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The statutory ground to award security for costs against an impecunious company: should we mourn its passing?

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Companies Act 1985 s.726

Cases: Sir Lindsay Parkinson & Co v Triplan Ltd [1973] Q.B. 609 (CA (Civ Div))

Pearson v Naydler [1977] 1 W.L.R. 899 (Ch D)

Anglo Petroleum Ltd v TFB (Mortgages) Ltd (Security for Costs) [2004] EWHC 1177 (Ch) (Ch D)

Unisoft Group (No.2), Re [1993] B.C.L.C. 532 (Ch D (Companies Ct))

Hutchison Telephone (UK) v Ultimate Response [1993] B.C.L.C. 307 (CA (Civ Div))

CT Bowring & Co (Insurance) Ltd v Corsi & Partners Ltd [1994] 2 Lloyd's Rep. 567 (CA (Civ Div))

Unisoft Group Ltd (No.1), Re [1994] B.C.C. 11 (CA (Civ Div))

Cohort Construction Company (UK) Ltd v Spring Hotels Ltd [1997] EWCA Civ 1415 (CA (Civ Div))

Jirehouse Capital v Beller [2008] EWCA Civ 908; [2009] 1 W.L.R. 751 (CA (Civ Div))

Keary Developments Ltd v Tarmac Construction Ltd [1995] 3 All E.R. 534 (CA (Civ Div))

Europa Holdings Ltd v Circle Industries (UK) Ltd [1993] B.C.L.C. 320 (CA (Civ Div))

Marine Blast Ltd v Targe Towing Ltd (Security for Costs) [2003] EWCA Civ 1940 (CA (Civ Div))

***C.J.Q. 470 Abstract:** *The jurisdiction to award security for costs against an impecunious company established by statute in the reign of Queen Victoria is scheduled for repeal on October 1, 2009. The Victorian statute made assumptions about categories of business entity and the type of costs order against which security is ordered which are now archaic, and incorporates elaborate and redundant phrases such as "credible testimony", but is also of wider application, including, by a sidewind, forms of proceeding, such as small claims, from which the procedural jurisdiction to award security under the CPR is explicitly excluded. Case law derived from the statute, as to the application of the jurisdiction to interim applications and counterclaims and as to the operation of the discretion, is still applied without question to the procedural jurisdiction, despite the "new procedural code" of the CPR. This article considers the continuing influence of the statutory jurisdiction, assessing the impact of its repeal.*

Introduction

The statutory jurisdiction created in Joint Stock Companies Act 1857 s.24 and, for the next few months, still found in Companies Act 1985 s.726 ("the statutory jurisdiction") to award security for costs against an impecunious company is based on two concepts: of costs following the event and of the "unwilling defendant", obliged to seek exoneration at the risk of the costs of doing so being irrecoverable.

The likelihood of a once and for all single award of costs following the event of the defendant's success at trial has, however, decreased significantly in ***C.J.Q. 471** recent years. Pre-emptive cost capping¹; issue-based costs orders sharing costs between the parties in proportions not predictable before the trial; CPR Pt 36; before the event and after the event insurance; recoverability of success fees and insurance premia² all militate against an attempt to calculate an appropriate amount of security at a stage prior to trial.

Even the unwilling defendant is now often a fiction. Which of the parties is the defendant ostensibly entitled to apply for an award may be a matter of coincidence³ or a race to the issue office.⁴

Nevertheless, the wording of, and case law derived from, the statutory jurisdiction remains a significant influence on its parallel in CPR r.25.13(2)(c) (“the procedural jurisdiction”) introduced in 2000. It is the analysis, application ***C.J.Q. 472** and interrelationship of these apparently co-extensive jurisdictions which forms the basis of this paper. The analysis is particularly significant because Companies Act 1985 s.726 is scheduled for repeal on October 1, 2009 under Companies Act 2006. This paper considers the continuing power of the statutory jurisdiction, assessing the impact of its repeal.⁵

The impecunious corporate claimant⁶

Introduction: “impecunious” and “corporate”

The power to award security for the defendant's prospective costs against an impecunious corporate plaintiff, when there is no such jurisdiction in respect of natural persons,⁷ has long been justified,

“otherwise the privilege of limited liability could be used in an oppressive and unfair way, allowing those with means behind companies with no assets to indulge in a kind of fail safe litigation free of the risk of having to shoulder a successful defendant's costs and leaving defendants who had only and successfully sought to defend themselves to carry the costs burden of that defence”.⁸

Professor Zuckerman, in addition, suggests that this risk places pressure (in the absence of an order for security) on the defendant to settle the claim disadvantageously.⁹ Although the problem of limited liability is not now perceived to be the sole justification for the existence of the jurisdiction,¹⁰ ***C.J.Q. 473** the existence of the jurisdiction is now entrenched. Nevertheless, it remains subject to a number of constraints.

First, one should define what is meant by a “*corporate* claimant”. The statutory jurisdiction applies, as one might expect given its genesis, only to a limited company. In the 21st century, however, there is a plethora of forms of business organisation. A response might be to subject each to the statutory jurisdiction on a piecemeal basis, as with the limited liability partnership (LLP).¹¹ The modern procedural jurisdiction, in CPR r.25.13(2)(c), however, adopts an umbrella approach by applying to, “a company or other body (whether incorporated inside or outside Great Britain)”. Whilst an LLP has acquired the status of a body corporate by statute,¹² the procedural jurisdiction has been held to include a company with unlimited liability.¹³ References to “incorporation” indicate that it was not intended to include unincorporated “other bodies”¹⁴ such as clubs and associations or partnerships.¹⁵ The breadth of the procedural jurisdiction is, therefore, less different from that of the statute than it might at first appear. Nevertheless, a trades union—explicitly prevented from registration as a company¹⁶ and therefore outside the statute, but expressly permitted to sue and be sued in its own name¹⁷—might logically, I suggest, be subject to an order under the procedural rule.

Secondly, even if the claimant is sufficiently corporate for the purposes of either jurisdiction, both are aimed only at such of those bodies as are impecunious. The statute frames this criterion as, “unable to pay the defendant's costs *if successful in his defence*” [my italics] whereas the procedural rule requires that, “[the respondent] will be unable to pay the defendant's costs *if ordered to do so*” [my italics]. The procedural formulation, as might be expected, better reflects the modern approach to issue-based costs; the statute arguably precluding security where, although a costs order of some kind can be anticipated against the claimant, the defendant is likely only to be *partially successful* in the defence.

Whether the costs order against which protection is sought is a single award or not, the phraseology of both jurisdictions raises further questions about the extent of impecuniosity required. Companies Act 1862 s.69, referred to ***C.J.Q. 474** the company's assets being “insufficient to pay his costs” rather than focussing attention, as does the modern wording of both jurisdictions, on the ability to *pay* (possibly caused by sufficient, but illiquid, assets). Impecuniosity, then, in both cases, now anticipates illiquidity short of technical insolvency.

It is not surprising, however, that attempts have been made to exploit the distinction between individuals and corporate entities by assigning causes of action from companies to individuals; thereby successfully avoiding the risk of a security for costs award on this basis of impecuniosity.¹⁸ A

further complication where a company is illiquid but not insolvent arises in a different context: whilst applications for interim payments by companies are rare,¹⁹ might a small claimant company with restricted cash flow applying for such a payment be taken to have admitted impecuniosity sufficiently to be met by a cross-application for security?²⁰ Or could a claimant arguing in opposition to a security application that its impecuniosity was due to the defendant's failure to pay disputed sums, be criticised for failing to remedy the situation by seeking an interim payment?²¹ These are unanswered questions: what follows is an exploration of the extent of the statutory jurisdiction and, from 2000, its interaction with the procedural jurisdiction such that, albeit on the verge of extinction, the statutory jurisdiction exerted and continues to exert control over the CPR rule.

The statutory jurisdiction

The Companies Act 1985 s.726(1)²² provides, until repealed, that where in England and Wales (sub-s.(2) providing for proceedings taking place in Scotland²³),

***C.J.Q. 475** “a limited company is a plaintiff in an 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 company will be unable to pay the defendant's costs if successful in his defence, require sufficient security to be given for those costs, and may stay²⁴ all proceedings until the security is given”.

The separate parallel procedural jurisdiction of CPR r.25.13(2)(c) was created in April 2000.²⁵

Other grounds for awards of security for costs also appeared in RSC Ord.23 r.1, which was expressly “without prejudice” to statutory provisions covering the same ground. Despite arguments to the contrary in *Greenwich Ltd v National Westminster Bank Plc*,²⁶ the statute does not constrain the award of security against companies on any of these other grounds (now found in CPR r.25.13).

The overlap between the statutory and procedural jurisdictions

Although CPR Pt 49 treats, “proceedings under the Companies Act 1985” as specialist proceedings to be commenced (CPR PD 49: (Applications Under the Companies Acts and Related Legislation) para.5) by Pt 8 claim form in the Companies Court or Chancery Division, the statutory jurisdiction to award security operates as an interlocutory (“interim”) application for what is now an “interim remedy”. Like RSC Ord.23 r.1, CPR r.25.13(1)(b) excepts all statutory jurisdictions,²⁷ allowing the court to award security in any case where, “an enactment permits the court to require security for costs”, although there is a further precondition (in addition to CPR Pt 1) that, “[the court] is satisfied, having regard to all the circumstances of the case, that it is just to make such an order”. CPR r.25.13(2)(c) then creates the separate procedural jurisdiction--always assuming it is “just” to make the order--if,

“the claimant is a company or other body (whether incorporated inside or outside Great Britain) and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so”.

For the same issue to be covered both by statutory and procedural powers is not unique. For example, Companies Act 1985 s.725²⁸ provides, until it, too ***C.J.Q. 476** is repealed, for service on domestic companies differing from the provisions in CPR Pt 6, although methods of service prescribed in other enactments are similarly excepted.²⁹

The oddity about CPR r.25.13(2)(c), however, is the creation of a *parallel* jurisdiction on the same criteria and in very similar wording. That similarity of wording suggests that the intention was to subsume s.726, for the purpose of court proceedings in England and Wales at least, into the CPR and, in addition, that there was thought to be no fundamental difference between the two jurisdictions. The fact that the Companies Act 2006 Sch.16 will repeal s.726 without replacement lends, I suggest, force to this interpretation.

Despite the distinctions already identified as to the nature of the respondent and the kind of costs order in respect of which the jurisdiction is available, the two jurisdictions have frequently been treated as identical³⁰ (and litigants tend, where they can, to apply simultaneously under both). Nevertheless, the overlap is not complete: in some circumstances only the statutory, or only the procedural, jurisdiction can be invoked.

Distinctions between the extent of the statutory and the procedural jurisdictions

A clear distinction is, of course, that the statute patently cannot apply to foreign and Northern Irish limited companies³¹ whereas the procedural jurisdiction explicitly does.

***C.J.Q. 477** The procedural jurisdiction, by definition, necessarily extends only to courts governed by the CPR. Prior to its repeal, then, other *fora* where costs orders are available but there is no explicit provision for security must rely on the statutory jurisdiction, which refers in terms to “the court ³² having jurisdiction in the matter” [my italics]. In *Abdulhayoglu's Application*, ³³ for example, it was held that the Comptroller-General of Patents was not a “court”. Circumstances where the statute provides coverage where the CPR does not can even be found within the CPR themselves. Part 25, in which the procedural jurisdiction is found, is disappplied in the small claims track.³⁴ There is nothing to suggest, however, that this disapplication (by a mere statutory instrument) has any effect on the statutory jurisdiction, in the rare case that any order for costs is made in a small claim. The small claims applicant would, however, be obliged to *invoke* the statutory jurisdiction by using the general procedures in CPR Pt 23. This may be an extreme reading, but nevertheless, the repeal may deprive some applicants of a useful jurisdiction in *fora* to which the CPR do not apply, if remedial steps (as with the Patents Rules³⁵) are not taken.

However, assuming circumstances where the two jurisdictions occupy common ground, in the next passages I use the wording of the statute as a springboard to discuss the development of the award from statutory jurisdiction alone to the present situation--pending final repeal of the statutory jurisdiction--of parallel jurisdictions. This will involve considering the following aspects: counterclaims and interim applications; standards of proof and the exercise of the discretion.

A plaintiff in an action or other legal proceeding

The questions here are whether either jurisdiction: (a) legitimately applies to counterclaiming defendants; or (b) extends to awards of security for the costs of interim stages.

The statute unambiguously uses the word “plaintiff”. Nevertheless, in *Neck v Taylor*, ³⁶ Esher M.R. made a distinction between: (i) the defendant's counterclaim “in respect of a matter wholly distinct from the claim”, where ***C.J.Q. 478** an award was possible; and (ii) a counterclaim arising out of the same event as the main claim, in which case the court would consider whether it was a “mere defence”. The distinction between “real” counterclaims and “mere defences” was more subtle in 1980 in *Samuel J Cohl Co v Eastern Mediterranean Maritime Ltd (The Silver Fir)*, ³⁷ where both parties to arbitration had applied for security and it was largely coincidental which had instigated the arbitration. On appeal, mirroring orders were made, Lawton L.J. commenting that, “if the counterclaim is a defence and nothing more then *normally* the discretion should not be exercised in favour of ordering security”³⁸ (my italics).

Whilst it can be inferred that this distinction was an attempt to mitigate the strict words of the statute, in neither case was the use of the word “plaintiff” in s.726(1) addressed in terms. In *Hutchison Telephone (UK) Ltd v Ultimate Response Ltd*, ³⁹ however, Dillon L.J. drew by analogy on the other grounds in RSC Ord.23, which provided that references to a “plaintiff” intended the person, “in the position of plaintiff ... in the proceeding ... including a proceeding on a counterclaim”.

The substantial size of the counterclaim and its effect on the ambit of the evidence and the length of the trial allowed Dillon L.J. to determine that there was, “more than a mere defence and that security ought to be given”. For Bingham L.J., it was exercise of the *discretion* to make the order that was dependent on characterising the counterclaim as “mere defence” or otherwise,

“even though a counterclaiming defendant may technically be ordered to give security for the costs of a plaintiff against whom he counterclaims, such an order should not ordinarily be made if all the defendant is doing in substance, is to defend himself ... is the defendant simply defending himself, or is he going beyond mere self-defence and launching a cross-claim with an independent vitality of its own?”⁴⁰

There was, therefore, jurisdiction under the statute to make an order against a defendant (at least if the defendant had actually filed a pleading entitled “counterclaim”) but subject to the operation of a discretion at two levels: first, that if the so-called counterclaim was a “mere defence” discretion would “normally” or “ordinarily” be exercised against the award and secondly, that the court retained an overall discretion to make an order and to determine the amount.

This liberal approach to the identification of a “plaintiff” informs *CT Bowring & Co (Insurance) Ltd v Corsi and Partners Ltd*, ⁴¹ in which the statutory use of the expressions “plaintiff” and “other proceedings” permitted an award in an application under Companies Act 1985 s.459. Holding that proceedings not brought by writ were “other proceedings”, the Court of Appeal in *Unisoft*, ***C.J.Q. 479**

Re (No.1) ⁴² similarly concluded that “plaintiff” included any person who had instituted originating process (even if formally a “petitioner”).⁴³ The restriction of “proceedings” to originating process also, of course, justifies the housing of statutory applications for security outside CPR Pt 49.

In *CT Bowring*,⁴⁴ however, an additional factor was present as the plaintiff sought security only for the costs of an application against it for damages under the cross-undertaking attached to a *Mareva* injunction.⁴⁵ Security was refused on the ground that s.726 could not apply to interlocutory proceedings, but, by the time of appeal, the plaintiff sought also to rely on an alleged inherent jurisdiction⁴⁶ and other grounds. Dillon L.J. reiterated the distinction between “counterclaim” and “mere defence”, in the latter case there being a rule of practice that the plaintiff took the risk of the defendant’s impecuniosity:

“Although the word counterclaim is not used in s 726 or any of its predecessors--no doubt because the counterclaim, as we have long known it, did not exist as a form of procedure in 1857 or 1862--it is clear that an impecunious company which makes a counterclaim which is more than a mere formulation of its defence can be ordered to give security for the plaintiff’s costs of the counterclaim.”⁴⁷

On the matter at issue, however, he held that “plaintiff” did not include the applicant in interlocutory proceedings, otherwise,

“chaos would reign, for every time an interlocutory application was taken out by a defendant the plaintiff would be able to say ‘The plaintiff is in the position of the defendant in this application and the defendant is in ***C.J.Q. 480** the position of the plaintiff. They are proceedings. Therefore I ought to have security for the costs of this application.’”⁴⁸

Consequently, whilst “plaintiff” in the statute does not necessarily mean “plaintiff”; “an action or other proceedings” *always* means originating proceedings.⁴⁹ The position of the “mere defendant”, at risk of a discretion to make the order in *The Silver Fir*⁵⁰ and *Hutchison*⁵¹ but apparently not in *CT Bowring*,⁵² is less clear. If the more liberal *Hutchison*⁵³ approach is taken, then why should the order be confined to those who have filed a formal counterclaim? A “mere defendant” who has relied on an exclusion clause; tender; prior compromise or set-off without filing a counterclaim adds new issues and new costs to the dispute which could legitimately be protected by security.⁵⁴

Whilst suggesting that it might be useful for there to be a jurisdiction to award security,

“if it appears that the defendant is making a case of doubtful validity or putting forward what appear to be excessive or extravagant claims”,

Dillon L.J. nevertheless declined to award security on any of the additional grounds relied on.

Millet L.J. identified additional practical reasons not to allow the award in interlocutory proceedings:

“If the plaintiff’s argument in the present case is right, only the defendant could obtain an order for security for costs of the entire proceedings; but if he applied for such an order the plaintiff could immediately apply for security for costs of the defendant’s application--and so *ad infinitum*, each application for security provoking a cross-application for security for that application.”⁵⁵

Scott L.J. in *Unisoft*⁵⁶ had relied on the definition of “plaintiff” in the Judicature Acts. Millett L.J., however, was not prepared to do so, justifying the emerging wide reading of the statutory use of “plaintiff” and narrow reading of “proceedings” to which I have referred above on the basis that RSC Ord.23, unlike the statutory jurisdiction was bound by definitions of “plaintiff” and “action” in Supreme Court of Judicature (Consolidation) Act 1925 s.225 and its predecessors:

***C.J.Q. 481** “Accordingly, the word ‘action’ in O 23, r 1(1) has a wider meaning than the same word in s 726, and the scope of the expression ‘other proceeding in the High Court’ is correspondingly reduced.”⁵⁷

Despite this, Millett L.J. reached the same result: even under RSC Ord.23, interlocutory proceedings were excluded. The defendant had no “independent cause of action” to recover the damages sought: it could not have sued for them otherwise than in connection with the cross-undertaking. Millett L.J. was at one with Dillon L.J. that there was no inherent jurisdiction but suggested that if the claim for an inquiry as to damages was an abuse of process: “[the court] has power ... to put the defendant on terms; and these may include the provision of security for costs”. Not only does CPR Pt 3 now explicitly permit security for costs to be awarded (against any party, “mere defendant” or not) by way of conditional order or as a sanction,⁵⁸ but, as the security may be, “for any sum payable by that party

to any other party in the proceedings”,⁵⁹ I suggest that there is no reason why the security provided should not represent the costs of an interim application.⁶⁰

This was the somewhat strained position then, in April 2000, when the parallel procedural jurisdiction was introduced. By virtue of the expression “a new procedural code” in CPR Pt 1, there was the opportunity to detach the CPR jurisdiction from any pre-existing definitions in the statute or its associated case law.

CPR r.25.12(1) provides that, “[a] defendant to *any claim* may apply under this Section of this Part for security for his costs of *the proceedings*” (my italics). Neither expression is defined in CPR r.2.3(1) although the definition of “claim for personal injuries” implies originating process.⁶¹ Security for costs under Pt 25 is, then, security for the costs only of the substantive proceedings. Security for the costs of an *appeal* from an interim application, may, however, be awarded by virtue of CPR r.25.15.⁶²

***C.J.Q. 482** On the subject of counterclaims, however, the CPR position appears much simpler. CPR r.20.3, expressly cross-referred in CPR r.25.12(1), provides that a counterclaim, “shall be treated as if it were a claim for the purposes of these Rules”.⁶³ If a counterclaim, even if no more in fact than a “mere defence” is assimilated *entirely* to a claim for the purposes of the CPR--so “dealing with the parties on an equal footing”⁶⁴ --then, is there any longer any need for the taxonomic distinction created to soften the statutory wording?

Apparently so. *Hutchison*⁶⁵ was applied in *Pimlott v Meregrove Holdings Ltd.*⁶⁶ Judge Spencer Q.C. refused security as, “[i]nsofar as the set-off has the capacity to extinguish the claim it is a [mere] defence”. Having so determined, he also found that there were no additional costs involved in defending the Pt 20 counterclaim in any event.

At approximately the same time, in *Anglo Petroleum Ltd v TFB (Mortgages) Ltd*,⁶⁷ Park J. also refused security on the basis that the “mere defence” mirrored the claim:

“It sometimes happens that a single underlying dispute between two persons gives rise to two actions: one sues the other. There might be a claim and counterclaim within one legal action; there might be two separate actions.... A sues B; B defends A's claim. B also sues A and A defends B's claim. Essentially each says the same thing in each case. So the ground on which B defends A's claim is also the ground on which B sues A; and the ground on which A sues B is also the ground on which A defends B's claim.... Now let me add the further assumption that A is impecunious but B is wealthy. If the court ordered A to provide ... security, A could not provide it. But, ... it would not make much sense for the court to make the order. Suppose that the court did make the order and A failed to provide the security. The court would stay A's claim against B. But B's claim against A is still on foot and when B brings it to trial, A can defend it. The court has no power to order a defendant to provide security for costs.⁶⁸ In my example, A could, and presumably would, defend B's claim by advancing essentially the same arguments as those which he, A, wanted to advance in his own claim. It would, in my view, be largely pointless for the court to have ordered A to provide security for the costs of his own claim.”⁶⁹

***C.J.Q. 483** Subsequently, in *Thistle Hotels Ltd v Orb Estates Plc*,⁷⁰ where the claimant applied under CPR r.25.12 for security for the costs of counterclaims both on the ground of impecuniosity and foreign residence, *Neck*,⁷¹ *Hutchison*⁷² and *CT Bowring*⁷³ were all considered. The test applied was adapted from Bingham L.J.'s speech in *Hutchison*,⁷⁴ to the effect that,

“once the applicant had shown that the case fell within one of the classes specified by the rules of court, it was ‘a largely discretionary area’ (part of the issue whether it was just and right) whether an order for security was to be made against a counterclaiming defendant”,⁷⁵

whilst requiring,

“the substance of each claim to be considered and whether, and if so how far, the counterclaim enlarges the ambit of the action in terms of issues, time and costs”.⁷⁶

After a careful examination of the facts on this pragmatic rather than taxonomic basis, an order was made.

The existence of costs specifically attributable to the defence of the counterclaim, even where it is a “mere defence”, has been treated as a significant factor (see *Hutchison*⁷⁷ and *Pimlott*⁷⁸ above), as otherwise, the claimant could, clearly, obtain what it could not obtain otherwise: security for its own costs of bringing its claim against the defendant.⁷⁹ Indeed, I suggest that this factor has become so

intertwined with the concept of a “mere defence” that it has become part of the definition; a “mere defence” being characterised as a defence or counterclaim which does not involve additional costs. If, as in *Hart Investments Ltd v Larchpark*,⁸⁰ the counterclaim has, “an independent vitality of its own”,⁸¹ it will almost necessarily carry with it some additional investigative and probative cost. But it remains possible to imagine a vigorous, independent, vital defence that could be raised in legal argument only, as, for *C.J.Q. 484 example, an allegation of lack of privity, where the additional costs might be minimal. Indeed, in an extreme case, where it is, as in *Jones v Environcom Ltd*,⁸² the counterclaim which is the most significant, allowing the main claim to be discontinued, this might justify an award not limited to the additional costs of the counterclaim.

Neither Lawton L.J. in *The Silver Fir*⁸³ (“normally”) nor Dillon L.J. in *Hutchison*⁸⁴ (“ordinarily”) had, in fact, imposed a bar on security being exceptionally awarded in the case of a “mere defence” (and therefore, by implication, cases in which the claimant faced no additional costs burden).⁸⁵

The procedural jurisdiction has, then, inherited a considerable degree of complexity as a result of absorbing these attempts to soften the statutory wording. Taken on its own terms, the procedural jurisdiction clearly permits an award on a pleaded counterclaim as a result of Pt 20, the question whether it is a “mere defence” or whether it involves identifiable additional costs logically going to the discretion to make an award and as to the amount of that award. Part 3 would permit security for costs to be awarded in some interim applications. The outstanding problem to which case law derived from the statutory jurisdiction might assist is, then, the case in which no formal counterclaim has been pleaded. As we have seen, if the threshold is the pragmatic one of a defendant incurring additional costs, there is no reason why the award should be confined to circumstances in which a counterclaim has to be pleaded.

May if it appears by credible testimony that there is reason to believe that the company will be unable to pay the defendant's costs if successful in his defence ...

The test for impecuniosity is, in CPR r.25.13(3)(c) expressed in modern, straightforward language. Nevertheless, it adopts from the statute the rider that there should be “reason to believe” in the claimant's impecuniosity. The statute insists in addition that such “reason to believe” should be grounded in “credible testimony”. The question arises, therefore, of the effect of either phrase on the standard of proof.

In 1973, in *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd*, Denning M.R. relied on the word “may” in the section to create a discretion to make the award under the statute:

“Turning now to the words of the statute, the important word is ‘may’. That gives the judge a discretion whether to order security or not. There is no burden one way or the other. It is a discretion to be exercised in *C.J.Q. 485 all the circumstances of the case.... If there is reason to believe that the company cannot pay the costs, then security *may* be ordered, but not *must* be ordered.”⁸⁶

Cairns L.J. thought that the discretion operated only in “special circumstances”, but Lawton L.J. agreed with Denning M.R. that:

“[The] discretion ought not to be hampered by any special rules or regulations, nor ought it to be put into a straitjacket by considerations of burden of proof.”⁸⁷

Similar considerations were utilised by Dillon L.J. in *Europa Holdings Ltd v Circle Industries (UK) Ltd*,⁸⁸ as means of tempering, not the discretion, but the underlying jurisdiction in the case of a struggling small company. He emphasised that the statutory jurisdiction arose only if,

“there is reason to believe that the company will (and I stress that the word is *will* and not *may*) be unable to pay the defendant's costs”.⁸⁹

Consequently, the order was not made because the plaintiff had made efforts to “keep afloat” during a lengthy depression and there was evidence that it was, “a solvent and apparently well-managed and prudently managed company” with a genuine claim.⁹⁰

Approximately two months later, in *Unisoft (No.2), Re*⁹¹ Nicholls V.C. considered the phrase “credible testimony”, concluding that it did not “water down” the basic test inherent in the statutory jurisdiction whether the company would, at the time of the future costs order against it, be unable to pay:⁹²

“The court, on the basis of credible testimony must have ‘reason to believe’, that is, to accept, ‘that the company will be unable to pay’. If this were not so, and the test is not whether the court, on the

basis of credible testimony, believes the company will be unable to pay, then it is difficult to identify what is the proper approach and what is the test being prescribed by the statute. It cannot, surely, suffice that the applicant's **C.J.Q. 486* accountant, for example, who is a credible witness, puts forward a case of inability to pay."⁹³

The reference to "credible testimony", then, adds nothing to the normal requirement to evaluate all the evidence.

If "reason to believe it will be unable" means no more than "will be unable", there seems no obvious reason why that phrase should be retained in the statute or inherited by the procedural jurisdiction. The expression "reason to believe" appears only in this and one other of the grounds for the order expressed in CPR r.25.13(2).⁹⁴

In *Marine Blast v Targe Towing Ltd*,⁹⁵ Mance L.J., specifically considering the phrase as used in the CPR said:

"This is not an occasion on which one can determine whether or not, as a matter of probability, it will pay. The question is whether there is reason to believe that it will be unable to pay. I think that test is satisfied."⁹⁶

Mance L.J.'s comment was subsequently treated, in *Mbasogo v Logo Ltd*,⁹⁷ as defining the standard of proof as less than a balance of probabilities. This approach was explicitly approved and *Unisoft (No.2)*, *Re*⁹⁸ not followed in *Aerotel Ltd v Wavcrest Group Enterprises Ltd*,⁹⁹ also applying the procedural rule.

On that basis, the burden for the applicant in respect of CPR r.25.13(2)(a), (d), (e) and (g) is that of the balance of probabilities whilst that of the statute and of r.25.13(2)(c) and (f), as a result of the inclusion of the words "reason to believe", is the *lower* threshold of what was described by Buxton L.J. in *Phillips v Symes*,¹⁰⁰ as a "significant danger". The use of inexact verbal expressions of probability has the potential to create much confusion and potential for misunderstanding.¹⁰¹ In a very small and entirely unscientific survey of 45 **C.J.Q. 487* lawyers and non-lawyers within my own department, both "reason to believe" (67 per cent) and "significant danger" (78 per cent) were regarded--taken as phrases without any context--by the vast majority of respondents as indicating a *greater* than 50 per cent likelihood.

The matter came to a head in 2008 in *Jirehouse Capital v Beller*,¹⁰² where *Unisoft (No.2)*, *Re*¹⁰³ was subjected to careful analysis by Arden L.J. Counsel had argued that CPR r.25.13(2)(c) demanded a standard of proof, that of a balance of probabilities, higher than that of the "significant danger" applicable under the statute. This suggestion was rejected and *Aerotel*¹⁰⁴ held to be wrong,

"there is a critical difference between a conclusion that there is 'reason to believe' that the company will not be able to pay costs ordered against it and a conclusion that it has been proved that the company will not be able to pay costs ordered against it. In the former case, there is no need to reach a final conclusion as to what will probably happen. In the latter case, a conclusion has to be reached on the balance of probabilities.... the Vice Chancellor in *Unisoft* did not lay down any test on the balance of probabilities."¹⁰⁵

In addition, Arden L.J. considered that Buxton L.J. had not intended "significant danger" to indicate a different test, although,

"that said, there may be contexts in which a test of significant danger does produce a different result from 'reason to believe' and so it would be much safer to use the statutory words in future".¹⁰⁶

This distinction, between current fact and speculation as to a future inability to pay then justifies the distinct approach in r.25.13(2)(c) and (f), the latter also referring to a future inability to pay (by a nominal claimant). Here, assimilation of the statutory words and related case law into the procedural arena is, although it has taken eight years to do so, vindicated.

A final excursion into the semantics of the two jurisdictions relates, once impecuniosity has been established, to the exercise of the discretion. Where the statute is invoked in proceedings to which the CPR apply,¹⁰⁷ CPR r.25.13(1), demands not only that it should be "just" to make the order but that the court should be "satisfied" that it is so.¹⁰⁸ This might reasonably, I suggest, **C.J.Q. 488* appear to, for example, a litigant in person, a different and more stringent test for the exercise of the discretion than that required to establish jurisdiction, or than a balance of probabilities, although it is probably--again--intended to add nothing.

The exercise of the discretion

Denning M.R. having discerned a discretion to make the order under the statute, a series of criteria governing its exercise also emerged from *Parkinson*.¹⁰⁹ The extent of the discretion under the statute was then aligned with that of the then procedural rules to award security on other grounds by Megarry V.C. in *Pearson v Naydler*,

“the word “just” which the judge [in *Bilcon Ltd v Fegmay Investments Ltd*¹¹⁰] took from RSC Ord 23 r 1, does not in fact appear in section 447; but it seems to be to be an entirely appropriate term to apply in a case where Parliament has not laid down any express criteria for exercising the discretionary power”.¹¹¹

A number of factors then fall to be discussed in the present context: the criteria by which that discretion is exercised and the relevance to it (or otherwise) of issues such as the merits of the case and whether the additional filters now placed on the statutory jurisdiction by CPR Pt 1 in particular render earlier case law based entirely on the statute obsolete. The possibility of preventing an order by a claim that it would “stifle” a legitimate defence, or of using CPR Pt 3 to overturn an order by seeking relief against sanctions are also significant in understanding the interplay between the procedural and statutory jurisdictions.

Factors in the exercise of the discretion

In *Pearson*,¹¹² Megarry V.C. identified the following factors in applying *Parkinson*¹¹³ to a statutory claim:

- The impecuniosity of the company goes not simply to the existence of the jurisdiction to make the order but is also “a substantial factor” in the decision to exercise the discretion to do so.

***C.J.Q. 489** • However the order must not be used as “an instrument of oppression”, for example, stifling a genuine claim by a small company.

- But the court must not be so reluctant to make the order that an impecunious company can use its impecuniosity to put “unfair pressure” on its opponent.

- The fact that the co-plaintiff was an individual against whom security could not be ordered did not preclude the making of the order.¹¹⁴

- An award of two-thirds of the costs incurred to date was an appropriate guideline (factoring in, for example, litigation risk). This does, of course, assume, a single once and for all costs award.

Insolvent liquidation creates a presumption of impecuniosity¹¹⁵ but is only one factor in exercise of the discretion.¹¹⁶ For example, in *Tripp Ltd v Landor*,¹¹⁷ the fact that the insolvent company had a facility available to it with its bank (even though the court could not compel the company to draw on it) was sufficient to prevent security being ordered.

In *Cohort Constructions Co (UK) Ltd v Spring Hotels Ltd*, Evans L.J. was, however, less confident as to the irrelevance of the merits of the case:

“Certainly the court must be satisfied that the defence is arguable, or, putting the matter differently, that the defence gives rise to triable issues ... I am not persuaded that it is realistic to ignore the merits beyond this, for the simple reason that the burden or unfairness to the plaintiff, if an order is made with which he cannot comply, must depend on the value of the claim which he has to forego, which depends on its turn on a broad assessment of its chances of success. Similarly the risk for the defendant of having a costs order in his favour which the plaintiff cannot satisfy must depend on the chances of such an order being made and therefore on the eventual outcome of the proceedings.”¹¹⁸

The strength of the plaintiff’s substantive case did, however, appear to be the deciding factor in the first instance decision of *Turberville Smith Ltd v Turberville Smith*¹¹⁹ where, although there were prima facie grounds for security, no ***C.J.Q. 490** order was made on the grounds of the plaintiff’s “realistic prospect”¹²⁰ of success against all defendants. Apparently, even a claim “likely to fail” does not necessarily attract an award provided the intentions of the claimant are good, *Anglo Petroleum Ltd v TFB (Mortgages) Ltd* :

“If a claim is a genuine claim, seriously pursued, a court should in general resist being swayed towards ordering security for costs on the ground that, as the court sees it at the time of the

application for security, the claim is likely to fail in the end.”¹²¹

And the prospects of success appear to have even less relevance to the procedural jurisdiction to award security for the costs of an appeal:

“It is implicit in the whole jurisdiction to award security for the costs of an appeal that the appeal may fail; and it is seldom that the prospects of success on an appeal are relevant and very seldom, if ever, that they are determinative.”¹²²

Stifling a legitimate claim

Where the merits of the case hold distinct significance, however, is in circumstances where the claimant as respondent to the application alleges that awarding security would stifle its legitimate claim. It is a paradox arising from the fact the jurisdictions are based on impecuniosity that,

“the court [has] power to order the company to do what it is likely to find difficulty in doing, namely to provide security for the costs which *ex hypothesi* it is likely to be unable to pay”.¹²³

This was, however, described as a non sequitur by Saville J. in *Flender Werft AG v Aegean Maritime Ltd.*¹²⁴ In his view:

“A great deal of international business is conducted through offshore or shell companies with no or no apparent assets but with legal or beneficial owners or financial backers well able to provide the necessary funds ... including ... the investment needed for litigating or arbitrating claims made by those companies. To my mind, particularly where commercial entities are involved, any argument that an order for security will stifle a claim is likely to fail *in limine*, unless the court is persuaded that in truth it ***C.J.Q. 491** is at least more likely than not that funds are not available from any source to provide or support security.”¹²⁵

Whilst the hurdle set (“more likely than not”) is not a high one--albeit higher than the test for establishing the jurisdiction--this is, I suggest, very much a Commercial Court view, in contrast to the sympathy shown to a private, apparently sole-director company by the Chancery Division in *Pearson*,¹²⁶ or to the single mother who had offered the claimant almost all her savings towards satisfying the award in *Mini-Lux Ltd v Panasonic (UK) Ltd.*¹²⁷

There has been, however, a debate about the extent to which the respondent need adduce evidence of its own impecuniosity in support of its stifling claim. In *Trident International Freight Services Ltd v Manchester Ship Canal Co.*,¹²⁸ citing both *Parkinson*¹²⁹ and *Pearson*,¹³⁰ the Court of Appeal held that it was not essential:

“It would be pointless to insist on the company putting in evidence in order effectively to admit that which the defendant effectively asserts. Nor can any objection reasonably be taken because the plaintiff’s counsel does not in terms submit that, if security is ordered, it will or may be unable to pursue the proceedings. That submission is implicit in the plaintiff’s resistance of the application.”¹³¹

Nevertheless, even if no evidence was available from the plaintiff, “probability” rather than “certainty” of an inability to pursue the proceedings if the award were made was adequate: a comparatively high test, and higher both than that proposed by the Commercial Court in *Flender Werft*¹³² (“more likely than not”) and, as we have seen, than that for establishing the jurisdiction in the first place. Peter Gibson L.J., however, in *Keary Developments Ltd v Tarmac Construction Ltd*¹³³ questioned this assumption:

“it seems to me that there are two quite separate questions which are relevant. One is whether the condition for the application of s 726 is ***C.J.Q. 492** satisfied. That requires the court to look ahead to the conclusion of the case to see whether the plaintiff would be able to meet an order for costs. On that the [plaintiff]¹³⁴ accepting the applicability of the section, need put in no evidence. The other question which is relevant, given that an application for security is made at a stage when the trial will not have occurred, is whether the plaintiff company will be prevented from pursuing its litigation if an order for security is made against it. On this, evidence from the [plaintiff]¹³⁵ may be needed. The considerations affecting those two questions seem to me to be rather different. For example, a backer might well be prepared to put up money to assist a company to pursue a case when the trial has not yet occurred, but the same backer would be extremely unlikely to put up money after the trial has been unsuccessfully concluded against the company.”¹³⁶

He went on to identify the following factors affecting the interaction of the discretion with a stifling defence:

- Following *Parkinson*,¹³⁷ there was a complete discretion to be exercised in the light of all the circumstances.
- The “possibility or probability” that an award would deter the plaintiff from proceeding was not “without more” a reason to dismiss the application.
- The court must,

“carry out a balancing exercise. On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that it must weigh the injustice to the defendant if no security is ordered ... it will also be concerned not to be so reluctant to order security that it becomes a weapon whereby the impecunious company can use its inability to pay costs as a means of putting unfair pressure on the more prosperous company.”¹³⁸

- The plaintiff's prospects of success form part of the circumstances but will *not* be investigated unless there is “a high degree of probability of success or failure”.
- Whilst a payment in might acknowledge that the claim had merit, it might be made on a nuisance value basis from which no such inference could be drawn. (Presumably now the existence of Pt 36 offers by *either* party might be considered under this head.)¹³⁹

***C.J.Q. 493** • The award need not be of a substantial amount as long as it is not nominal.

- As to stifling, the court must be “satisfied that, in all the circumstances, it is probable that the claim would be stifled”. Despite *Trident*, in most cases evidence would be required. The court should, however, consider whether the company could obtain funds from third parties such as shareholders, directors or investors to continue the litigation. The burden of producing evidence that this was impossible was on the plaintiff.¹⁴⁰ In *Inplus Group Ltd v Pyke*,¹⁴¹ however, it was argued that the effect of Strasbourg jurisprudence, at least in the case of applications for security of the costs of an appeal under CPR r.25.15 (that is, necessarily an invocation of a procedural jurisdiction), involved deeper consideration of the merits of the case and that there was no obligation on the claimant to provide evidence as to stifling and its rights under ***C.J.Q. 494** ECHR art.6 to have access to justice. Neither argument found favour with Brooke L.J.¹⁴²

- The lateness of the application, whose fault such lateness was, the fact that the plaintiff¹⁴³ has already incurred costs in anticipation that an application for security would not be made and the costs to be incurred¹⁴⁴ were all relevant, as was the fact that costs and trial length had now increased and new evidence that companies under the same directorship had gone into liquidation when substantial claims they were making had failed.

In *Danemark v BAA*,¹⁴⁵ applying the *Keary*¹⁴⁶ principles, the link between the stifling argument and the lateness of the application and costs of trial was further developed:

“Where such an order is sought very late in the day, the result of that exercise is not likely to favour the defendant, for the costs left to be incurred are likely to be proportionately small when compared to the plaintiff's claim, including his costs to date and any security he may already have given.”¹⁴⁷

Whilst this might be right when the parties are very close to trial, there is, of course a tipping point before then when costs begin to escalate substantially. At or before that point, one might suggest that, on the same logic, the timing should favour the defendant.

Stifling and third-party funding

The interaction of the security jurisdiction with the possibility of third-party funding, as with the interaction between the security jurisdiction and interim payments, raises further questions. Requiring third-party backers who might be individuals to provide security might, for example, be thought to abrogate the principle that security is not available on the basis of individual impecuniosity (still less on the basis of someone else's impecuniosity). Supreme Court Act 1981 s.51, nevertheless allows for costs orders ex post facto against third-party funders of litigation, raising the possibility that a third party funder whose ***C.J.Q. 495** backing allows the litigation to continue despite the award of security at an early stage renders him- or herself additionally liable to such a costs order at a later one. So, in *Petromec Inc v Petroleo Brasileiro SA Petrobras (No.4)*,¹⁴⁸ the existence of an (ultimately inadequate)

security for costs order was a factor but did not prevent a third party costs order subsequently being made against a funder of the litigation.¹⁴⁹ Indeed, in *Longstaff International Ltd v Baker & McKenzie*,¹⁵⁰ the impecuniosity of a foreign claimant was relied on under CPR r.25.13(2). The claimant, which was illiquid, owned a subsidiary, which undertook to meet the claimant's liability in costs. *Unisoft (No.2)*, *Re*¹⁵¹ and *Thistle*¹⁵² were cited as authority for the proposition that the time at which the decision had to be made was as at the speculative time of the final costs order and that a net asset balance was not determinative because the liquidity of the claimant had to be considered. Park J., expressly treating the position under the CPR and under the Companies Act 1985 as identical, held that,

"[a] case cannot be taken out of sub-paragraph c) by saying that, although the claimant company will be unable to pay the defendant's costs, some other person will".

The offer of security by Redwell was taken not only as an admission of the claimant's impecuniosity but also as a concession that, "it is just that some form of security should be ordered"; an additional risk undertaken by the third party backer in offering security.

CPR Part 1 and relief against sanctions

The question of the amount of security, bearing in mind that one sum might stifle a meritorious claim whilst a lesser one might not, was regarded as a starting point under the statutory jurisdiction in *Cohort Constructions Co (UK) Ltd v Spring Hotels Ltd*.¹⁵³ This case also marks the first leakage of what was, two years later, to become CPR Pt 1, into the court's approach to the statute; not here as to the "justice" aspect already well-established at common law, but as to speed, economy and active case management.¹⁵⁴ Case management is ***C.J.Q. 496** relevant because it defines the scope of the trial, the costs of which it is sought to protect by security. Evans L.J. identified two principles to be adopted in cases where the costs were "out of scale" with the issues in dispute,

"first, the issues should be carefully identified so that the proceedings can be limited to those which really matter; secondly the costs or proposed costs should be scrutinised so that they do not become disproportionate to the amounts which realistically are in dispute".¹⁵⁵

It has, however, been suggested that pre-1999 case law governing the exercise of the *discretion* should be disregarded,¹⁵⁶ although, as we have seen, pre-1999 case law as to the meaning and extent of the statutory jurisdiction has informed and consistently been applied to its procedural equivalent. Nevertheless, in *Hammond Suddard Solicitors v Agrichem International Holdings Ltd*,¹⁵⁷ *Keary*¹⁵⁸ was referred to in the following terms,

"although that case was decided before the advent of the CPR, the principles in it are relevant to the determination of any case in which the appellant asserts that an order for security for costs (or an order for security for costs above a certain amount) will stifle an appeal".¹⁵⁹

In *Sinclair Investment Holdings SA v Cushnie*,¹⁶⁰ the applicant was obliged to rely only on the procedural jurisdiction, as the claimant was a foreign company. Mann J. was concerned that attempts were being made to cost the claimant out of the proceedings and considered that security was premature, but, again, applied the *Keary*¹⁶¹ principles in so doing. The issue, I suggest, is not that of the discretion per se, that having been discerned by Denning M.R. and confirmed by Megarry V.C. as identical to the existing procedural "just to do so" filter, but the effect of CPR Pt 1, now governing both jurisdictions. The effect of the case law is, I suggest, to regard CPR Pt 1 as a supplement to the pre-1999 and statutory case law, rather than as superseding it.

Possibly more significant, however, is the effect of CPR Pt 3, which I have already identified as possibly allowing for the award of security for the costs of an interim application by way of general sanction. CPR Pt 3, however, also introduced provision for relief against sanctions from 1999 which then also apply to ***C.J.Q. 497** the statutory jurisdiction in proceedings governed by the CPR. The sanction, of course, when an order for security is made, is that if the security is not provided, the claimant's action is stayed with the risk of being struck out. So, in *Mini-Lux Ltd v Panasonic (UK) Ltd*¹⁶² the claimant's impecuniosity was the only stated reason for its failure to comply with the order and relief was given to prevent strike out of the substantive claim once the criteria in CPR r.3.9 were applied.

Conclusion

An examination of the wording of the statute on its own terms, then, demonstrates a number of

differences between the Victorian statutory jurisdiction and the modern procedural jurisdiction: it applies to different categories of business entity; arguably to different types of costs order; and to wider categories of proceedings (including, in principle, small claims otherwise falling under the CPR). The words “credible testimony” in the statute appear to add nothing and the discretion extracted from case law is confirmed by the procedural, “just to do so” superimposed on the statutory jurisdiction in proceedings to which the CPR apply. Case law derived from the statute, particularly as to its application to interim applications and counterclaims, is applied without question to the procedural jurisdiction even though, in the case of counterclaims at least, a simpler route to much the same end could be found in CPR Pt 20. The distinctions between counterclaims and “mere defences” employed in that case law is, I suggest, also at odds with a pragmatic approach to costs more consistent with the tenor of the CPR. Further, the CPR allow both for imposition of security for costs awards in other circumstances as sanctions and for relief against the sanction for a failure to provide the security.

The question of impecuniosity straddles both limbs of both jurisdictions but with very different burdens of proof: less than the balance of probabilities in order to find sufficient impecuniosity to establish jurisdiction but a test of “more likely than not” or even “probability” of the same impecuniosity to justify refusing an order on the ground it would stifle a legitimate claim.

The complexity of factors considered in exercise of the discretion, however, suggests that a codification of the accretion of glosses, interpretations and criteria actually employed, even if a non-exhaustive list, might usefully be added to the procedural rule, on the model of a similar list in CPR r.3.9, for the sake not only of my notional litigant in person but even for lawyers seeking realistically to understand and advise on the prospects of success of such an application.

Mourn or rejoice? The repeal of the statute will make no substantial difference to the way in which the procedural jurisdiction has been and is exercised; the effect of the statute on the procedural jurisdiction being, and as a result of continued recourse to its case law, I suggest, too ingrained. Outside the ambit of the CPR, there may still be cause to reflect on the passing of a useful procedural manoeuvre.

I am grateful to Professor Adrian Walters for helpful comment and discussion on this paper and to the 45 members of the law school's staff who responded with alacrity and enthusiasm to the small survey I refer to in this paper. The law and procedure stated is believed to be up to date to January 2009 (including the 48th amendment to the CPR).

C.J.Q. 2009, 28(4), 470-497

1. See, for example, *King v Telegraph Group Ltd* [2004] EWCA Civ 613; [2005] 1 W.L.R. 2282 (also discussing the interrelationship between conditional fees and conditional orders akin to those for security for costs made under CPR r.24.6); Anon., “Case Comment” (2004) 23 C.J.Q. 413. See also *Knigh v Beyond Properties Pty Ltd* [2006] EWHC 1242 (Ch); [2007] 1 W.L.R. 625.

2. For a discussion of the possible impact of ATE policies on the award of security, or as a form of security, see T. Bullimore R. and Crossingham, “ATE Insurance and Security for Costs” (2005) 155(7173) *New Law Journal* 632. The fact that the defendant had the protection of the plaintiff's legal expenses insurance was a factor in refusing an application for security in *Airmuscle v Spitting Image Productions Ltd* [1994] R.P.C. 604 Patents County Court. See also dictum of Mance L.J. in *Nasser v United Bank of Kuwait (Security for Costs)* [2001] EWCA Civ 556; [2002] 1 W.L.R. 1868 at [60], “[t]he interesting possibility was raised before us that a claimant or appellant who has insured against liability for the defendant's costs in the even of the action or appeal failing might be able to rely on the existence of such insurance as sufficient security in itself. I comment on this possibility only to the extent of saying that I would think that defendants would, at the least, be entitled to some assurance as to the scope of the cover, that it was not liable to be avoided for misrepresentation or non-disclosure (it may be that such policies have anti-avoidance provisions) and that its proceeds could not be diverted elsewhere. The new arrangements for funding litigation certainly appear capable of throwing up possible imbalance, in so far as they permit contingency fee arrangements [sic] with uplifts potentially recoverable from losing defendants but enable claimants to pursue litigation without insuring of securing the defendant's fees”, quoted by Sedley L.J. in *Al-Koronky v Time-Life* [2006] EWCA Civ 1123; [2006] C.P. Rep. 47; [2007] 1 Costs L.R. 57 at [25] of the transcript, who concluded that, “a claimant's (or for that matter a defendant's) entry into a CFA with his solicitor has by itself no impact on the case for or against the making of an order for security for costs” at [35] and that since in this case the policy was voidable on an event which amounted to the claimant losing the case, on the facts, even with a 100% uplift, the CFA was neutral in its effect. An after the event policy was, on the facts, regarded as insufficient security by the Court of Session in *Monarch Energy Ltd v Powergen Retail Ltd* [2006] CSOH 102; 2006 S.L.T. 743 and by the Court of Appeal in *Belco Trading Co v Kondo* [2008] EWCA Civ 205.

3. As in some landlord and tenant litigation; see for example: *Classic Catering Ltd v Donnington Park Leisure Ltd* [2001] 1 B.C.L.C. 537 Ch D. In *Samuel J Cohl Co v Eastern Mediterranean Maritime Ltd (The Silver Fir)* 1980] 1 Lloyd's Rep. 371 CA, claimant and counterclaimant both applied for security under RSC Ord.23, it being largely coincidence that had resulted in the claimant starting the proceedings and, as the same issues arose from both claim and counterclaim, it was held on appeal that both parties should be treated alike and ordered to pay similar amounts by way of security. A similar approach (that neither party, if successful, should be at risk as to costs) was taken in *Flender Werft AG v Aegean Maritime Ltd* [1990] 2 Lloyd's Rep. 27 QBD (Commercial Court).

4. And a defendant, in bringing a counterclaim, not only submits him or herself to the possibility of an award for security in respect of the counterclaim, but the possible advantages of constituting him or herself a claimant for other purposes (CPR r.20.3), such as making a *claimant's* CPR Pt 36 offer on the counterclaim rather than a *defendant's* offer on the main claim that merely takes the counterclaim into account. The disparity between a claimant's offer and a defendant's offer have, however, now been much reduced by changes to CPR Pt 36 in the 44th amendment, although differences in the "penalty" attaching to the two different types of offer remain.
5. The Companies Act 2006 (Commencement No.8, Transitional Provisions and Savings) Order 2008 (SI 2008/2860) Sch.1.
6. I am obliged in this section to my colleague Professor Adrian Walters and in particular to his articles "Security for Costs" (1995) *The Litigator* 237 and (1995) *The Litigator* 285.
7. An impecunious claimant may, of course, fall under the other grounds for jurisdiction found in CPR r.25.13 but there is no jurisdiction against a natural person on grounds of impecuniosity simpliciter. See, for example, *Thune v London Properties Ltd* [1990] 1W.L.R. 562 CA at [571], per Bingham L.J., "it cannot be too emphatically stated that the impecuniosity of a personal plaintiff is never of itself enough to confer on the court a discretion to order security". Note however discussion of the possibility that r.4.120(3) Insolvency Rules 1986 might allow for orders to be made against impecunious individuals in *Quicksons (South & West) Ltd v Katz (No.1)* [2003] EWHC 1981 (Ch); (2003) 153 N.L.J. 1308. It is a point of irony, if nothing else, that in Scots law there would appear to be a common law jurisdiction to award security against impecunious natural persons that was at least briefly thought to be wider than that applicable to companies: *Rose's Trustees v Rose* 1993 S.L.T. (Sh Ct) 85.
8. Per Saville L.J. in *Flender v Werft* [1990] 2 Lloyd's Rep. 27 QBD (Commercial Court) at [30]-[31]. See also Megarry V.C. in *Pearson v Naydler* [1977] 1W.L.R. 899 Ch D at [905]: "A man may bring into being as many limited companies as he wishes with the privilege of limited liability; and [Companies Act 1985 s.726] provides some protection for the community against litigious abuses by artificial persons manipulated by natural persons. One should be as slow to whittle away this protection as one should be to whittle away a natural person's right to litigate despite poverty."
9. A. Zuckerman, *Civil Procedure* (London: LexisNexis UK, 2002), pp.339-340, para.9.155. This might be thought of as a similar pressure on the defendant as created by the prospect of not only split costs but indemnity costs and interest under CPR r.36.14(3).
10. *Jirehouse Capital v Beller* [2008] EWCA Civ 908; [2008] C.P. Rep. 44, per Arden L.J. at [19]: "Although Millett J [in *DSQ Property Co Ltd v Lotus Cars Ltd* [1987] 1 W.L.R. 127] described the policy behind s. 726 s one of imposing a price for the privilege of limited liability (a policy which would not include extending the security for costs regime to unlimited companies). Mr. Auld accepted that there was no statement of policy that this was the only reason for having a security for costs regime against companies."
11. Limited Liability Partnership Regulations 2001 (SI 2001/1090) reg.4 and Sch.2.
12. Limited Liability Partnerships Act 2000 s.1(2).
13. *Jirehouse Capital v Beller* [2008] EWCA Civ 908; [2009] 1 W.L.R. 751; [2008] C.P. Rep. 44, per Arden L.J. at [17]: "It is a striking feature of [the procedural jurisdiction] that it does not use the expression 'limited company' which is a feature of s. 726. In my judgment, the rules committee which was responsible for the CPR must have been aware that s. 726 was restricted to limited companies. The change of terminology must ... have been deliberate."
14. Note the different wording in r.45(5)(c) of the Competition Appeal Tribunal Rules 2003 (SI 2003/1372), "an *undertaking (whether or not it is an incorporated body)*, and whether or not it is incorporated inside or outside the United Kingdom) and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so" [my italics]. Might such an "undertaking" include a sole trader?
15. Andrews, however, considered it less than obvious that a failing partnership should be outside the jurisdiction to award security: N. Andrews, *Civil Procedure* (London: Sweet & Maxwell, 1994), p.253, para.10-012.
16. Trade Union and Labour Relations (Consolidation) Act 1992 s.10(1) and (3). Note however that such a body might, however, fall under other statutory provisions allowing security to be awarded, such as that under r.45(5)(c) of the Competition Appeal Tribunal Rules 2003, fn.14 above.
17. Trade Union and Labour Relations (Consolidation) Act 1992 s.10(1)(b).
18. One objective of this manoeuvring, historically, at least, was to take advantage of the legal aid available to individuals but not to companies. See for example, *Eurocross Sales Ltd v Cornhill Insurance Plc* [1995] 1 W.L.R. 1517; [1995] 4 All E.R. 950 CA; *Circuit Systems Ltd (In Liquidation) v Zuken-Redac (UK) Ltd* [1997] 1 W.L.R. 721; [1996] 3 All E.R. 748 CA; *Norglen Ltd (In Liquidation) v Reeds Rains Prudential Ltd* [1999] 2 A.C. 1; [1997] 3 W.L.R. 1177 HL. See also *Compagnie Noga d'Importation et d'Exploration SA v Abacha (No.5)* [2004] EWHC 2601 (Comm). For a more recent discussion of the principle, clearly surviving the introduction of the CPR, see *Investment Invoice Financing Ltd v Limehouse Board Mills Ltd* [2006] EWCA Civ 9; [2006] 1 W.L.R. 985 in which it was said that: "The fact that there were grounds for requiring the original claimant to provide security in respect of his potential liability in respect of costs ... provides no grounds for imposing a similar requirement on a new claimant whose circumstances may be entirely different." See also S. Gold, "Civil Way" (2006) 156 N.L.J. 142.
19. See *Crimfil Ltd v Barclays Bank Plc*, *The Times*, February 24, 1995 CA, and comment thereon in J. Ching, "Get it on account: the interim

payment in commercial cases" (1997) *The Litigator* 177.

20. In *Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons (Interim Payment)* [2001] C.P. Rep. 20 QBD (TCC), however, an interim payment of £1.8 million was made on the application of a company admittedly in insolvent liquidation.
21. This potential for interaction between the security for costs jurisdiction and the interim payment jurisdiction has not, to the best of my knowledge, been explored in case law to date. One factor that would be of interest in such an exploration would be the place of an examination of the merits of the parties' substantive cases: highly significant to the interim payment jurisdiction but resisted by the courts in the exercise of the security jurisdiction.
22. This reproduces a principle appearing in the Joint Stock Companies Act 1857 s.24 and in Companies Acts from 1862 onwards. See, for example, Companies Act 1948 s.447, incorporating the same wording (give or take "the costs of the defendant" in place of "the defendant's costs").
23. The approach of the Scottish courts to the jurisdiction is discussed further below. Campbell, however, suggests a practical distinction between the two sub-sections in that in England and Wales, the court has an apparent discretion to stay the proceedings until security is provided, whereas in Scotland a sist of the action is automatic: K.J. Campbell, "Security for Costs against Insolvent Companies: a Cross-Border Anomaly in Practical Protection" (2000) (May) *Journal of Business Law* 278, discussing the decision in *Pioneer Seafood Ltd v Braer Corp* 1999 S.C.L.R. 1126 S.C. (Outer House).
24. The stay may ultimately be converted into a dismissal of the claim: *Speed Up Holdings Ltd v Gough & Co (Handly) Ltd* [1986] F.S.R. 330 Ch D.
25. The 14th amendment to the CPR.
26. *Greenwich Ltd v National Westminster Bank Plc* [1999] 2 Lloyd's Rep. 308 Ch D.
27. As, of course, it must, the CPR being only a statutory instrument. This technicality does not always appear to be in the forefront of the mind of the framers of the rules, however, witness an apparent attempt to override or subvert the requirement of service of a distinct "hearsay notice" in Civil Evidence Act 1995 s.2 in CPR r.33.2(1), which allows for compliance with s.2 by *not* serving a separate notice.
28. Replaced by Companies Act 2006 s.1139 for some purposes from April 6, 2007: Companies Act 2006 (Commencement No.2, Consequential Amendments, Transitional Provisions and Savings) Order 2007 (SI 2007/1093). It is to be entirely repealed from October 1, 2009 by Companies Act 2006 (Commencement No.8, Transitional Provisions and Savings) Order 2008 (SI 2008/2860) Sch.1.
29. Currently by CPR r.6.1, "[t]his Part applies to the service of documents, except where--(a) another Part, any other enactment or a practice direction makes different provision" and r.6.3(2): "A company may be served (a) by any method permitted under this Part; or (b) by any of the methods of service set out in the Companies Act 1985 or the Companies Act 2006." See further *Murphy v Staples UK Ltd*, one of the consolidated cases reported as *Cranfield v Bridgegrove Ltd* [2003] EWCA Civ 656; [2003] 1 W.L.R. 2441, in which, although the defendant's solicitors had indicated that they had instructions to accept service (as permitted by CPR Pt 6), the claimant nevertheless effected service at the defendant's registered office in accordance with the statute. It was held that although it was possible for parties to contract out of s.725 and restrict themselves to the CPR, no such agreement had been reached on the facts.
30. For example, "the condition is really duplicated by the reference in r 25.13(2)", per Weeks J. in *Classic Catering Ltd v Donnington Park Leisure Ltd* [2001] 1 B.C.L.C. 537 Ch D at [541]; "[s]ection 726(1) of the Companies Act is to the same effect", per Park J. in *Brimko Holdings Ltd v Eastman Kodak Co* [2004] EWHC 1343 (Ch); "there is plainly an overlap between condition 2(c) in CPR 25.13 ... and section 726 of the Companies Act 1985", per Chadwick L.J. in *Meretz Investments NV v ACP Ltd* [2006] EWCA Civ 1193. It was agreed between the parties in *Societa Finanziaria Industrie Tristiche v Manfredi Lefebvre D'Ovidio De Clunteres (Security for Costs)* [2004] EWHC 2154 (Comm) that the CPR provision and the statute involved the same considerations.
31. *Halsbury's Laws* (2004 reissue), Companies Vol.7(1), para.514, suggests that s.726(1) does not create jurisdiction to make the order over a *Scottish* company in English or Welsh proceedings. As the whole Companies Act applies to companies in both England and Wales and Scotland, and s.726(1) refers to the location of the proceedings rather than the place of registration of the company, it is suggested that this is incorrect. The act did not, of course, create jurisdiction to make the order in the case of a Northern Irish company, whether in proceedings in England, Wales or Scotland: see *Dynaspan (UK) Ltd v H Katzenberger Baukonstruktionen GmbH & Co KG* [1995] B.C.C. 778; [1995] B.C.L.C. 536 Ch D. It was common ground in *Greenwich Ltd v National Westminster Bank Plc* [1999] 2 Lloyd's Rep. 308 Ch D, that the section did not apply to a Manx company.
32. Whilst the default definition of "court" in the Companies Act 1985 s.744, is that of the court having jurisdiction to wind up the company, the reference in s.726 to, "the court having jurisdiction *in the matter*" [my italics] must be taken to displace it.
33. *Abdulhayoglu's Patent Application* [2000] R.P.C. 18, Comptroller-General of Patents.
34. CPR r.27.2(1)(a).
35. Patents Rules 1995 r.89A, inserted by the Patents (Amendments) Rules 2005 allowing for security if the applicant, "is a company or other body (whether or not incorporated in the UK) and there is reason to believe that it will be unable to pay another party's costs if ordered to

do so": D. Bainbridge, "Changes to Patent Legislation as from 1 October 2005" (2005) 10(5) *Intellectual Property and IT Law* 7. The Competition Appeal Tribunal created under the Enterprise Act 2002 also has its own power to grant security in r.45(5) of the Competition Appeal Tribunal Rules 2003 (SI 2003/1372). Security for costs is available (in principle: the parties may contract out of the provision) in arbitrations whose seat is England, Wales or Northern Ireland by virtue of Arbitration Act 1996 s.38, which provides no specific ground based on impecuniosity. For the likelihood in fact of security for costs orders being made in international arbitration, see G. Reid, "Security for costs in international arbitrations--forget it?" (2002) 152(7049) N.L.J. 1426.

- [36.](#) *Neck v Taylor* [1893] 1 Q.B. 560 CA.
- [37.](#) *The Silver Fir* [1980] 1 Lloyd's Rep. 371 CA.
- [38.](#) *The Silver Fir* [1980] 1 Lloyd's Rep. 371 CA, per Lawton L.J. at [374].
- [39.](#) *Hutchison Telephone (UK) v Ultimate Response* [1993] B.C.L.C. 307 CA. It was common ground that the defendant was impecunious.
- [40.](#) *Hutchison Telephone* [1993] B.C.L.C. 307 CA at [317].
- [41.](#) *CT Bowring & Co (Insurance) Ltd v Corsi and Partners Ltd* [1994] 2 Lloyd's Rep. 567 CA.
- [42.](#) *Unisoft (No. 1), Re* [1993] B.C.L.C. 1292 CA.
- [43.](#) The definition of "plaintiff" in Supreme Court of Judicature (Consolidation) Act 1925 s.225 (despite having been repealed and not replaced by the Supreme Court Act 1981) was discussed in this context as no longer being a "necessary" provision but as "colouring" all references to "plaintiff" both in the procedural rules and in the Companies Act.
- [44.](#) *CT Bowring* [1994] 2 Lloyd's Rep. 567 CA.
- [45.](#) A number of cases, including *Sinclair Investment Holdings SA v Cushnie* [2004] EWHC 218 (Ch) have compared the jurisdiction to require a claimant to "fortify" the undertaking as to damages usual in a freezing injunction with the jurisdiction to require a claimant to provide security for the defendant's costs.
- [46.](#) *CT Bowring* [1994] 2 Lloyd's Rep. 567 CA perhaps also represents the first occasion on which an attempt was made to rely on an inherent jurisdiction to award security outside the established rules, given their failure to provide a solution. Having earlier indicated that the jurisdiction to award security at all was contained entirely in the Companies Act and RSC Ord.23, later in the judgment Dillon L.J. suggested that this was on policy grounds: "In theory, as the Courts originally ordered security for costs under their inherent jurisdiction, there must be still inherent jurisdiction in the Court to order security in cases not covered by s. 726 or any other statutory provision or by O. 23 or any other Rule of Court. But the issues of policy involved are such that I find it difficult to envisage the Court creating a new category of case in which a plaintiff or defendant can be required to give security, without leaving that to the Rules Committee or Parliament." *CT Bowring* [1994] 2 Lloyd's Rep. 567 CA, per Dillon L.J. at [574]-[575]. The circumstances in which security can be awarded have been extended under the CPR (Pts 3 and 24 in particular). See *Olatawura v Abiloye* [2002] EWCA Civ 998; [2003] 1 W.L.R. 275, applied in *Halabi v Fieldmore Holdings Ltd* [2006] EWHC 1965 (Ch).
- [47.](#) *CT Bowring* [1994] 2 Lloyd's Rep. 567 CA at [570], per Dillon L.J.
- [48.](#) *CT Bowring* [1994] 2 Lloyd's Rep. 567 CA at [573], per Dillon L.J.
- [49.](#) As the consensus appears to be that a statutory application is brought under CPR Pt 25 as an interim application rather than by originating process under CPR Pt 49, it can be inferred that, "proceedings under the Companies Act 1985" in that rule is also confined to originating proceedings.
- [50.](#) *The Silver Fir* [1980] 1 Lloyd's Rep. 371 CA.
- [51.](#) *Hutchison* [1993] B.C.L.C. 307 CA.
- [52.](#) *CT Bowring* [1994] 2 Lloyd's Rep. 567 CA.
- [53.](#) *Hutchison* [1993] B.C.L.C. 307 CA.
- [54.](#) Some protection can sometimes be obtained in similar circumstances by use of a notice to admit facts under CPR r.32.18. However, this only puts the party raising new facts at risk of an adverse order for costs, it does not, as does an award for security, secure funds representing that potential adverse order.

55. *CT Bowring* [1994] 2 Lloyd's Rep. 567 CA at [577], per Millet L.J.
56. *Unisoft* [1993] B.C.L.C. 1292 CA.
57. *Unisoft* [1993] B.C.L.C. 1292 CA at [578].
58. CPR r.3.1(6A).
59. CPR r.3.1(6A).
60. It might be noted that the Scottish courts, interpreting the equivalent wording of s.726(2), had determined as early as 1998 that it did not supersede the common law *Atlas Hydraulic Loaders Ltd v Seabon Ltd* 1998 S.L.T. (Sh Ct) 6. This principle is treated as a correct statement of the law in Stair, *Laws of Scotland: Stair Memorial Encyclopaedia*, 3(2)(c)(i) 1073, so that a defending company could be ordered to provide security and, in 2000, *Assuranceforeningen Skuld v International Oil Pollution Compensation Fund (No.3)* 2000 S.L.T. 1352, Court of Session, Outer House, that security could be awarded against a defender to a multiplepinding (a form of procedure in Scotland by which the holder of a fund calls into court all those who assert a claim on it (Rules of the Court of Session Ch.51)) as the strict terminology of "pursuer" and "defender" did not apply to "other legal proceedings".
61. See also CPR r.7.2(1), "[p]roceedings are started when the court issues a claim form at the request of the claimant"; r.7.3(1), "[a] claimant may use a single claim form to start all claims which can be conveniently disposed of in the same proceedings" and the distinction in Pts 23 and 25 between the use of the words "claimant" and "defendant" and the words "applicant" and "respondent".
62. See also CPR r.52.10. For an example of the criteria taken into account when exercising the discretion to order security for the costs of an appeal, see *Dar International FEF v Aon Ltd* [2003] EWCA Civ 1833; [2004] 1 W.L.R. 1395. See also *Great Future International Ltd v Sealand Housing Corp* [2003] EWCA Civ 682, discussed in M. Davenport, "Security for costs: How powerful is the CA?" (2003) 153(7101) N.L.J. 1605.
63. Rather than confuse matters further, the jurisdiction in CPR r.25.14, "Security for costs other than from the claimant" is clearly intended to be confined to claims for security against third parties other than a claimant or (through the filter of Pt 20) a counterclaiming defendant.
64. CPR r.1.1(2)(a). Such equality has been incorporated explicitly elsewhere in the CPR as, for example, by extending the summary judgment jurisdiction to defendants as well as claimants and by allowing formal offers to be made by both parties under CPR Pt 36 (although opinions might differ on the "equality" of the respective "penalties" under r.36.14, hence my suggestion that it might be beneficial for a counterclaiming defendant to constitute him or herself a claimant for the purposes of Pt 36).
65. *Hutchison* [1993] B.C.L.C. 307 CA.
66. *Pimlott v Meregrove Holdings Ltd* [2003] EWHC 1766 (QB).
67. *Anglo Petroleum Ltd v TFB (Mortgages) Ltd* [2004] EWHC 1177 (Ch).
68. To be read, in my terms, as a "mere" defendant.
69. *Anglo Petroleum Ltd v TFB (Mortgages) Ltd* [2004] EWHC 1177 at [30]-[32].
70. *Thistle Hotels Ltd (formerly Thistle Hotels Plc) v Gamma Four Ltd* [2004] EWHC 322 (Ch); [2004] 2 B.C.L.C. 174.
71. *Neck* [1893] 1 Q.B. 560 CA.
72. *Hutchison* [1993] B.C.L.C. 307 CA.
73. *CT Bowring* [1994] 2 Lloyd's Rep. 567 CA.
74. *Hutchison* [1993] B.C.L.C. 307.
75. [2004] 2 BCLC 174 at [185], per Sonia Proudman Q.C.
76. [2004] 2 BCLC 174 at [33].

- [77.](#) *Hutchison* [1993] B.C.L.C. 307.
- [78.](#) *Pimlott v Meregrove Holdings* [2003] EWHC 1766 QBD.
- [79.](#) See, for example, *Chantrey Vellacott v The Convergence Group Plc* [2002] EWHC 3096 (Ch), where security in respect of the costs of a counterclaim was refused, there being insufficient evidence of the defendants' impecuniosity, although, in any event, only a small proportion of the claimant's costs could be attributed specifically to the main claim or the counterclaim. Note a Scottish case on s.726(2) as to the opposite position, where the costs for which the *defender* sought security from the pursuer included not only its costs of the main claim but also those attributable to its own counterclaim: *Cromarty Conservation Ltd v Revack Lodge Estate Ltd* 2005 S.C. (D) 15/5 Sheriff Court.
- [80.](#) *Hart Investments Ltd v Larchpark Ltd* [2007] EWHC 291; [2007] B.C.C. 541 TCC.
- [81.](#) In *Hutchison* [1993] B.C.L.C. 307, per Bingham L.J. and applied in *Hart* [2007] EWHC 291; [2007] B.C.C. 541 TCC.
- [82.](#) *Jones v Environcom Ltd* [2009] EWHC 16 (Comm).
- [83.](#) *The Silver Fir* [1980] 1 Lloyd's Rep. 371 CA.
- [84.](#) *Hutchison* [1993] B.C.L.C. 307.
- [85.](#) This residual discretion was implicitly also recognised by H.H. Judge Peter Coulson Q.C. in *Newman (t/a Newman Associates) v Wenden Properties Ltd* [2007] EWHC 336 TCC when, citing *Hutchison* [1993] B.C.L.C. 307, he described it as merely, "*common for security to be refused*" (my italics) in "*mere defence*" cases.
- [86.](#) *Sir Lindsay Parkinson & Co v Triplan Ltd* [1973] Q.B. 609; [1973] 2 W.L.R. 632; [1973] 2 All E.R. 273 CA at [285].
- [87.](#) *Sir Lindsay Parkinson* [1973] Q.B. 609; [1973] 2 W.L.R. 632; [1973] 2 All E.R. 273 CA at [287].
- [88.](#) *Europa Holdings Ltd v Circle Industries (UK) Ltd* [1993] B.C.L.C. 320 CA.
- [89.](#) *Europa Holdings* [1993] B.C.L.C. 320 CA at [321].
- [90.](#) *Europa Holdings* [1993] B.C.L.C. 320 CA at [326].
- [91.](#) *Unisoft (No.2), Re* [1993] B.C.L.C. 532 Ch D (Companies Court).
- [92.](#) The development of this principle can be seen in *Uni-Continental Holdings Ltd and Adlock Packaging Ltd v Eurobond Adhesives Ltd* [1996] F.S.R. 834, Ch D. Laddie J. held that s.726 considered the position of the plaintiff at the date of the assumed order for costs against it (i.e. at the trial). However, if the plaintiff was not now in funds, the onus was on it to demonstrate that the position would be different by the time of trial. In *Tripp Ltd v Landor & Hawa International Ltd* [2004] EWHC 1564 Ch D, Pumfrey J. found that the claimant, "may or may not be able to pay any bill of costs, depending on its precise cashflow position, at the moment the bill is tendered". His view of the authorities was, however, rather different: "It is always said--and on the authorities this is unavoidable--that the question of whether a company can meet its debts in the form of a bill of costs has to be answered at the time of the application, although evidence as to what may happen in the future is admissible." Finding that the company was able to pay its debts at the time of the application, no order would be made.
- [93.](#) *Europa Holdings* [1993] B.C.L.C. 532 Ch D (Companies Court) at [534].
- [94.](#) That of the impecuniosity of a "nominal claimant".
- [95.](#) *Marine Blast Ltd v Targe Towing Ltd (Security for Costs)* [2003] EWCA Civ 1940.
- [96.](#) *Marine Blast* [2003] EWCA Civ 1940 at [11].
- [97.](#) *Mbasogo v Logo* [2006] EWCA Civ 608. Applications were for security for the costs of an appeal although the statutory ground would not have been available in any event in respect of the corporate parties, not domestic companies.
- [98.](#) *Unisoft (No.2), Re* [1993] B.C.L.C. 532 Ch D (Companies Court).

99. *Aerotel Ltd v Wavecrest Group Enterprises Ltd* [2007] EWHC 104 Ch D (Patents Court).
100. *Phillips v Symes* [2002] EWCA Civ 486.
101. The legal profession seems largely unaware of the considerable amount of research conducted by psychologists on the equivalence or otherwise of numerical and verbal expressions of probability. For some discussion, see J. Ching, "Part 24--how real is a real prospect of success?" (1999) 8 *Nottingham Law Journal* 28 and "Communicating Risk: words or numbers?" (2006) 10 Co. L.J. 2. I am grateful to my colleague Judith Ward for drawing my attention to conclusions in the family law sector that "likely" in Children Act 1989 s.31 meant "a real possibility" equivalent to proof on the balance of probabilities (*H (Minors) (Sexual Abuse: Standard of Proof), Re* [1996] AC 563; [1996] 2 W.L.R. 8 HL) whilst "reasonable cause to suspect" in Children Act 1989 s.47 was a threshold less than the balance of probabilities (*R. (on the application of S) v Swindon BC* [2001] EWHC Admin 334; [2001] 2 F.L.R. 776 QBD). The latter view is, of course, consistent with the view of "reason to believe" expressed in this context. One might, however, consider the view of Lord Lamont expressed in discussions about the Extradition Bill: "Reason to believe" implies any reason to believe--a slight reason as opposed to a significant reason. 'Reasonable grounds' implies looking at something in the round--at all the evidence available and whether the conclusion is reasonable. To me, that is the difference between the two phrases. Respectfully, I do not agree with those who think that there is no difference." *Hansard*, col.GC 341 (June 18, 2003).
102. *Jirehouse Capital v Beller* [2008] EWCA Civ 908; [2009] 1 W.L.R. 751; [2008] C.P. Rep. 44.
103. *Unisoft (No.2), Re* [1993] B.C.L.C. 532 Ch D (Companies Court).
104. *Aerotel* [2007] EWHC 104 Ch D (Patents Court).
105. *Jirehouse Capital v Beller* [2008] EWCA Civ 908; [2009] 1 W.L.R. 751; [2008] C.P. Rep. 44 at [26], per Arden L.J.
106. *Jirehouse Capital v Beller* [2008] EWCA Civ 908; [2009] 1 W.L.R. 751; [2008] C.P. Rep. 44 at [33].
107. And not, therefore in a forum to which the statute applies but the CPR--or at least Pt 25--do not, such as the small claims court.
108. Compare the use in the jurisdiction to award interim payments under CPR r.25.7(1)(c) that the court is "satisfied" that judgment would be obtained, considered in R. Rose (ed. in chief), *Blackstones' Civil Practice 2009* (Oxford: Oxford University Press, 2009), para.36.8 and given the use of identical wording to RSC Ord.29 rr.11 and 12 to import pre-CPR authority defining the standard as, "satisfied on the balance of probabilities that the claimant 'would' obtain judgment".
109. *Parkinson* [1973] Q.B. 609; [1973] 2 W.L.R. 632 CA. These can be identified from the speech of Denning M.R. as: (i) the circumstances of the case; (ii) the bona fides of the claim and its chances of success; (iii) any admission by the defendant that sums are due; (iv) a payment into court (now a defendant's Pt 36 offer) "of a substantial sum" (i.e. not an amount based on nuisance value): Cairns L.J. considered, in fact, that the existence of an offer treated as equivalent to a payment into court meant that the defendant *already* had security of an appropriate amount; (iv) whether the application for security was being used oppressively "so as to try and stifle a genuine claim"; (v) whether the plaintiff's impecuniosity had been caused by the defendant; (vi) the lateness of the application for security.
110. *Bilcon v Fegmay Investments Ltd* [1966] 2 Q.B. 221; [1966] 3 W.L.R. 118 QBD.
111. *Pearson v Naydler* [1977] 1 W.L.R. 899 Ch D at [903].
112. *Pearson* [1977] 1 W.L.R. 899 Ch D.
113. *Parkinson* [1973] Q.B. 609; [1973] 2 W.L.R. 632 CA.
114. Applied in *Hall v Pertemps* [2005] EWHC 2327 (Ch). This was argued in *Pearson* [1977] 1W.L.R. 899 Ch D by analogy (at [902]) with a practice that if a foreign resident plaintiff had a domestically resident co-plaintiff, security would not be ordered. *Okotcha v Voest Alpine Intertrading GmbH* [1993] B.C.L.C. 474 CA, in which the first plaintiff was a Nigerian resident in the jurisdiction and the second plaintiff a Nigerian company, suggests that this practice has been abandoned.
115. See, for example, *Alex Lawrie Factors Ltd v Mander Fashions* [2001] C.L.Y. 508 CC, an application apparently invoking only the statutory jurisdiction.
116. So, for example, in *Aquila Design (GRB) Products Ltd v Cornhill Insurance* (1987) 3 B.C.C. 364; [1988] B.C.L.C. 134 CA, where the claimant was in insolvent liquidation prior to the instigation of proceedings, its admitted impecuniosity was only one factor in the decision that security should not, on the facts (a bona fide claim and an evens chance of success in it) be ordered. For case comment see Anon, "Security for Costs" (1988) 1 *Insolv Int* 6; D. Owles, "A Matter of Discretion" (1987) 137(6320) N.L.J. 815.
117. *Tripp Ltd v Landor* [2004] EWHC 1564 (Ch).

- [118.](#) *Cohort Constructions Co (UK) Ltd v Spring Hotels Ltd* [1997] EWCA Civ 1415. See also *Fernhill Mining Ltd v Kier Construction Ltd* [2000] C.P. Rep. 69 CA.
- [119.](#) *Turberville Smith Ltd v Turberville Smith* [1998] 1 B.C.L.C. 134 QBD.
- [120.](#) *Turberville Smith Ltd v Turberville Smith* [1998] 1 B.C.L.C. 134 QBD at [141], per Morland J. This would appear to predate a reading of similar wording in CPR Pt 24 as meaning only better than “fanciful”. See *Swain v Hillman* [2001] 1 All E.R. 91; [2001] C.P. Rep. 16 CA.
- [121.](#) *Anglo Petroleum Ltd v TFB (Mortgages) Ltd* [2004] EWHC 1177 Ch D at [22], per Park J.
- [122.](#) *Pagemanor Ltd v Ryan* [2002] EWCA Civ1065 at [9], per Robert Walker L.J.
- [123.](#) *Pearson* [1977] 1 W.L.R. 899 Ch D at [906], per Megarry V.C. See also Park J. in *Anglo Petroleum Ltd v TFB (Mortgages) Ltd* [2004] EWHC 1177 Ch at [19]: “A claimant’s ‘impecuniosity’ (as it is sometimes described) provides a strong motive for a defendant to want security for costs, but it is not in itself a sufficient reason for a court to order it. Indeed in some cases it can be given by the court as a specific reason for not ordering it.”
- [124.](#) *Flender Werft AG v Aegean Maritime Ltd* [1990] 2 Lloyd’s Rep. 27 QBD (Commercial Court).
- [125.](#) *Flender Werft* [1990] 2 Lloyd’s Rep. 27 QBD (Commercial Court) at [28]. See also *Parimtree Ltd v Archard* [1997] EWCA Civ 1624, an application for permission to appeal from an award of £70,000 made under s.726, in which Potter L.J. said, dismissing the application: “In circumstances where a corporate plaintiff asserts its claim to be a good one and where there are shareholders, directors and others who might reasonably be expected to support it in its litigation, it is plainly incumbent upon such a plaintiff, when resisting an application for security, to address the question of the feasibility of support from other sources and the means and willingness of likely candidates, that is to say persons who may be expected to benefit from a successful outcome or who may be otherwise interested in seeing the litigation to a conclusion.” For an opposite view, see the judgment of Lord Greene in *Naamlooze Vennootschap Beleggings Compagnie Uranus v Bank of England* [1948] 1 All E.R. 465 at [467].
- [126.](#) *Pearson* [1977] 1 W.L.R. 899 Ch D.
- [127.](#) *Mini-Lux Ltd v Panasonic (UK) Ltd* Unreported February 21, 2003 Ch D.
- [128.](#) *Trident International Freight Services Ltd v Manchester Ship Canal Co* [1990] B.C.L.C. 263 CA.
- [129.](#) *Parkinson* [1973] Q.B. 609; [1973] 2 W.L.R. 632; [1973] 2 All E.R. 273 CA.
- [130.](#) *Pearson* [1977] 1 W.L.R. 899 Ch D.
- [131.](#) *Pearson* [1977] 1 W.L.R. 899 Ch D at [266], per Nourse L.J.
- [132.](#) *Flender Werft* [1990] 2 Lloyd’s Rep. 27 QBD (Commercial Court).
- [133.](#) *Keary Developments Ltd v Tarmac Construction Ltd* [1995] 3 All E.R. 534; [1995] 2 B.C.L.C. 395 CA.
- [134.](#) Both this and a subsequent use of the word “plaintiff” in this quotation appear as “defendant” in the *All England* report. “Plaintiff” however appears in both cases in the court transcript.
- [135.](#) My correction from “defendant” in the *All England* report.
- [136.](#) *Keary Developments* [1995] 3 All E.R. 534; [1995] 2 B.C.L.C. 395 CA at [542].
- [137.](#) *Parkinson* [1973] Q.B. 609; [1973] 2 W.L.R. 632; [1973] 2 All E.R. 273 CA.
- [138.](#) *Keary Developments* [1995] 3 All E.R. 534; [1995] 2 B.C.L.C. 395 CA at [540].
- [139.](#) See *Vision Golf Ltd v Lofthouse Hill Golf* [2005] EWHC 1443 (Ch) in which Lawrence Collins J., applying both the statutory and procedural rules, found a defendant’s Pt 36 offer of £50,000 plus costs, albeit more than a mere nuisance value payment, of sufficiently limited amount not to constitute, “a substantial factor in the exercise of discretion”.

- [140.](#) In *Kufaan Publishing Ltd v Al-Warrak Publishing Ltd* [1998] EWCA Civ 1693 the judge at first instance had considered himself precluded from addressing the stifling argument or the merits of the plaintiff's claim as the plaintiff dormant and insolvent company had filed no evidence. It was held, at the application for leave to appeal, that the judge should have allowed the plaintiff the opportunity to adduce evidence as to the prospects of raising funds from other sources. See also as to the relevance of potential third party funding where an application is made for payment into court as security for the costs of an application to set aside: *CIBC Mellon Trust Co v Mora Hotel Corp* [2002] EWCA Civ 1688; [2003] 1 All E.R. 564. In *BrimKo Holdings Ltd v Eastman Kodak Co* [2004] EWHC 1343, Park J. held at [11] and [12], on the questions of burden and standard of proof that, "[f]irst the burden of establishing that a claim would be stifled ... rests on the claimant. He or it must put evidence before the court of his or its means and must satisfy the court, not to a standard of certainty but at least to a standard of probability, that the claim would be stifled. Second, the court should not restrict its evaluation of the ability of a claimant to provide security to the means of the claimant itself ... If the case moves to the stage of considering whether security should be regarded as being available from third parties, the burden still rests on the claimant.... At the same time the court should not press too far the proposition that the burden rests on the claimant. It should be recalled that when the claimant has to establish that third parties do not exist from whom security can reasonably be expected [sic] and obtained, that is to place on the claimant the burden of proving a negative. That is always difficult to do, and the court should, in my judgment, evaluate the evidence with a degree of sympathy for the difficulty which a claimant faces", drawing comparison with the similar position of a respondent to a CPR Pt 24 application seeking to avoid a conditional order being made, and his own judgment on that point in *Anglo-Eastern Trust Ltd v Kermanshahchi* [2002] EWCA Civ 198; [2002] C.P. Rep. 36 accepting a submission of counsel that, "it is almost always possible for the other party to suggest some conceivable source of funds which the evidence has not closed off". In *Anglo Petroleum Ltd v TFB (Mortgages) Ltd* [2004] EWHC 1177 Ch, however, Park J. had put the standard of proof for the claimant on the stifling point as a requirement to produce "convincing evidence" both in relation to the claimant's own means as well as those of potential backers. The stifling issue now, of course, attracts consideration under art.6 ECHR. A different basis for the stifling argument is seen in the Scottish case of *La Pantofola D'Oro SpA v Blane Leisure Ltd (No.2)* 2000 S.L.T. 1264, Court of Session (Outer House) where the pursuer company, in insolvent judicial administration in Italy, was precluded from providing security as a matter of Italian law. An award of security would result in the pursuer discontinuing the action and the claim would, necessarily, be stifled as a result.
- [141.](#) In *Plus Group Ltd v Pyke* [2002] EWCA Civ 147.
- [142.](#) A majority in *Miloslavsky v United Kingdom (A/323)* [1996] E.M.L.R. 152; (1995) 20 E.H.R.R. 442, ECtHR had found that an order for security did not contravene art.6 ECHR. Followed in *Federal Bank of the Middle East v Hadkinson (Security for Costs) (No.1)* [2000] C.P. Rep. 31 CA.
- [143.](#) In *Danemark v BAA* [1995] EWCA Civ 6 the unsecured costs already incurred by the defendant were thought to be a relevant factor. Lateness was a significant factor in *Vedatech Corp v Crystal Decisions (UK) Ltd* [2002] EWCA Civ 356.
- [144.](#) A distinction between costs incurred and costs to be incurred was made by the Court of Appeal in *Danemark Ltd v BAA Plc* [1995] EWCA Civ 6, per Phillips L.J.: "I accept that where the plaintiff, or those behind the plaintiff, are in a position to meet an order for security for costs, it is normal for an order for security to relate to both past and future costs. It seems to me, however, that the position may be very different where the plaintiff and those behind the plaintiff will not be able to meet an order for costs so that the order is likely to stifle the action."
- [145.](#) *Danemark v BAA* [1995] EWCA Civ 6.
- [146.](#) *Keary* [1995] 3 All E.R. 534; [1995] 2 B.C.L.C. 395 CA.
- [147.](#) *Danemark v BAA* [1995] EWCA Civ 6, unpaginated transcript.
- [148.](#) *Petromec Inc v Petroleo Brasileiro SA Petrobras (No.4)* [2006] EWCA Civ 1038; [2007] 2 Costs L.R. 212.
- [149.](#) The interrelationship between the security for costs jurisdiction and the possibility of a successful defendant obtaining a costs order against that company's liquidator is discussed in *Digital Equipment Co Ltd v Bower* [2003] EWHC 2895 (Ch); [2004] 1 W.L.R. 1678, noted in S. Gelghorn, "Out of pocket? Prioritising Costs Orders" (2004) 154(7112) N.L.J. 85.
- [150.](#) *Longstaff International Ltd v Baker & McKenzie* [2004] EWHC 1852 (Ch); [2004] 1 W.L.R. 2917.
- [151.](#) *Unisoft (No.2), Re* [1993] B.C.L.C. 532 Ch D (Companies Court).
- [152.](#) *Thistle* [2004] EWHC 322 (Ch); [2004] 2 B.C.L.C. 174.
- [153.](#) *Cohort Constructions Co (UK) Ltd v Spring Hotels Ltd* [1997] EWCA Civ 1415. See also references to Lord Woolf's "cards on the table" approach in *Parimtree Ltd v Archard* [1997] EWCA Civ 1624.
- [154.](#) Another example is provided by *Guinle v Kirreh* [2000] C.P. Rep. 62 Ch D. Here Arden J. had, in the exercise of her case management powers, directed that a single joint expert should report on the impecuniosity of the company. That expert had considered the company's ability to meet a sliding scale of different costs outcomes referring to both net assets and cash flow. The judge then, having received that expert evidence, directed a further hearing to determine the amount of the defendant's costs and the appropriate amount of security.
- [155.](#) *Cohort Constructions* [1997] EWCA Civ 1415, the quotation is taken from an unpaginated BAILII transcript.

- [156.](#) Rose, *Blackstones Civil Procedure 2009*, 2009, para.65.16 in which the approach in *Nasser v United Bank of Kuwait* [2001] EWCA Civ 556; [2002] 1 W.L.R. 1868, said to involve a rejection of pre-CPR law on the subject is preferred to an approach taken on an application for permission to appeal in *Vedatech Corp v Seagate Software Information Management Group Ltd* [2001] EWCA Civ 1924. In *Nasser*, Mance L.J. pointed out at [32] et seq., that, since the introduction of the CPR, the discretion to award security for costs of an appeal had acquired the additional "just to do so" filter by virtue of an assimilation to CPR r.25.13. This filter had already been imposed on the statutory jurisdiction at common law.
- [157.](#) *Hammond Suddard Solicitors v Agrichem International Holdings Ltd* [2001] EWCA Civ 2065; [2002] C.P. Rep. 21.
- [158.](#) *Keary* [1995] 3 All E.R. 534; [1995] 2 B.C.L.C. 395 CA.
- [159.](#) *Hammond Suddard Solicitors* [2001] EWCA Civ 2065; [2002] C.P. Rep. 21, per Clarke L.J.
- [160.](#) *Sinclair Investment Holdings SA v Cushnie* [2004] EWHC 218 (Ch).
- [161.](#) *Keary* [1995] 3 All E.R. 534; [1995] 2 B.C.L.C. 395 CA.
- [162.](#) *Mini-Lux Ltd v Panasonic (UK) Ltd* Unreported February 21, 2003 Ch D.

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