THE LAW SOCIETY
OF NEW SOUTH WALES

COSTS GUIDE 7TH EDITION

CHAPTER 11

SECURITY FOR COSTS, OFFERS OF COMPROMISE, COSTS ON DISCONTINUANCE

The Uniform Law is a suite of legislation including:

Legal Profession Uniform Law (NSW) ["LPUL"]

Legal Profession Uniform Law Application Act 2014 ["LPULAA"]

Legal Profession Uniform Law Application Regulation 2015 ["LPULAR"]

Legal Profession Uniform General Rules 2015 ["LPUGR"]

Prior legislation referred to:

Legal Profession Act 2004 ["LPA 2004"]

Legal Profession Regulation 2005 ["LPR"]

The Uniform Law applies for instructions first received from your client on or after 1 July 2015 (LPUL Schedule 4 clause 18).

The Uniform Law applies for proceedings commenced on or after 1 July 2015 (LPULAR clause 59).

11.1 SECURITY FOR COSTS

11.1.1 INTRODUCTION

Courts are given wide discretion to order security for costs on the application of a defendant/respondent/cross-respondent after considering all the circumstances of a particular case. In *King v Commercial Bank of Aust* (1920) 28 CLR 289; [1920] HCA 62 at 292, Rich J said, with respect to section 35 of the *High Court Procedure Act*:

> "No rules can be formulated in advance by any Judge as to how the discretion shall be exercised. It depends entirely on the circumstances of each particular case."

While similar general principles apply for granting an order for security, each jurisdiction has its own discrete rules for failure to provide security. For example, the Supreme Court of Victoria may dismiss the proceedings (rule 62.04 of the *Supreme Court (General Civil Procedure) Rules 2005 (Vic)*).

The court has three distinct sources of power to order a plaintiff to provide security for the defendant's costs, which are:

- its inherent power to stay proceedings to ensure the proper and effective administration of justice
- the rules of the court
- section 1335 of the *Corporations Act 2001* (Cth).

This chapter will concentrate on the NSW and federal jurisdictions:

- In NSW, the Uniform Civil Procedure Rules 2005 ("UCPR") provide that the proceedings will be stayed until security is given (rule 42.21(1) of the UCPR), and if the plaintiff fails to provide security, the proceedings may be dismissed (rule 42.21(3) of the UCPR)
- The Federal Court Rules 2011 ("FCR") provide that the proceedings may be stayed or dismissed (rule 19.01(1))
- The *Federal Court of Australia Act 1976* (Cth) ("FCA") provides that the proceedings may be dismissed if security is not given (s. 56(4)).

A key case considering an application to dismiss the proceedings upon non-compliance with a security for costs order is *Idoport Pty Ltd v National Australia Bank Ltd* [2002] NSWSC 18 (upheld on appeal at [2002] NSWCA 271). See also Porter v Gordian Runoff Ltd (No. 3) [2005] NSWCA 377 in the appellate context.

This chapter provides guidance on:

- security for costs
- offers of compromise
- costs on discontinuance.

11.1.2 PRINCIPLES FOR DETERMINING WHEN SECURITY WILL BE ORDERED

Under rule 42.21 of the UCPR, the court may, but need not, order security for costs if:

- a plaintiff is ordinarily resident outside Australia
- the address of a plaintiff is not stated or is misstated in their originating process, and there is reason to believe that the failure to state an address, or the misstatement of the address, was made with the intention to deceive
- after the commencement of proceedings, the plaintiff has changed addresses, and there is reason to believe that the change was made with a view to avoiding the consequences of the proceedings
- the plaintiff is a corporation and there is reason to believe that it will be unable to pay the costs of the defendant if ordered to do so (see, for example, *KP Cable Investments Pty Ltd v Meltglow Pty Ltd* (1995) 56 FCR 189; [1995] FCA 1093)
- the plaintiff is suing for the benefit of someone else and there is reason to believe that they will be unable to pay the costs of the defendant if ordered to do so
- there is reason to believe the plaintiff has divested assets with the intention of avoiding the consequences of the proceedings.

Under rule 19.01 of the FCR, the court may order security in any case but, in deciding whether to do so, the court may consider:

- whether there is reason to believe that the applicant will be unable to pay the respondent's costs if so ordered
- whether the applicant is ordinarily resident outside Australia
- whether the applicant is suing for someone else's benefit
- whether the applicant is impecunious
- any other relevant matter.

In *KP Cable Investments Pty Ltd v Meltglow Pty Ltd*, Beazley J (as Her Honour then was) set out what she described as well-established guidelines, which the court typically takes into account in determining any such application. The guidelines are:

- that such an application should be brought promptly
- that the strength and bona fides of the applicant's case should be considered
- whether the applicant's impecuniosity was caused by the respondent's conduct, which is the subject of the claim
- whether the respondent's application for security is oppressive, in the sense that it is being used merely to deny an impecunious applicant a right to litigate. (See also *Singer v Berghouse* (1993) 114 ALR 521; [1993] HCA 35; *Cowell v Taylor* (1885) 31 Ch D34, 38; *Chen v Keddie* [2009] NSWSC 762; *Fiduciary Limited v Morningstar Research Pty Ltd* (2004) 208 ALR 564; [2004] NSWSC 664)
- in the case of a company, whether any person is standing behind the company who is likely to benefit from the litigation, and who is willing to provide the necessary security. If so, whether that person has offered any personal undertaking to be liable for the costs, and if so, the form of any such undertaking
- that security will only ordinarily be ordered against a party that is in substance the plaintiff, and an order ought not to be made against parties that are defending themselves and thus forced to litigate.

See rule 42.21(1A) of the UCPR for a full list of factors the court will take into account in considering an application for security for costs.

When the plaintiff is a natural person, the general rule is that poverty is not itself sufficient to justify ordering security: *Cowell v Taylor* (1885) 31 Ch D 34 at 38 (see rule. 42.21(1B) of the UCPR).

Section 1335(1) of the Corporations Act represents a departure from the common law rule that the poverty of a plaintiff should not become a bar to litigation. It provides:

> "Where a corporation is a plaintiff in any action or other legal proceeding, the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the corporation will be unable to pay the costs of the defendant if successful in his, her or its defence, require sufficient security to be given for those costs and stay all proceedings until the security is given."

A foreign corporation or a plaintiff resident outside the jurisdiction, with no assets within the jurisdiction, is likelyto face great difficulty in avoiding an order for security for costs (see PS Chellaram & Co Limited v China Ocean Shipping Co (1991) 102 ALR 321; [1991] HCA 36).

11.1.3 AMOUNT AND APPLICATION OF SECURITY

The court does not set out to indemnify a defendant against costs. It is up to the defendant to provide evidence to the court as to the costs and disbursements to be incurred in preparing the action for hearing (and may include the costs for the trial period), so that the court can determine a reasonable amount to fix for security.

Where the plaintiff is resident overseas, and that is the only reason to require security, the defendant may only be able to obtain (by way of security) the costs of enforcing any judgment in the place where the plaintiff resides.

Security is to be given on the terms directed by the court (rule 42.21(2) of the UCPR, rule 19.01(1)(a) of the FCR and s. 56(2) of the FCA), but in practice, is generally payment of a sum into court or into a solicitor's trust account within a stipulated time period.

A party can reapply to the court for additional security in circumstances where the original order for security was made on a limited basis; for example, costs up to a certain stage of the proceedings. Security may extend to both future costs and costs already incurred (Gordon J in *Norcast S.ar.L v Bradken Limited & Ors* [2012] FCA 765).

11.1.4 APPEALS

An order for security for the costs of proceedings in the Court of Appeal may be made in special circumstances, such as:

- when an appeal involves an apparent abuse of process
- when an appeal is manifestly groundless
- when there is a risk the appeal will involve unnecessary costs
- when there has been great delay in prosecuting the appeal
- when the appellant is a foreigner with few resources in Australia or elsewhere, whose general impecuniosity is of his own making, but who has been able to fund legal services to conduct litigation.

See rules 50.8 and 51.50 of the UCPR (Mazzei v Industrial Relations Commission of New South Wales (2000) 97 IR 457; [2000] NSWCA 104).

An order for security for the costs of an appeal proceeding in the Federal Court may be made on similar grounds to rule 19.01 of the FCR (see rule 36.01 of the FCR). See *Equity Access Ltd v Westpac Banking Corp* (1989) ATPR 40972 for the criteria to be considered by the court in granting any order for security.

11.2 OFFERS OF COMPROMISE

11.2.1 OFFERS OF COMPROMISE IN NSW AND FEDERAL JURISDICTIONS

Be careful to follow the rules precisely if making an offer of compromise.

NSW amended the rules (effective 7 June 2013) relating to offers of compromise under the Uniform Civil Procedure Rules (Amendment No 59) (NSW) 2013. The amendments provide that an offer of compromise must not include an amount for costs and is not to be expressed to be inclusive of costs (see rule 20.26(2)(c) of the UCPR). The rules enshrine the effect of remaining silent about costs.

In one exception to the above, an offer may propose (under rule 20.26(3) of the UCPR):

- a judgment in favour of the defendant with no order as to costs or an order that the defendant will pay the plaintiff a specified sum in respect of the plaintiff's costs
- that the costs as agreed or assessed up to the time the offer was made will be paid by the offeror
- that the costs as agreed or assessed on an ordinary basis or on an indemnity basis will be met out of a specified estate, notional estate or fund.

Therefore, from 7 June 2013, offers of compromise can, in certain circumstances, use words to the effect of "plus costs as agreed or assessed".

Offers of compromise made prior to 7 June 2013 are subject to the UCPR that was current prior to that date. The Court of Appeal in *Whitney v Dream Developments Pty Limited* (2013) 84 NSWLR 311; [2013] NSWCA 188 confirmed that *Old v McInnes and Hodgkinson* [2011] NSWCA 410 was correctly decided. The rule prior to 7 June 2013 was that an offer of compromise expressed to be "plus costs agreed or assessed" was not valid, and could not be treated as a Calderbank offer.

See Part 42, Division 3 of the UCPR for the cost consequences of offers of compromise.

Offers of compromise in the federal jurisdiction are governed pursuant to:

- the Federal Court of Australia – Part 25 of the Federal Court Rules 2011
- the Family Court of Australia – Part 10.1 of the Family Court Rules 2004.

The principles of Calderbank are available in Australian jurisdictions, even where statutory offers of compromise are available. Generally, where a statutory offer of compromise is available, that option is preferable to a Calderbank letter because it is easier to obtain a costs order using an offer of compromise.

11.3 DISCONTINUANCE

11.3.1 INTRODUCTION

What costs, if any, apply from discontinuance?

11.3.2 WHEN AND HOW A PARTY MAY DISCONTINUE

Under rule 12.1 of the UCPR, a party may only discontinue with the consent of all parties involved or with the leave of the court. The notice of discontinuance must bear a certificate to the effect that the discontinuing party does not represent any other person. Unless it is filed with the leave of the court, it must be accompanied by a notice (which is normally endorsed on the notice of discontinuance) recording each party's consent to the discontinuance. If the discontinuance is on terms, for example, such as costs, those terms must be incorporated in the notice. If the originating process has not been served, the plaintiff must also file an affidavit to that effect.

Similar principles apply under the FCR, except that a party has a right to file a notice of discontinuance up until the first return date fixed on the originating application or, if the case proceeds on pleadings, up until the time pleadings are closed (rule. 26.12 of the FCR). If the discontinuing party represents another party, the discontinuing party may only discontinue with the leave of the court. Similarly, a winding-up application may only be discontinued with the leave of the court (rule. 26.12(5) of the FCR).

11.3.3 WHO PAYS THE COSTS FOR DISCONTINUANCE?

Normally the party that discontinues must pay the other party's costs, unless the parties agree otherwise, or the discontinuance is with the leave of the court, or the court makes some other order in relation to costs (rule 42.19 of the UCPR; rule 26.12(7) of the FCR; *Inground Constructions Pty Ltd v FCT* (1994) ATR 513).

The court may make a different costs order when:

- the discontinuance is a consequence of succeeding in relation to the claim
- the costs have been significantly increased by the unreasonable conduct of the opposing party
- both parties have acted reasonably but the proceedings have been rendered futile by circumstances beyond their control.

Another exception is found in the case of an appeal to the District Court under section 91 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW). In this case, the plaintiff was not liable to pay the costs of discontinuance, unless there were special circumstances justifying such an order (rule 42.19(3) of the UCPR).

11.3.4 EXERCISE OF THE COURT'S DISCRETION

A number of cases have considered the issue of costs, where the leave of the court has been sought to discontinue and the proceedings have been resolved without a hearing on the merits. The starting point is often taken to be the judgment of McHugh J in *Re The Minister for Immigration and Ethnic Affairs of the Commonwealth of Australia: Ex Parte Lai Qin* (1997) 186 CLR 622; [1997] HCA 6.

In this case, His Honour pointed out:

> "The power to order costs is a discretionary power. Ordinarily, the power is exercised after a hearing on the merits and as a general rule (whether under the general law or by statute) the successful party is entitled to his or her costs ... When there has been no hearing on the merits, however, a Court is necessarily deprived of the factor that usually determines whether or how it will make a costs order."

His Honour continued:

> "The Court cannot [(assess costs where there has been no hearing on the merits by trying] a hypothetical action."

His Honour continued:

> "In some cases ... the Court may be able to conclude that one of the parties has acted so unreasonably that the other party should obtain the costs of the action."

His Honour continued:

> "In some cases a judge may feel confident that, although both parties have acted reasonably, one party was almost certain to have succeeded if the matter had been fully tried."

By way of caution, His Honour noted that such cases were likely to be rare.

His Honour also stated that if the parties had both acted reasonably in commencing and defending the proceedings, and in conducting them until resolution, the proper exercise of the costs discretion would usually mean that the court would make no order as to the costs of the proceedings.

In *Chapman v Luminis Pty Ltd* [2003] FCAFC 162, the Full Court of the Federal Court of Australia, repeating the proposition that there should not be something in the nature of a hypothetical trial, noted that sometimes the court could make an order for costs without engaging in that exercise. The court instanced two ways in which that could happen: one involved an examination of the reasonableness of the conduct of the parties and the other involved the court being confident that one party was almost certain to have succeeded if a matter had been fully tried (see also Owner's Strata Plan 63094 v Council of the City of Sydney (2009) 165 LGERA 17; [2009] NSWSC 141; Owners Strata Plan 62327 v *Vero* [2009] NSWSC 908; Newcastle Wallsend Coal Co Pty Ltd v Industrial Relations Commission (NSW) (2006) 153 IR 386; [2006] NSWCA 129 (in this last case, both parties had acted reasonably, but the proceedings had been rendered futile by circumstances beyond their control) and *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* [2009] NSWCA 32).

Subject to the terms of any consent to discontinuance, or any leave to discontinue, in accordance with the relevant rules, a discontinuance of proceedings associated with a plaintiff's claim for relief does not prevent the plaintiff from claiming the same relief in fresh proceedings.

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