropriate for a court to evaluate material on the court file but not read in the application,[28] but it may be appropriate for the court to accept uncontradicted affidavits.[29] The steps taken or proposed to be taken and the estimated costs in relation to those steps should be justified.

The affidavit may include a detailed itemised estimate of the likely costs to be incurred[30] in the form of a:

(a) draft or skeleton bill of costs;[31]

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22 *Lhoneux, Limon & Co v Hong Kong and Shanghai Banking Corporation* (1886) 33 Ch D 446; *Smith, Bain v Bain* [1896] WN 88, (1896) 75 LT 46.

23 'Costs. Security for Costs' (1934) 78 *SJ* 92; failure to state an address.

24 RFC (1976) O 28, r 2 specifically provides that all material facts be deposed to in the affidavit including the stage which the proceedings have reached: *Huntley v Bulwer* (1838) 6 Dowl 633.

25 *Busk v Beetham* (1840) 2 Beav 537, 48 ER 1290; *Ainslie v Sim* (1853) 17 Beav 57, (1853) 22 LJ Ch 834; *Atherton v Jackson's Corio Meat Packing (1965) Pty Ltd* [1967] VR 850 at 853; *Cardwell v Baynes* (1854) 2 WR 525.

26 *Young v J L Young Manufacturing Co Ltd* [1900] 2 Ch 753; *Hardie Rubber Co Pty Ltd v General Tyre & Rubber Co* (1973) 47 ALJR 462 at 466.

27 *Thomas v Doughty* [1877] WN 51.

28 *Sportz Bagz Limited v Pepsi Cola Bottlers Limited* (High Court of New Zealand, Auckland Registry, Robertson J, CP 1957 of 1988, 9.12.88, unreported); *Medway v Doubledock Ltd* [1978] 1 WLR 710, [1978] 1 All ER 1261.

29 *Stewart v Shire of Portland* (1885) 7 ALT 98.

30 *J & M O'Brien Enterprises Pty Ltd v Shell Company of Australia Ltd* (1983) 70 FLR 261.

31 *T Sloyan & Sons (Builders) Ltd v Brothers of Christian Instruction* [1974] 3 All ER 715; [1975] Lloyd's Rep 183; *Watkins Ltd v Ranger Uranium Mines Pty Ltd* (1985) 35 NTR 27 at 30.

(b) cost assessor[32] or consultant's report; or
(c) solicitor's estimate.[33]

The estimate of costs may address the following issues:

(a) the expected length of the final hearing;[34]
(b) the extent of solicitors' preparation;[35]
(c) the extent of counsel's involvement,[36] including their number and experience;[37]
(d) the necessity for further interlocutory steps;[38]
(e) apportioning estimates of costs of the application and hearing;[39]
(f) comparisons which may be drawn with similar actions;[40] and
(g) the experience of the person giving the estimate.[41]

Examples of draft affidavits are available from various sources,[42] though the affidavit will of necessity have to be tailored to the specific circumstances of the case. In the event an estimate of likely costs is not provided or is the subject of contradictory affidavit material, courts are prepared to make their own estimates of costs[43] and may seek the assistance of court taxing officers, particularly in complex cases.[44]

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32 *Bruce Pie & Sons, Pty Ltd v R H Mainwaring, English and Peldan* [1985] 1 Qd R 401, 403; *M & B Rigging Pty Ltd v John Holland Constructions Pty Ltd* (Supreme Court of Queensland, Master White, No 481/90, 28.5.91, unreported, 5); SR Budd, AP Ryan, 'Security for Costs – A Practitioners Guide' (1990) *QLSJ* 215. *T Sloyan & Sons (Builders) Ltd v Brothers of Christian Instruction* [1944] 3 All ER 715, [1975] Lloyd's Rep 183; *Airlie Group Pty Limited v John Fairfax Group Pty Limited* (Federal Court of Australia, Sheppard J, G28 of 1991, 7.6.91, unreported).

33 *T Sloyan & Sons (Builders) Ltd v Brothers of Christian Instruction* [1944] 3 All ER 715; [1975] Lloyd's Rep 183; *Airlie Group Pty Limited v John Fairfax Group Pty Limited* (Federal Court of Australia, Sheppard J, G28 of 1991, 7.6.91, unreported).

34 Street, op cit 5030, 5166; *Labertouche Sands Pty Ltd v Moowinnybah Pastoral Co Pty Ltd* (Federal Court of Australia, Ryan J, No VG 91 of 1985, 25.2.87, unreported); *August Investments Pty Limited v Poseidon No Liability* [1971] 2 SASR 65. The number of witnesses is a relevant consideration.

35 Street, op cit 5030, 5166.

36 Street, op cit 5030, 5166.

37 Briefing leading counsel is a relevant consideration: *Sunday Times Newspaper Company Ltd v McIntosh* (1933) 33 SR (NSW) 371; *Labertouche Sands Pty Ltd v Moowinnybah Pastoral Co Pty Ltd* (Federal Court of Australia, Ryan J, No VG 91 of 1985, 25.2.87, unreported).

38 Street, op cit 5030, 5166. The expected length of discovery is a relevant consideration.

39 *Labertouche Sands Pty Ltd v Moowinnybah Pastoral Co Pty Ltd* (Federal Court of Australia, Ryan J, No VG 91 of 1985, 25.2.87, unreported).

40 *August Investments Pty Limited v Poseidon No Liability* [1971] 2 SASR 65.

41 *August Investments Pty Limited v Poseidon No Liability* [1971] 2 SASR 65.

42 Street, op cit 5166, 3174, 3175; J Delaney, *Security for Costs*, Law Book Company, Sydney, 1989, p 194. Illustration supporting affidavit: Sir Jack I H Jacob (ed), *5 Atkin's Encyclopaedia of Court Forms in Civil Proceedings*, 2nd ed, Butterworth, London, 1984 Form 84.

43 Neil J Williams, 'Security for costs against a Company' (1979) *LIJ* 577 citing *Sunday Times Newspaper Company Ltd v McIntosh* (1933) SR (NSW) 371, (1933) 50 WN (NSW) 155; *T Sloyan & Sons (Builders) Ltd v Brothers of Christian Instruction* [1974] 3 All ER 715, [1975] Lloyds Rep 183. Courts will have regard to all the circumstances of the case: *Ciappina v Ciappina* (1983) 70 FLR 287.

44 *Airlie Group Pty Limited v John Fairfax Group Pty Limited* (Federal Court of Australia, Sheppard J, G28 of 1991, 7.6.91, unreported).

On the issue of the costs of the application, the affidavit should make reference to demands for security for costs made prior to the application. The affidavit may depose to any facts relevant to the exercise of the discretion.

Evidential Onus

The onus rests with the applicant to establish the prerequisites for an order for security for costs whether based on inherent or statutory jurisdiction.[45] Once any prerequisite for jurisdiction is established, the discretion is alive and there is no burden, nor predisposition, one way or the other, in relation to the discretionary factors. In the case of an application based on the Corporations Law, the prerequisite threshold test, namely, that there is reason to believe that the corporation will be unable to pay the costs of a successful defence, will be required to be satisfied by the applicant. In the case of an application based on the rules of court the prerequisites vary with the basic requirements of the rule. For example, RSC (NSW) (1970) Pt 53, r 2 contains five alternative prerequisites, any one of which will enliven the jurisdiction to order security for costs:

(a) that a plaintiff is ordinarily resident outside the state;
(b) that a plaintiff is suing, not for his own benefit, but for the benefit of some other person and that there is reason to believe that the plaintiff will be unable to pay the costs of the defendant if ordered to do so;
(c) that the address of a plaintiff is not stated or is misstated in his originating process;
(d) that a plaintiff has changed his address after the commencement of the proceedings with a view to avoiding the consequences of the proceedings; or
(e) that there is reason to believe that a plaintiff being a body corporate will be unable to pay the costs of the defendant if ordered to do so.

(a) Residence Out of the Jurisdiction

In the absence of the respondent making an admission in the pleadings or elsewhere that they are resident outside the jurisdiction, the fact that the respondent is resident out of the jurisdiction, and the circumstances of the respondent's absence, will be required to be deposed to in the applicant's supporting affidavit.[46] The applicant's affidavit material should depose to the fact that the respondent has gone to settle abroad and is not absent for a temporary purpose. Material relevant to the affidavit would include:

45 A discussion of the burden of proof under the Ontario rules of civil procedure r 56 may be found in L A Vandor, 'Security for Costs: Stopping Plaintiffs in their Tracks' (1988) *The Advocates Society Journal* 26.

46 *Green v Charnock* (1791) 3 Bro CC 371, 29 ER 589, (1791) 2 Cox 284, (1791) 1 Ves 152, 34 ER 731, (1791) 1 Ves Jun 396, 30 ER 404; *Hoby v Hitchcock* (1800) 5 Ves 699, 31 ER 812; *Blakeney v Dufaur* (1852) 22 LJ Ch 389.

(a) the amount of time the respondents spent in the jurisdiction;
(b) the presence of the respondent's close relations within the jurisdiction; and
(c) the extent of the respondent's assets within and outside the jurisdiction.

The applicant's affidavit material should depose all searches made to identify the respondent's property, the nature of any property located and the extent of encumbrances on that property.[47] In *Jelic v Co-operative Press, Limited*[48] an affidavit deposing that the respondent had no intention of going abroad, there being no present probability of deportation, was held sufficient to defeat an allegation that the respondent was ordinarily resident outside the jurisdiction. The court should be informed if the respondent is absent from the jurisdiction at the time of the application as a breach of natural justice may arise if the respondent is not aware of service of the application.[49]

(b) Nominal Respondents

The applicant should set out all facts, known or believed, stating the source of the information and the basis of the belief, indicating that the action is being brought for the benefit of another, not for the benefit of the respondent, and that the nominal respondent is bereft of assets or insolvent. Any documentation such as a deed,[50] charge[51] or an assignment[52] supporting the applicant's assertions should be exhibited to the affidavit.

(c) & (d) Misdescription of the Respondent's Address

Misdescription may arise in three situations, namely, where the respondent:

(a) fails to state an address on the initiating process;
(b) states an incorrect address on the initiating process; or
(c) changes address after the commencement of proceedings with an intention to evade the consequences of the litigation.

In each case the affidavit need only detail the facts upon which the allegation is based. In relation to stating an incorrect address the affidavit should depose to the attempts made at locating the respondent at the address given. Each change of address should be deposed to, it does not appear necessary to delve into the reasons for the changes. An inference that the reason is to evade potential execution is sufficient. The affidavit should not depose to the absence of a permanent residence on the part

47 *Rismondo v Rismondo* (1885) 11 VLR 541.
48 [1947] 2 All ER 767, (1948) 64 TLR 16.
49 *Lovell v WA Police Union* (Supreme Court of Western Australia, Master NG, No 1093 of 1990, 12.4.91, unreported).
50 *Lloyd v Hathern Station Brick Company Limited* (1901) 85 LT 158; *cf Greener v E Kahn & Co (Limited)* [1906] 2 KB 374.
51 *Semler v Murphy* [1968] 1 Ch 183.
52 *Semler v Murphy* [1968] 1 Ch 183; *Lloyd v Hathern Station Brick Company Limited* (1901) 85 LT 158; *The 'Lake Megantic'* (1877) 36 LT 183.

of the respondent, since this is not a sufficient ground for ordering security for costs.[53]

(e) Corporations

Before a court will consider exercising its discretion to order a respondent corporation to give security for costs the applicant must satisfy the threshold test that there is reason to believe that the corporation will be unable to pay the costs of a successful defence.[54] Evidence in support of the application, deposed to in the affidavit, may include: the results of corporations[55] and titles office[56] searches, accounting records, balance sheets,[57] trading statements, books of account,[58] correspondence showing the absence of trading or assets, annual returns,[59] tax returns,[60] debentures and charges,[61] calculated net deficiency of assets (notice of appointment of a liquidator),[62] all of which may cast doubt on the value of the corporation's assets and its ability to pay the costs of a successful defence. The fact that a company has gone into liquidation is prima facie evidence satisfying the threshold test,[63] as is the fact that the company has ceased to carry on business.[64]

Exempt proprietary companies present serious evidentiary problems for applicants for security for costs orders. Exempt proprietary companies may appoint auditors, but they are not required to lodge their accounts with the corporate affairs office nor are their accounts available for public inspection. In these circumstances the applicant may be able to satisfy the threshold test using their opponent's affidavit material. In

53 *Chellew v Brown* [1923] 2 KB 844; *Brooks v Wilkins* (1927) 71 SJ 520, [1927] WN 136.

54 *Ironite Pavings Ltd v Harrs* (1914) 31 WN (NSW) 60; *Labor Daily Ltd v Keller* (1939) 56 WN (NSW) 113; *Churchills Ltd v Pilcher* (1940) 57 WN (NSW) 109; *Pacific Acceptance Corporation Ltd v Forsyth trading as Flack & Flack (No 2)* (1967) 85 WN (Pt 1) (NSW) 720, [1967] 2 NSWR 402. See also *Marrick Productions Pty Ltd v Traders of Australia Pty Ltd* [1959] QLR 11.

55 S Bickford-Smith, C Davies, 'Security for costs and limited Companies' (1987) *Construction Industry Law Letter* 1.

56 *Anineim Pty Ltd v Australia Post and Telecom Credit Union (Qld) Ltd* (Supreme Court of Queensland, Master Weld, No 4735 of 1980, 27.5.81, unreported).

57 *Sydmar Pty Ltd v Statewise Developments Pty Ltd* (1987) 5 ACLC 480, (1987) 11 ACLR 616.

58 *J S Smith Pty Ltd v ACI Operations Pty Ltd* [1972] 1 NSWLR 253.

59 *Amalgamated Mining Services Pty Ltd v Warman International Ltd* (1988) 19 FCR 324; *Bryan E Fencott and Associates Pty Ltd v Eretta Pty Ltd* (1987) 16 FCR 497; *J & M O'Brien Pty Ltd v Shell Company of Australia Ltd* (1983) 7 ACLR 790, (1983) 70 FLR 261.

60 *J & M O'Brien v Shell Company of Australia Ltd* (1983) 7 ACLR 790, (1983) 70 FLR 261.

61 *Scanno Pty Ltd v Saab-Scania Aust Pty Ltd* (Federal Court of Australia, Woodward J, No VG 117 of 1983, 23.12.83, unreported).

62 *Victorian Mortgage & Deposit Bank Limited v Australasian Financial Agency and Guarantee Company and Lucas* (1892) 18 VLR 754, (1892) 14 ALT 180.

63 *Crystal Theatres Ltd v Fuss* (1940) 57 WN (NSW) 107; *Rogers Limited v MacPherson & Rogers Limited* [1904] QWN 32; *Northampton Coal, Iron & Wagon Company v Midland Waggon Company* (1878) 7 Ch D 500; *Pure Spirit Company v Fowler* (1880) 25 QBD 235.

64 *Lal Lal Iron Company No Liability v Mulligan* (1885) 11 VLR 58.

Molnar Engineering Pty Ltd v Herald & Weekly Times Ltd and E J Burns[65] the plaintiff was an exempt proprietary company whose managing director deposed to a serious cash flow problem, but had failed to clarify Molnar's net asset position. Northrop J held that the threshold test had been satisfied. Similar problems arise with applications for security for costs against corporate trading trusts.

Opposing the Application

When served with an application for security for costs the respondent has three choices – pay the amount of security, negotiate an amount, or contest the application. The first two choices have the following advantages for the respondent:

1 the respondent's true financial position does not need to be fully disclosed;
2 payment of the specified or negotiated sum may prove less expensive than the potential amount ordered by the court and the costs of the application or any appeal from that application;
3 the form which the security may take and the timing of payment may be agreed rather than imposed by the court; and
4 payment reveals tactical strength on the part of the respondent, that is, confidence in the cause of action.

A respondent through negotiation may be able to delay the requirement for security. The parties may agree on security up to a specified point leaving the applicant with a right to make a further application for security at a later date. The respondent may avoid an extensive court order for security including the entire costs of the action. Should the applicant's further application be made after all interlocutory steps are completed, all parties and the court will be in a better position to evaluate the strengths and weaknesses of their opponent's case. At this stage the pleadings would have clarified the issues and much speculation would have been reviewed. This clarification will assist a respondent with a novel claim based on complex facts. Summary proceedings are generally not suited to claims of this nature as the merits of the claim are not investigated in detail and a court is limited to affidavit material, cross examination not being usually permitted. In negotiating any agreement the motive of the applicant defendant should be evaluated as this may be relevant to the bargaining position of the parties. Tactical motives may include increasing costs to exert pressure for settlement, fishing for evidence to support or refute a claim, or attempting to ascertain the financial position of the plaintiff respondent. The third choice open to the respondent is to contest the application on the basis that the applicant has failed to establish the prerequisite for jurisdiction, or in the alternative, that the discretion should not be exercised in all the circumstances of the case. The contents of the supporting affidavit necessarily varies with the ground of the application

65 (Federal Court of Australia J, Northrop J, V No G209 of 1982, 22.2.85, unreported).

and points in issue, but vague affidavits may carry adverse inferences.[66] Security is not ordered if the applicant admits the claim,[67] or if the respondent has an unsatisfied judgment against the applicant,[68] or the applicant has control of the respondent's money.[69]

Defences Based on the Prerequisites for Jurisdiction

(a) Residence Out of the Jurisdiction

The respondent may be able to establish any of the following to counter the application for security for costs:

(a) the respondent was absent from the jurisdiction at the time of the application and was unaware of service resulting in a breach of natural justice;[70]
(b) a statutory provision enabling automatic registration and reciprocal enforcement of a judgment exists where the respondent ordinarily resides;
(c) the respondent is ordinarily resident within the jurisdiction; or
(d) the respondent has assets of a permanent nature of sufficient value to defray the potential costs of the applicant within the jurisdiction which can be subject to the court's process.

(b) Nominal Respondents

The respondent, when responding to an allegation that he is a nominal respondent, may depose that he falls within one of the exceptions to the general rule; for example, that the respondent has a real interest in the result of the litigation[71] or the respondent is suing in a representative capacity; that is, as administrator, trustee, executor, liquidator, receiver or representative of a person under a disability.

(c) & (d) Misdescription of the Respondent's Address

The respondent when responding to an allegation that he has misdescribed his address may be able to explain the reason for the

66 In the face of an unparticularised vague affidavit that assets exceeded liabilities such excess alleged to provide sufficient security for the defendant's costs, Hood J in *J Earle Hermann Limited v Linden* [1914] VLR 615 could find no reason for departing from the view of Higinbotham CJ in *Victorian Mortgage & Deposit Bank Limited v Australasian Financial Agency and Guarantee Company and Lucas* (1892) 18 VLR 754 at 758 that even if there were shown to be assets, it did not follow that those assets would be available for execution.

67 *De St Martin v Davis & Co* [1884] WN 86; *Mapleson v Masini* (1879) 5 QBD 144 at 147.

68 *Bristowe v Needham* (1842) 4 Man & G906; 134 ER 372; *Re Contract and Agency Corporation (Limited)* (1887) 57 LJ Ch 5; *La Banque des Traeaux Publiques v Wallis* (1814) WN 61.

69 *Duffy v Joyce and McMahon* (1890) 25 LR Ir 42; *Crozat v Brogden* [1894] 2 QB 30, 36.

70 *Lovell v WA Police Union* (Supreme Court of Western Australia, Master NG, No 1093 of 1990, 12.4.91, unreported).

71 A financial interest or benefit derived by the plaintiff in the subject matter of the proceedings: *Semler v Murphy* [1968] 1 Ch 183 at 188; cf *Andrews v Caltex Oil (Australia) Pty Ltd* (1981) 60 FLR 261, (1982) 40 ALR 305; *Co-Operative Farmers' and Graziers' Direct Meat Supply Ltd v Smart* [1977] VR 386 at 391.

change of address and discount any suggestion that he intended to frustrate potential execution. The misdescription may have occurred innocently or from mere error.[72] The respondent may even establish that he has no fixed place of abode.[73]

(e) Corporations

The respondent may counter the applicant's evidence that there is reason to believe that the respondent corporation will be unable to pay the costs of a successful defence, by proving for example that:

1 the respondent's business is expanding, has increased turnover and prospects of increased injections of capital.[74]
2 there are significant assets available both within and outside the jurisdiction available for execution.

In *Wrenfeld Pty Ltd t/as Compudraft Australia v GD Finch*[75] Kearney J suggested that: 'A plaintiff corporation seeking to resist an application for security should place before the Court a full and frank statement of its assets and liabilities as well as those of its shareholders'.

Special considerations arise where the corporation is a corporate trading trustee distributing profits to unknown beneficiaries and preventing direct execution by creditors.[76] It may be necessary to disclose a copy of the trust deed indicating the usual right of indemnity from trust assets. The trust assets themselves may need to be identified and accompanied by recent valuations. Where the capital of the corporate litigant is small, the directors must consider making disclosure of their own ability and/or willingness to personally meet an order for costs.[77] In some cases the entity will not be a bare trustee[78] whose solvency depends on rights of subrogation but an entity having significant equity and strong cash flow.[79]

Discretionary Factors

The making of an order for security for costs represents the exercise of an unfettered discretion to be exercised judicially having regard to all the

72 *Simpson v Burton* (1939) 8 LJ Ch 328.
73 *Chellew v Brown* [1923] 2 KB 844.
74 *Kevlacat Pty Ltd v Trailcraft Marine Pty Ltd* (Federal Court of Australia, French J, WAG 120 of 1987, 18.11.87, unreported).
75 (Supreme Court of Northern Territory, Kearney J, No 631 of 1990, 23.7.91, unreported, 5).
76 *Scanno Pty Ltd v Saab-Scania Aust Pty Ltd* (Federal Court of Australia, Woodward J, No VG 117 of 1983, 23.12.83, unreported).
77 *See Drumdurno Pty Ltd v Braham* (1982) 42 ALR 563 regarding failure to disclose personal asset position of directors and shareholders.
78 *Chester & Fein Property Developments Pty Ltd v Candam Investments Pty Ltd* (1985) 9 FCR 419.
79 *Caboolture Park Shopping Centre Pty Ltd v White Industries (Qld) Pty Limited* (Federal Court of Australia, Ryan J, No G198 of 1986, 4.5.88, unreported). In this case insufficient evidence could be established of any insolvency existing within an integrated financial group.

circumstances of the case[80] in order to achieve justice between litigants.[81] A balance needs to be struck between the interests of an applicant in securing their position against the prospect of stifling the respondent's claim. While no rules can be formulated in advance by any judge as to how the discretion shall be exercised, in any given case, numerous categories of discretionary factors have been identified by the courts.[82]

The discretionary factors relevant to applications for security for costs based on inherent or statutory jurisdiction involving corporate or natural persons,[83] include, but are by no means limited to the following:

(a) the means of persons who stand behind the litigation;
(b) the prospects of success or merits of the litigation;
(c) the bona fides of the litigation;
(d) whether the respondent is an impecunious company;
(e) whether the respondent's impecuniousity is attributable to the applicant's conduct;
(f) whether the respondent is the party attacked and is in essence occupying the position of an applicant;
(g) whether an order for security for costs would be oppressive;
(h) whether an order for security for costs will stifle the litigation;
(i) whether a pre-existing special relationship exists;
(j) whether the litigation will involve a matter of public importance;
(k) whether there has been an admission or payment into court;
(l) whether there has been delay in bringing the application;
(m) costs of enforcement procedures;
(n) whether a loss-bearing, loss sharing entity is involved;
(o) dissipation of assets; and
(p) costs.

The respondent may be able to establish, by way of example, that there are no persons with sufficient means standing behind the litigation who have not brought their assets into play and that the litigation is bona fide with considerable prospects of success. It is oppressive to require security for costs in circumstances where the litigation will be stifled, especially where the respondent's impecuniosity is due to the applicant's conduct. To require security for costs would be a denial of justice. The respondent may be able to establish that a pre-existing special relationship exists with

80 *John Arnold's Surf Shop Pty Ltd (in liq) v Heller Factors Pty Ltd and Allert* (1979) 22 SASR 20; *Remm Constructions (SA) Pty Ltd v Wallbridge & Gilbert Pty Ltd* (Supreme Court of South Australia, Mulligan J, No 911 of 1990, 28.10.91, unreported) *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* [1973] 1 QB 609, [1973] 2 All ER 273.

81 *McIntyre v Petitt* (Supreme Court of New South Wales, Wood J, No CLD 144 of 1984, 10.6.86, unreported); *Barton, Thomas v Minister for Foreign Affairs* (1984) 2 FCR 463; *Lucas v Yorke* (1985) 158 CLR 661; *King v Commercial Bank of Australia Limited* (1920) 28 CLR 289; *Alginates (Australia) Pty Ltd v Thomson & Carroll Pty Ltd* [1970] VR 570. The requirement that the discretion be exercised judicially has it foundation in the speech of Lord Halsbury LC in *Sharp v Wakefield* [1891] AC 173 at 179.

82 Refer *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* [1973] 1 QB 609; *Bryan E Fencott and Associates Pty Ltd v Eretta Pty Ltd* (1987) 16 FCR 497; *Sydmar Pty Ltd v Statewise Developments Pty Ltd* (1987) 5 ACLC 480 at 484, (1987) 11 ACLR 616 at 626.

83 See *Bryan E Fencott and Associates Pty Ltd v Eretta Pty Ltd* (1987) 16 FCR 497; *Motest Pty Ltd v Burns Corporation Pty Ltd* (Supreme Court of Western Australia, Acting Master Adams, No 1063 of 1990, 26.3.91, unreported).

the applicant, there have been no admissions or payments into court, the applicant has been dilatory in bringing the application and the respondent has been seriously prejudiced by the applicant's conduct, or they are really the party attacked and are in substance occupying the position of an applicant.

Silence

While inferences may be drawn from established facts, the silence or failure to give evidence by a party cannot fill the place of actual evidence on an issue, but it may serve to resolve a doubt or ambiguity, especially where the facts are peculiarly within the knowledge of the silent party.[84] It is risky for a respondent to adopt the course of not placing before the court any affidavit material in response to an application for security for costs;[85] the better approach, in the absence of a defence, is to attempt a negotiated solution. *Hamock Engineering Pty Ltd (Receiver and Manager Appointed) v Krupp (Australia) Pty Ltd*[86] provides an example of a case where silence was relevant in the context of a security for costs application. King J held[87] that the fact that a receiver had been appointed to a company was evidence on which a tribunal of fact was entitled to find, even though not obliged to find, that the company had insufficient assets to pay all its debts. In view of the claimant's silence on this issue his Honour was able to draw the inference that there was reason to believe that the company was unable to pay the costs of a successful defence within the meaning of the Companies Code 1981 s 533.[88] The fact of pending criminal proceedings decreases the weight or significance to be attached to the failure to give evidence.[89]

Costs

Where an applicant is successful the costs of an application or further application are usually reserved to the trial[90] or declared costs in the

84 *Tozer Kemsley & Millbourne (A'asian) Proprietary Limited v Colliers Interstate Transport Service Limited* (1956) 94 CLR 384 at 403; *Edwards v Minister Administering Environmental Planning and Assessment Act* (1985) 55 LGRA 171.

85 Illustrations of where this tactic failed: *Southern Cross Exploration NL v Fire and All Risks Insurance Co Ltd* (1985) 1 NSWLR 114 at 117, (1986) 4 NSWLR 491; *Chester & Fein Property Developments Pty Ltd v Candam Investments Pty Ltd* (1985) 9 FCR 419; *Kewross Constructions Pty Ltd v Onslow Park Engineering Pty Ltd* (Supreme Court of Western Australia, Master Adams, No 8986/91, 7.8.91, unreported).

86 (Supreme Court of Victoria, King J, 7.7.86, unreported).

87 Agreed with Gross DCJ in *H G Palmer Pty Ltd v Hill* (1976) 1 DCR (NSW) 250.

88 *Aspendale Pastoral Co Pty Ltd v W J Drever Pty Ltd* (1983) 7 ACLR 937 at 941 where Beach J thought it very significant that the plaintiff had failed to lodge documents with the Commissioner of Corporate Affairs to counter substantial evidence of impecuniosity.

89 *Sterling Industries Limited v Nim Services Pty Limited* (Federal Court of Australia, Shepherd J, No G281 of 1984, 23.4.86, unreported).

90 *Caruso Australia Pty Ltd v Portec (Australia) Pty Ltd* (1984) 1 FCR 311.

cause,[91] rather than following the event.[92] The trial judge once having determined the result of the action is at that time in a better position to determine whether the application for security for costs was necessary. In the event that an applicant is unsuccessful the costs of an application or further application may be awarded to the respondent. Where the application is evenly balanced and no party was entirely successful no order for costs will be made.

Conclusion

In making an application for security for costs counsel should ensure that a prior demand has been made and that all avenues to avoid the necessity of an application have been explored. In the event an application is brought counsel representing the applicant should establish the source of the jurisdiction upon which the application is based, proceed to outline relevant discretionary arguments, and conclude by stating the amount and form in which security for costs is sought. Affidavit material in support of the application should depose all relevant facts outlined in counsel's submissions. The applicant has the evidential onus of establishing the prerequisites for jurisdiction, which once satisfied enliven the court's discretion whether or not to order security for costs. There is no burden, nor predisposition, one way or the other in relation to the discretionary factors whether or not to order security for costs.

91 *Pacific Acceptance Corporation Ltd v Forsyth Trading as Flack & Flack (No 2)* [1967] 2 NSWR 402 at 409; S R Budd, A P Ryan, 'Security for Costs – A Practitioner's Guide' (1990) 20 *(3) QLSJ* 215 at 219; costs in cause: *Coote v Howlett* (1887) 3 WN (NSW) 135; *Lal Lal Iron Company No Liability v Mulligan* (1885) 11 VLR 58; *Specialised Building Materials Pty Ltd v EU Occusted Pty Ltd* (1981) 58 FLR 270, though Kelly J was prepared to hear argument on the point, *Kaldover Pty Ltd v C & J Maher* (Federal Court of Australia, Pincus J, Qld G76 of 1987, 9.3.88, unreported); *J S Smith Pty Ltd v ACI Operations Pty Ltd* [1972] 1 NSWLR 253.

92 *Collignon Developments Pty Ltd v Wurth* (1975) 1 ACLR 314 at 316; *Helliger v Marcus* (1901) 18 WN (NSW) 253; *Michael Bickley Pty Ltd v Westinghouse Electric Australasia Ltd* (1983) 1 ACLC 967 at 971; *W & K No 1 Pty Limited v Great Outdoors Company Limited* (Federal Court of Australia, Beaumont J, No G148 of 1983, 26.7.83, unreported).