Security for costs and case management regimes

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Introduction

There are a number of factors that a court will take into account when considering an application for security for costs. These include the strength and bona fides of the plaintiff's case, whether the defendant's conduct has caused the plaintiff's financial position, whether the defendant's application for security for costs is oppressive, and delay. Two recent cases have considered an additional factor for a court to consider when an application is made for security for costs: the failure of the applicant to comply with case management directions. The recent Supreme Court of Western Australia Court of Appeal decision in *Christou v Stanton Partners Australasia Pty Ltd*[3] indicates that if a defendant that has repeatedly ignored case management directions and delays in bringing an application for security for costs against a plaintiff, such defaults by the defendant will not necessarily preclude a court from exercising its discretion to order security for costs under s1335 of the Corporations Act 2001 (Cth) (the Act) or O 25 of the Rules of the Supreme Court of Western Australia 1971 (WA) (the WA Rules) or similar rules in other jurisdictions. The issue was also considered more recently in the Supreme Court of New South Wales in *ACN 105 921 962 Pty Ltd v Wiggett*.[4]

These two recent decisions are important because they provide support for the proposition that a defendant who delays, whether deliberately or otherwise, in bringing an application against a plaintiff for security for costs will not have such an application dismissed simply because of the failure of the defendant to comply with case management directions. The cases also indicate that non-compliance with the case management regime may be relevant when the court exercises its discretion in ordering security for costs only insofar as it is the cause of an unreasonable or unfair delay which contributes to the plaintiff's inability to meet a costs order.[5]

The purpose of this paper is to examine these decisions in the context of the overall purpose of orders for security for costs.

Purpose of security for costs order

Superior courts of record have inherent jurisdiction to order security for costs[6] and some courts will have an implied power to order security for costs. As the New South Wales Law Reform Commission recently stated, the District Court of New South Wales has power to make security for costs orders, relying on its implied power to govern its own proceedings, however, '[t]he position of other courts, such as the Local Court, is less clear'.[7] In relation to corporations, the power to order security for costs is found in s1335 of the Act, but in most cases the power can only be derived from the rules of court, for example, in New South Wales, the Uniform Civil Procedure Rules (the UCPR) Part 42.

The principle of security for costs derives from the fundamental right of a litigant to pursue and enforce their legal rights in court. As Vice-Chancellor Megarry said in *Pearson v Naydler*,[8] the basic rule that a natural person who sues will not be ordered to give security for costs, however poor, 'is ancient and well established'.[9] The general rule was stated in the late 19th century in *Cowell v Taylor*[10] where Bowen LJ said that 'poverty is no bar to a litigant'.[11]

In recent Australian cases, the focus of discussion concerning the 'purpose' of an order for security for costs has focused on the protection of the defendant. In *Remm Construction (SA) Pty Ltd v Allco Newsteel Pty Ltd*,[12] King CJ said that a court should protect a defendant 'against the loss which may result from inability to recover costs by reason of the impecuniosity of the plaintiff but should not go further than is reasonably necessary for that purpose'.[13] In *Jodast Pty Ltd v A & J Blattner Pty Ltd*[14] Hill J in the Federal Court of Australia held that the purpose of the power to order security for costs is to protect a defendant in whose favour the court may later make an order for costs. His Honour said that the ultimate purpose of ordering security for costs is: '[t]o ensure to a respondent, in the event that he is successful in the proceedings his costs will be met'.[15] Similarly, in *Idoport Pty Ltd v National Australia Bank Ltd (Idoport)*,[16] Einstein J in the Supreme Court of New South Wales noted that the purpose of a security for costs order is a 'protective jurisdiction'[17] in favour of the defendant which ensures that the primary purposes for having costs orders themselves can be achieved.

His Honour noted at paragraph 52 that a defendant is protected against the risk that a costs order obtained 'at the end of the day may turn out to be of no value by reason of the impecuniosity of the plaintiff', and the jurisdiction to award security for costs therefore assists both 'a compensation purpose as well as a public interest objective'.

In cases where the plaintiff is a corporate entity, Australian courts have generally been in agreement that an order for security for costs exists to protect the interests of the defendant. In *Pacific Acceptance Corporation Ltd v Forsyth (No 2)*[18] Moffitt J noted that:

'[The rationale] recognises that if a company wins it will get the benefit of its verdict and an order for costs against the defendant to the advantage of those who have an interest in the assets of the company but that the defendant sued will, if successful, be at a disadvantage in being unable to recover his costs if the company is financially insecure, and that it is fair that he be placed in an equal position with the company by the company providing or having provided by those concerned in the fruits of the litigation a means of the defendant sued recovering his costs, if he wins.'[19]

In discussing the rationale for security for costs under s363(1) of the Companies Act 1961 (NSW)[20] in *Buckley v Bennell Design & Constructions Pty Ltd* Street J said that the statutory power to order security for costs:[21]

'... reflects the concern of the legislature that, in permitting the incorporation of a limited liability entity, it was necessary to ensure that persons who might have dealings, whether voluntary or involuntary, with such an entity should have a measure of protection against the consequences of limited liability.'[22]

A similar position had been adopted in England in *Pearson v Naydler*,[23] where Vice-Chancellor Megarry stated that, in relation to security for costs, there was an essential distinction between natural persons and limited companies as plaintiffs:

'For a natural person, the basic rule is that he will not be ordered to give security for costs, however poor he is [subject to certain exceptions] ... In the case of a limited company, there is no basic rule conferring immunity from any liability to give security for costs. The basic rule is the opposite.'[24]

Inextricably tied to the purpose of the order for security for costs is the difficult balancing act engendered by the court's discretion which requires deliberation on a range of factors to determine whether an application should be granted. Before considering the failure to comply with case management directions as a factor to be considered, the more established discretionary factors are examined.

Discretionary factors

The factors that may be taken into account when exercising discretion in relation to an application for an order for security for costs are unrestricted provided that they are relevant.[25] The weight a court may give to any factor depends upon its own intrinsic persuasiveness and its impact on other factors which have to be considered.[26] Newnes JA noted in *Christou v Stanton Partners Australasia Pty Ltd*[27] that the discretion to order security for costs 'is a broad discretion and the factors which are relevant to the exercise of the discretion cannot be stated exhaustively'.[28] In *Slazengers Ltd v Seaspeed Ferries International Ltd*[29] Bingham LJ said that the discretion in ordering security for costs 'is not to be fettered by any inflexible rule'.[30]

One of the common factors which courts have held to be relevant to the exercise of the discretion to order security for costs is the impecuniosity of the plaintiff. This factor was established in a number of cases including *Pearson v Naydler*[31] and *Cowell v Taylor*.[32] In the past, courts have held that proof of the unsatisfactory financial position of the plaintiff effectively 'triggers' the discretion,[33] yet 'mere impecuniosity' is not an absolute factor in itself for the exercise of the discretion.[34] However, in cases where a plaintiff's lack of funds has been caused, or contributed to, by the defendant, the court will take that factor, the causation factor, into account.[35] There are exceptions to the rule however, such as where a plaintiff is intentionally sheltering their assets.[36] In *Dae Boong International Co Pty Ltd v Gray*,[37] Hodgson JA in the New South Wales Court of Appeal said that in determining the causation factor it is appropriate to 'have some regard to the apparent strength of the case'.[38]

Other factors that have been persuasive in the exercise of the discretion to order security for costs include what is known as the 'stultification factor' where the effect of an order for security would be to stifle the plaintiff's claim. In the past, courts have considered whether the impecunious plaintiff is actually the defender in the proceedings, and not the attacker[39] and to examine the means of others who stand to benefit from the litigation.[40] Basten JA, in *Pioneer Park Pty Ltd v ANZ Banking Group Ltd*,[41] remarked that it might in some circumstances 'be seen as oppressive to allow a large corporate defendant to obtain an order for security for costs'. His Honour concluded that there was a likelihood of stifling the litigation 'in circumstances where it could be seen that the claim had potential merit and that the quantum of the costs would in any event be a relatively insignificant amount for the corporate defendant, though beyond the capacity of the corporate plaintiff to pay.[42]

In *Fiduciary Ltd v Morningstar Research Pty Ltd*[43] Austin J held that while a consideration of the plaintiff's prospects of success is also an important factor in balancing justice between the parties, care needs to be exercised when assessing the proportionate strength of a case at the early stages of proceedings.[44] In *K P Cable Investments Pty Ltd v Meltglow Pty Ltd*,[45] Beazley J in the Federal Court of Australia held that where a claim is *prima facie* regular and discloses a cause of action, then in the absence of evidence to the contrary, the court should proceed on the basis that the claim is bona fide and has reasonable prospects of success.[46] However, whether the claim is bona fide or not is a further factor to be considered, and as Young J held in the Supreme Court of New South Wales in *Bhagat v Murphy*,[47] the court will take into account the motivation of a plaintiff in bringing the proceedings.[48]

Specific factors that affect the exercise of the discretion also arise from the UCPR in New South Wales and similar procedural rules in other jurisdictions. An important factor is whether or not a plaintiff is ordinarily resident outside the relevant jurisdiction and has no assets in the jurisdiction. If a plaintiff is resident outside of Australia, and has no assets in Australia, 'there must be weighty reasons why an order for security for costs should not be made'.[49] In *Shackles v The Broken Hill Proprietary Co Ltd*,[50] the court held that the difficulty in enforcing an order for costs overseas against a non-resident plaintiff will usually be sufficient to justify an order for security for costs. Similarly in *Batterham v Makeig (No 2)*,[51] Macfarlan JA said that the residence of an appellant outside Australia is a powerful factor in favour of ordering security for costs. However this principle is not absolute and must be weighed against other discretionary considerations.[52]

Miscellaneous factors that are often considered by courts in the exercise of the discretion to order security for costs include proceedings which raise matters of general public importance,[53] the relative disparity of the resources of the parties,[54] whether or not the parties are legally aided,[55] that the likely order as to costs, even if successful, may not be in favour of the successful defendant,[56] and that the proportionality of the costs to the activity which is the subject of the claim is so small as to impose an undue hardship on an already vulnerable plaintiff.[57]

A final factor, and one which the cases discussed in this paper are concerned with, is the implications of significant delay in the proceedings. In the Supreme Court of New South Wales in *Idoport Pty Ltd v National Australia Bank Ltd*,[58] it was held by Einstein J that delay by a defendant is a relevant factor in the exercise of the discretion for security for costs, however the passage of time is only one factor to be taken into account in the balancing exercise.[59] Einstein J held that evidence of delay does not render an application fatal of itself, there must be some prejudice demonstrated.[60] In *Litmus Australia Pty Ltd (in liq) v Canty*[61] in the Supreme Court of New South Wales White J noted that the conduct of the plaintiff, as it relates to the delay, would also be taken into account.[62] Einstein J in *Idoport* stated that the primary reason why an application for security for costs should be brought promptly and pressed to determination promptly is that a company:

'... is entitled to know its position in relation to security at the outset and before it embarks to any real extent on its litigation and certainly before it is allowed to or outlays substantial sums of money toward litigating its claim.'[63]

Recently, in the Federal Court of Australia in *Acohs Pty Ltd v Ucorp Pty Ltd*[64] Jessup J remarked that the delay itself must be balanced along with other factors, not merely prejudice, which have contributed to the delay.[65] As an example, in *Crypta Fuels Pty Ltd v Svelte Corp Pty Ltd*[66] Lehane J held that delay was less important where the hearing of the matter is not imminent or there has been some forewarning in correspondence foreshadowing an application for security for costs.[67] As Einstein J said in *Idoport*, delay is 'best regarded simply as a factor whose consequences are to be weighed in the balance in determining what is just between the parties' and that a court, in exercising the discretion to order security for costs, must consider the 'length of the delay and the nature of the acts done during the interval'.[68] The court must have a concern to achieve a balance between ensuring that adequate and fair protection is provided to the defendant, and avoiding injustice to an impecunious plaintiff by unnecessarily shutting it out or prejudicing it in the conduct of the proceedings.[69]

Failure to comply with case management directions

The failure of a defendant to comply with case management directions can now be considered in the context of an application for security for costs. The issue of the failure of a defendant to comply with case management directions in relation to an application for security for costs was first considered by Sanderson M in *Stanton Partners Australasia Pty Ltd v Christou*.[70] The appeal arose out of proceedings before Master Sanderson in the Supreme Court of Western Australia.[71] That litigation arose from disputes between former partners of an accounting firm and entities associated with them.[72]

The first and second defendants, Mr Christou and Corporate Systems Publishing Pty Ltd, brought an application for security for costs under O 25 of the WA Rules and s1335 of the Act. It was not in dispute that the first plaintiff, Stanton Partners Australasia Pty Ltd, was impecunious and would not be able to meet any costs order. *Prima facie* then, the defendants were entitled to an order for security for costs at least against Stanton Partners Australasia Pty Ltd. Master Sanderson noted that during the course of oral submissions, counsel for the plaintiffs indicated that if an order for security for costs was made, the terms of the order would be met by a director of Stanton Partners Australasia Pty Ltd.[73] Master Sanderson concluded that any order for security for costs would therefore not stultify the proceedings or be unduly oppressive to the plaintiffs.[74] Master Sanderson heard evidence that the delay in making the application for security for costs was as a result of the heavy workload of the second defendant's solicitor, Mr Rumsley.[75] This was not accepted by the Court because, as Master Sanderson noted, the application was not complex and as 'an experienced litigation solicitor Mr Rumsley must also have known delay in bringing an application was a factor to be taken into account in determining whether security was ordered'.[76]

Master Sanderson concluded that the delay in bringing the application was significant and, 'in my view is very much in the plaintiffs' favour and against security being ordered'.[77] Master Sanderson then examined the defendant's failures to meet certain case management directions. Master Sanderson said that there 'is every reason to look critically at the conduct of the defendant in the course of litigation in determining whether security for costs ought be ordered'.[78]

There had been many failures by the defendants to comply with case management directions. On 25 August 2009, Registrar Dixon, who had been the case management registrar throughout, ordered the defendants to file and serve a defence by 22 September 2009. The defence was eventually served on the plaintiffs on 2 October 2009 subsequent to a letter being sent by the plaintiffs' solicitors dated 29 September 2009. In relation to discovery, Registrar Dixon first ordered that the defendants provide discovery at a status conference on 22 December 2009. By the orders made the parties were to give discovery by 1 March 2010. A series of extensions to those orders were made culminating in the plaintiffs providing their discovery to the defendants on 14 May 2010. Ten days after receiving the plaintiffs' discovery, the defendants requested a further seven-day extension to provide their discovery. The plaintiffs consented to the extension and the time for the defendants to provide discovery was extended to 1 June 2010, however the defendants did not meet that deadline. On 11 June 2010 the plaintiffs filed a notice of non-compliance with case management directions. The notice of motion also dealt with the defendants' failure to provide particulars of its statement of claim against a third party in the proceedings.

On 15 June 2010 the parties attended a status conference before the registrar. The registrar ordered that the defendants provide discovery by 21 June 2010. The matter was otherwise adjourned on the basis that the defendants were proposing to make a security for costs application within seven days of the status conference. The orders were made by the registrar despite the plaintiffs' desire to program the matter to a position where it could be entered for trial. The matter came on again before Registrar Dixon on 20 July 2010. On that date Registrar Dixon ordered that the defendants provide discovery by 30 July 2010. The defendants again failed to comply with those orders and the plaintiffs invited the defendants to submit a proposed revised timetable for discovery. No response was received to that invitation and on 16 August 2010 the plaintiffs wrote to the defendants requiring discovery to be provided by 20 August 2010 otherwise the plaintiffs would apply for a springing order. No response was received from the defendants. The plaintiffs again wrote to the defendants inviting them to provide a revised timetable for discovery but that request was ignored. The matter then went back before Registrar Dixon on 24 August 2010 where a springing order was made.

Master Sanderson noted that 'so far as I am aware a failure to comply repeatedly with case management directions has not been a factor taken into account when determining whether or not security ought be ordered'.[79] Importantly Master Sanderson said that 'there is an argument for saying the case management regime can look after itself and defaults in compliance with case management orders should be dealt with in the context of the case management regime'.[80] Master Sanderson went on to note that it could also be argued that '[t]o allow case management principles to intrude upon a determination whether or not security for costs ought to be ordered is to confuse two separate and distinct areas of practice and procedure'.[81]

In rejecting those arguments Sanderson M said that 'there is every reason to look critically at the conduct of the defendant in the course of litigation in determining whether security for costs ought be ordered'.[82] Master Sanderson went on to say that '[a] party in the position of the plaintiffs has every right to conclude the defendants, by their conduct, are simply delaying progress of the action' and that '[a]n application for security will be seen as yet another step to delay the action'.[83] Master Sanderson said that '[w]hile not necessarily determinative in every case, ... it is appropriate to take into account the way the defendants' have participated in the litigation process'.[84] Master Sanderson concluded that '[i]n this case, the defendants' repeated failures to comply with case management orders is, in my view, a factor to be taken into account in determining whether or not security ought be ordered'.[85] Master Sanderson then weighed each of the relevant factors, including 'the defendants' inexcusable conduct in repeatedly failing to comply with case management directions'[86] and concluded that on balance 'I am satisfied this is not an appropriate case to order security'.[87]

The defendants appealed. In the Supreme Court of Western Australia Court of Appeal in *Christou v Stanton Partners Australasia Pty Ltd*[88] Newnes JA, with whom Murphy JA agreed, acknowledged the judicial discretion to award security for costs and noted that 'the purpose of an order for security for costs is to protect the defendant, if successful, against the risk of being deprived of the benefit of a costs order through the plaintiff's inability to pay'.[89] Newnes JA noted that the 'court must examine the circumstances of the particular case to determine where the interests of justice lie'.[90] His Honour emphasised that '[s]ecurity for costs is not a card that a defendant can keep up its sleeve and play at its convenience'.[91] His Honour stressed that the timing of the application can be determinate because '[d]elay is an important consideration in the determination of an application for security for costs because it is capable of causing prejudice or unfairness to the plaintiff'.[92] His Honour said that 'in the circumstances of this case the master erred in concluding that the appellants' non-compliance with case management orders was itself a relevant factor'.[93] But importantly his Honour did not rule out the possible importance of the issue in other circumstances when his Honour said that there 'may well be cases where a defendant's non-compliance with procedural orders will be relevant in determining whether or not an order for security for costs should be made' and that that 'will depend upon the particular circumstances of the case'.[94] In the context of the current case Newnes JA said that the factor was not relevant and that while 'the appellants' non-compliance undoubtedly contributed to the slow progress of the action, it was not relevant to the purpose for which an order for security for costs is made'.[95] His Honour said that although the defendants' 'con-

duct in flouting case management directions was deplorable, there are remedies available to a party under the case management system where such default occurs and that is the way that such default should normally be dealt with'.[96] Importantly Newnes JA said that the 'discretion to order security for costs is not a means by which a defendant may be punished for its non-compliance with case management directions'.[97] His Honour also said that whilst the delay was significant, 'only a limited number of interlocutory steps had been taken and the interlocutory processes remain incomplete' and that the 'action was still some way from having a trial date fixed'.[98] In granting leave to appeal, and in allowing the appeal, his Honour concluded that security for costs was 'appropriate for future costs, but not for costs incurred prior to the application'.[99]

The issue arose more recently in the Supreme Court of New South Wales in *ACN 105 921 962 Pty Ltd v Wiggett*[100] where the first defendant, Mr Wiggett, and the second defendant, A-TEK Specialised Industrial Cleaning Services Pty Ltd, made an application by notice of motion that the first plaintiff, ACN 105 921 962 Pty Ltd, and the third plaintiff Shannongrove Pty Ltd, provide security for costs. In New South Wales, in addition to s 1335 of the Corporations Act 2001 (Cth) the relevant rule for security for costs is r42.21 of the Uniform Civil Procedure Rules 2005 (NSW). In opposing the application for security for costs the plaintiffs argued that there had been significant delay in the conduct of the proceedings by the defendants and that there was a degree of non-compliance by the defendants with case management directions. Black J said that he agreed with the views expressed by Newnes JA in Christou that 'a party's non-compliance with previous directions is ultimately not relevant to the purpose for which an order for security for costs is made, namely to protect against the risk that a successful party cannot recover costs which the other party is ordered to pay'.[101] But importantly Black J said that 'I do not consider that I should decline to order security for costs by reason of [the failure to comply with case management directions], where the case for it is otherwise established'.[102] The application for security for costs was successful based on other relevant factors and Black J did not take into account the failure to comply with case management directions.

Conclusion

Parties to litigation must have the confidence that the case management regime will be observed by all parties. Although the cases discussed in this paper have not held that a failure of a defendant to comply with case management directions is a bar to an order for security for costs, delay remains a significant factor. Failures to comply with case management directions by any party to a proceeding will in many cases cause a delay. If that delay is caused by a defendant then although their own failure to comply with case management directions will not be a bar to an application for security for costs their own delay may result in such an application being rejected.

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3 [2011] WASCA 176.

4 [2012] NSWSC 1526.

5 *Christou v Stanton Partners Australasia Pty Ltd* [2011] WASCA 176, [26].

6 *Morris v Hanley* [2000] NSWSC 957; *Bhagat v Murphy* [2000] NSWSC 892. *See also Merribee Pastoral Industries Pty Ltd v Australia & New Zealand Banking Group Limited* (1998) 193 CLR 502.

7 New South Wales Law Reform Commission, Security for Costs and Associated Orders, Report No 137 (2012) ix. See also *Philips Electronics Australia Pty Ltd v Matthews* (2002) 54 NSWLR 598 at [50]–[53].

8 [1977] 1 WLR 899.

9 Ibid at 902.

10 (1885) 31 Ch D 34.

11 Ibid at 38. See also *Ross v Jacques* (1841) 8 M & W 135 at 136; 151 ER 980 at 981; *Le Mesurier v Ferguson* (1903) 20 TLR 32 (CA); Re Emery [1923] P 184 at 189; *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* [1973] QB 609 at 612-613.

12 (1992) 57 SASR 180.

13 Ibid at 189.

14 (1991) 104 ALR 248.

15 Ibid at 255.

16 [2001] NSWSC 744.

17 Ibid at [52].

18 [1967] 2 NSWR 402.

19 Ibid at 407.

20 Now superseded by Corporations Act 2001 (Cth) s1335.

21 (1974) 1 ACLR 301.

22 Ibid at 303.

23 [1977] 1 WLR 899.

24 Ibid at 904.

25 *Morris v Hanley* [2000] NSWSC 957 at [11]–[21]. See also *Southern Cross Exploration NL v Fire and All Risks Insurance Co Ltd* [1985] 1 NSWLR 114.

26 *Acohs Pty Ltd v Ucorp Pty Ltd* (2006) 236 ALR 143 at [12]; *Swift v McLeary* [2013] NSWCA 173 at [30]; *P S Chellaram & Co Ltd v China Ocean Shipping Co* [1991] HCA 36; (1991) 102 ALR 321 at 323 (McHugh J).

27 [2011] WASCA 176.

28 Ibid at [19].

29 [1988] 1 WLR 221.

30 Ibid at 226.

31 [1977] 1 WLR 899.

32 (1885) 31 Ch D 34.

33 See *Fiduciary Ltd v Morningstar Research Pty Ltd* (2004) 208 ALR 564 at [35]-[36]; *Thalanga Copper Mines Pty Ltd v Brandrill Ltd* [2004] NSWSC 349 at [12]–[13]; *Ballard v Brookfield Australia Investments Ltd* [2012] NSWCA 434 at [29]–[41].

34 See *Levy v Bablis* [2011] NSWCA 411.

35 *Fiduciary Ltd v Morningstar Research Pty Ltd* (2004) 208 ALR 564 at [85]-[101].

36 *Rajski v Computer Manufacture & Design Pty Ltd* [1982] 2 NSWLR 443 at 452.

37 [2009] NSWCA 11.

38 Ibid at [34].

39 *Amalgamated Mining Services Pty Ltd v Warman International Ltd* (1988) 19 FCR 324 at 67–8.

40 *Acohs Pty Ltd v Ucorp Pty Ltd* (2006) 236 ALR 143 at [49]. See also *Citrus Queensland Pty Ltd v Sunstate Orchards Pty Ltd (No 5)* [2006] FCA 1672 at [38.8]; *Odyssey Financial Management Pty Ltd v QBE Insurance (Australia) Ltd* [2012] NSWCA 113 at [17] (McColl JA).

41 (2007) 65 ACSR 383.

42 Ibid at [56].

43 (2004) 208 ALR 564.

44 Ibid at [39].

45 (1995) 56 FCR 189.

46 Ibid at 197.

47 [2000] NSWSC 892.

48 Ibid at [20]–[21], [26]. See also *Lall v 53-55 Hall Street Pty Ltd* [1978] 1 NSWLR 310 at 313–314.

49 *Cheng XI Shipyard v The Ship 'Falcon Trident'* [2006] FCA 759 at [9] (Besanko J).

50 [1996] 2 VR 427.

51 [2009] NSWCA 314 at [8]. See also *Energy Drilling Inc v Petroz NL* [1989] ATPR ¶40-954 at 50,422.

52 *Corby v Channel Seven Sydney Pty Ltd* [2008] NSWSC 245.

53 *Merribee Pastoral Industries v Australia and New Zealand Banking Group Ltd* (1998) 193 CLR 502 at [31]; *Soh v Commonwealth of Australia* (2006) 231 ALR 425 at [26].

54 *P M Sulcs & Associates Pty Ltd v Daihatsu Australia Pty Ltd (No 2)* [2000] NSWSC 826 at [82].

55 *Webster v Lampard* (1993) 177 CLR 598.

56 *Singer v Berghouse* (1993) 114 ALR 521 at 522.

57 *Shackles v The Broken Hill Proprietary Co Ltd* [1996] 2 VR 427 at 432.

58 [2001] NSWSC 744.

59 Ibid at [68]-[81]. See also *Southern Cross Exploration NL v Fire & All Risks Insurance Co Ltd* [1985] 1 NSWLR 114 at 123; *P M Sulcs & Associates Pty Ltd v Daihatsu Australia Pty Ltd (No 2)* [2000] NSWSC 826.

60 *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 744 at [70].

61 (2007) 25 ACLC 1141 at [26].

62 See also *Staff Development & Training Centre Pty Ltd v Commonwealth* [2005] FCA 1643 at [26].

63 [2001] NSWSC 744 at [121].

64 (2006) 155 FCR 181.

65 Ibid at [61].

66 (1995) 19 ACSR 68.

67 Ibid at 71.

68 [2001] NSWSC 744 at [81]. See also *Bryan E Fencott & Associates Pty Ltd v Eretta Pty Ltd* (1987) 16 FCR 497 at 514 (French J); *Commonwealth of Australia v Cable Water Skiing (Australia) Ltd* (1994) 14 ACSR 760 at 762.

69 Ibid at [47]. See also *Buckley v Bennell Design & Constructions Pty Ltd* (1974) 1 ACLR 301 at 304; SE Colbran, 'Security for costs: A fettered discretion?' (1989) 5 *Australian Bar Review* 102 at 108.

70 [2010] WASC 370.

71 Ibid.

72 *Corporate Systems Publishing Pty Ltd v Lingard (No 4)* [2008] WASC 21.

73 *Stanton Partners Australasia Pty Ltd v Christou* [2010] WASC 370 at [2].

74 *Stanton Partners Australasia Pty Ltd v Christou* [2010] WASC 370 at [2]-[3] citing *Yandil Holdings Pty Ltd v Insurance Co of North America* (1985) 3 ACLC 542 at 545 (Clarke J).

75 *Stanton Partners Australasia Pty Ltd v Christou* [2010] WASC 370 at [10].

76 Ibid.

77 Ibid at [11].

78 Ibid at [22].

79 Ibid at [20].

80 Ibid at [21].

81 Ibid.

82 Ibid at [22].

83 Ibid.

84 Ibid.

85 Ibid.

86 Ibid at [24].

87 Ibid at [25].

88 [2011] WASCA 176.

89 Ibid at [18].

90 Ibid at [19].

91 Ibid at [20].

92 Ibid.

93 Ibid at [26].

94 Ibid.

95 Ibid.

96 Ibid at [27].

97 Ibid.

98 Ibid at [28].

99 Ibid at [30].

100 [2012] NSWSC 1526.

101 Ibid at [20].

102 Ibid.