

HIGH COURT OF AUSTRALIA

KIRBY J

MERRIBEE PASTORAL INDUSTRIES
PTY LIMITED & ORS

PLAINTIFFS

AND

AUSTRALIA AND NEW ZEALAND
BANKING GROUP LIMITED

DEFENDANT

*Merribee Pastoral Industries Pty Ltd v Australia and New Zealand Banking
Group Ltd (S18-1998) [1998] HCA 41
16 June 1998*

ORDER

- 1. Defendant's application dismissed with costs.*
- 2. Certify for counsel.*

Application for security for costs.

Representation:

N Perram for the plaintiffs (instructed by Jackson Smith)

J E Thomson with B McManus for the defendant (instructed by Norton Smith
& Co)

Notice: This copy of the Court's Reasons for Judgment is
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Commonwealth Law Reports.

CATCHWORDS

Merribee Pastoral Industries Pty Ltd v Australia and New Zealand Banking Group Ltd

Practice - High Court - Order for security for costs - Proceedings in original jurisdiction of the Court - Order for security for costs within inherent jurisdiction - Width of jurisdiction and matters relevant to its exercise - Constitutional challenge to validity of winding up order - Companies insolvent - Whether collateral challenge to orders of Federal Court doomed to fail - Order for security for costs refused.

Costs - High Court - Security for costs - Original jurisdiction - Absence of express provision for security - Reasons for express provision for security in case of appeals - Inherent jurisdiction to order security - Whether security for costs should be ordered - Order refused.

Corporations - Insolvent corporations - Winding up order made by Federal Court - Challenge to constitutional validity of order - Determination deferred pending decision in *Gould v Brown* (1998) 72 ALJR 375; 151 ALR 395; [1998] HCA 6 - Challenge by proceedings in original jurisdiction of High Court - Public importance and urgency of resolution of challenge - Whether security for costs should be ordered - Order refused.

Corporations - Insolvent corporations - Commencement of proceedings in High Court - Whether governed by Corporations Law s 1335 - Whether High Court is a "court" within the section - Special definition of "court" - Description inapplicable to proceedings invoking the original jurisdiction of the High Court under the Constitution - Discretion to order security for costs at large within inherent jurisdiction of the Court - Order refused.

Constitutional law - Australian Constitution - Federal judicature - Judicial power of the Commonwealth - Cross-vested jurisdiction in Federal Court as to matters arising under a State Corporations Law - Whether constitutionally valid - Challenge by company ordered to be wound up - Relevance of importance of determination of challenge to application for order for security for costs - Order refused.

Constitutional law - Federal judicature - Judicial power of the Commonwealth - Application for security for costs - Whether doomed to fail - Whether challenge to constitutional validity of winding up order a collateral attack bound to be dismissed - Order for security for costs refused.

2.

Federal Court - Original jurisdiction - Application of State laws - Cross-vesting legislation - Validity - Challenge by company ordered to be wound up - Public importance of challenge - Application for order for security for costs refused.

Constitution, ss 75, 76(i).

Corporations Act 1989 (Cth), s 56(2).

High Court Procedure Act 1903 (Cth), repealed, ss 32, 33, 35, Schedule.

Judiciary Act 1903 (Cth) ss 26, 30(a), 35AA, 42, 44, 78B.

Jurisdiction of Courts (Cross-Vesting) Act 1987 (Cth), s 9(2).

Corporations Law, ss 58AA, 459A, 1335.

Companies (New South Wales) Code, s 533

Corporations (New South Wales) Act (1990) (NSW), s 42(3).

High Court Rules (*Statutory Rules* 1928, No 118), O XXVIII rr 9 and 17.

High Court Rules, O 70 r 7, O 71 rr 5 and 6.

- 1 KIRBY J. This application for an order for security for costs raises two questions. The first relates to the power of the Court to make such an order in respect of proceedings brought in its original jurisdiction. The second, power being established, is whether exercising the discretions afforded to it, the Court should order the provision of security in the circumstances of this case, including the fact that the plaintiff companies are insolvent.

The facts

- 2 On 13 February 1998 Merribee Pastoral Industries Pty Limited, R J Gilbert Investments Pty Limited and West Merribee Pty Limited (the plaintiffs) caused a writ to be issued out of this Court, together with a statement of claim. The process named, as defendants, the State of New South Wales, the Commonwealth of Australia and Australia and New Zealand Banking Group Limited ("the Bank"). Subsequently, the plaintiffs discontinued the proceedings against the State and the Commonwealth. However, they maintain their proceedings against the Bank. On 27 April 1998 the Bank caused a summons to be issued. That summons sought an order that, within 14 days, the plaintiffs give security for the costs of the proceedings between them and the Bank in the sum of \$53,700. In default of the provision of security, the Bank sought an order that the plaintiffs' proceedings be dismissed with costs. Earlier, the State and the Commonwealth had sought similar orders for the provision of security for their costs. However, with the discontinuance of the plaintiffs' proceedings against them, those summonses were discontinued, leaving the Bank's summons the only one now to be determined.

- 3 The Bank and the plaintiffs have been engaged in an extended dispute resulting in litigation, originally in the Supreme Court of New South Wales and later in the Federal Court of Australia. It is unnecessary to describe the course of this litigation. Suffice it to say that it has involved proceedings before two Masters, single judges in both the Common Law and Equity Divisions of the Supreme Court and in the New South Wales Court of Appeal. The Bank contends that the plaintiffs are indebted to it in a sum of about \$3.5 million, that they have insufficient assets to cover their debts, that their principal officers have been declared bankrupt, that the plaintiffs have not been in a position to fund the foregoing proceedings out of their own assets so far as these are known to the Bank and that there is a need to wind them up without further delay. Only if wound up would a liquidator be able to ascertain the possibility of satisfying the large debt to the Bank. It was with this object in mind that the Bank made an application to the Federal Court of Australia for orders that each of the plaintiffs be wound up under the provisions of the Corporations Law ("the Law"). As the plaintiffs were all companies incorporated under the former *Companies (New South Wales) Code*, resident, and carrying on their activities, in New South Wales, the jurisdiction of the Federal Court to make the orders sought by the Bank was said to arise from the provisions of s 42(3) of the *Corporations (New South Wales) Act* 1990 (NSW), s 56(2) of the *Corporations Act* 1989 (Cth), and s 9(2) of the *Jurisdiction of Courts (Cross-Vesting) Act* 1987 (Cth) or a combination of some, or all, of the foregoing.

4 The plaintiffs challenged the jurisdiction of the Federal Court to make the winding up orders sought by the Bank. The basis of their objection was apparently similar to that argued in this Court in the challenge to the cross-vesting legislation in *Gould v Brown*¹. That proceeding came to this Court by way of an appeal against the unanimous decision of the Full Court of the Federal Court of Australia upholding the validity of the cross-vesting scheme². On 15 October 1997, after *Gould v Brown* had been argued before this Court and before the decision was given, Hill J acceded to the Bank's applications with respect to the plaintiffs. By his decision, the Federal Court ordered that each of the plaintiffs be wound up under the provisions of the Law. However, his Honour stayed the operation of his orders until 14 days after this Court's decision in *Gould v Brown* was announced. Each winding up order was made by the Federal Court pursuant to s 459A of the Corporations Law of New South Wales.

5 Following the announcement of the decision of this Court in *Gould v Brown* in February 1998, the validity of the cross-vesting legislation, whereby the jurisdiction of State courts under State legislation was conferred on the Federal Court, remained undisturbed. However, the position resulting from the Court's decision was less than entirely satisfactory. Three members of the Court (Brennan CJ, Toohey J and I) found no constitutional or other impediment to the legislation providing for the Federal Court to receive and exercise the jurisdiction for which the cross-vesting legislation provided. Three members of the Court (Gaudron, McHugh and Gummow JJ) held otherwise. Because there was no majority to allow the appeal from the Full Court of the Federal Court in that case, the resulting order of this Court was that the appeal was dismissed³. For the time being, the cross-vesting legislation had survived the constitutional challenge.

6 The resulting situation was not satisfactory for at least three reasons. First, because of the pending retirement of Dawson J, the appeal in *Gould v Brown* had been heard by a Court constituted of six Justices and not seven (as would ordinarily have been the case). For that reason, and because the participating Justices divided evenly, no majority could be obtained conclusively to determine the constitutional challenge. Secondly, by reason of further retirements from the Court since *Gould v Brown* was decided, and the appointment of a new Chief Justice and two Justices who have never passed on the validity of the cross-vesting legislation, an added element of uncertainty has been introduced for the ascertainment of the validity of the cross-vesting laws. Thirdly, such laws are in daily use and affect thousands of litigants throughout the country. Those litigants, and the persons advising them,

1 (1998) 72 ALJR 375; 151 ALR 395. A summary of the appellants' contentions in that case appears at 436 (ALJR); 477 (ALR).

2 *BP Australia Ltd v Amann Aviation* (1996) 62 FCR 451.

3 *Judiciary Act* 1903 (Cth), s 23(2)(a).

3.

are entitled to a conclusive ruling on the validity of their proceedings. The cloud left by *Gould v Brown* should be dispelled as quickly as possible. In these circumstances, an early attempt to re-agitate the point argued in that appeal seemed inevitable. By their statement of claim, the plaintiffs proffer their endeavour to do so.

7 When, after *Gould v Brown* was decided, the proceedings in the Federal Court were returned before Hill J, in the light of the indication of the intention to commence proceedings in this Court, his Honour refused to lift the stay which he had earlier granted. Instead, he stood the proceedings over for further consideration at a later date. His orders in this regard have apparently been made the subject of an appeal, or application for leave to appeal, to the Full Court of the Federal Court. But this does not concern me. The plaintiffs explained their omission to appeal from the orders of Hill J winding them up, relying on their constitutional objections, on the footing that, until this Court, by a clear decision, resolves the points left unresolved by *Gould v Brown*, the Federal Court would not be able effectively to consider their challenge to the validity of the cross-vesting legislation. At all times, they have indicated their intention to challenge the validity of the Federal Court's orders. They asserted that their proceedings in this Court represented the neatest, most direct and most economical way of presenting that challenge to this Court. It was not, as the Bank suggested, a collateral attack on the orders which Hill J had made⁴.

8 For the Bank, the plaintiffs' proceedings were simply a further step on their part to squander funds on litigation and to delay payment to the Bank of the large sums owed to it. Whilst asserting the legal merit of their arguments and denying the dark suggestions of unidentified, external support for their litigation, the plaintiffs conceded, for the purpose of the application for security for costs, that they were insolvent. They also conceded that the evidence contained in the affidavit of a costs expert, tendered for the Bank, was accurate. If the Bank were entitled to security for its costs, the sum of \$53,700 was a proper amount.

4 cf *Cameron v Cole* (1944) 68 CLR 571 at 599; *Gould v Brown* (1998) 72 ALJR 375 at 433; 151 ALR 395 at 473 per Gummow J.

Security for costs: High Court provisions

9 As the plaintiffs resisted the Bank's application, it became necessary to consider the basis of the power to so provide. Some of the bases propounded by the Bank were contested by the plaintiffs. Until the foundations of the jurisdiction of a court are clarified, it is scarcely possible to exercise whatever jurisdiction exists with accuracy. In the case of a dispute as to jurisdiction, it is the obligation of a court to clarify the jurisdiction which it is exercising.

10 In anticipation of the establishment of this Court, the Parliament enacted the *High Court Procedure Act* 1903 (Cth), since repealed. That Act contained the first express provisions for security for costs to be ordered by the Court. Section 35(1) of the Act provided that "[i]n any appeal to the High Court, security shall not except under an order of the High Court be required to be given by a party appellant" save for certain cases where an appeal lay to the Privy Council at the establishment of the Commonwealth. In such exceptional cases, security was to be given "by the party appellant in such manner as is prescribed by Rules of Court for the prosecution of the appeal without delay, and for the payment of all such costs as may be awarded by the High Court to the party respondent"⁵. A specific sum (£50) was nominated as the amount which such security should be, unless otherwise ordered by the Court or a Justice⁶. In terms, therefore, the statutory provisions relating to security were confined to appeals. They related to the rights of appellants and respondents. No express mention was made in the Act of security for the costs of proceedings between plaintiffs and defendants in the original jurisdiction of the Court⁷.

11 By the *High Court Procedure Act*, the Rules contained in the Schedule to the Act were to regulate the proceedings of the High Court until new Rules of Court were made by the Justices⁸. By O XXV of the Rules, contained in the Schedule, provision was made for security. By the first rule of that Order, such security was to be given by an instrument as described "[w]henever in any cause or matter in the High Court security is required to be given". This phrase was wide enough to encompass security in proceedings in the original jurisdiction. The provisions in relation to "Security in General" contained in the statutory Rules refer to the litigants concerned as a "party" and not as an "appellant" or "respondent". The

5 *High Court Procedure Act* 1903 (Cth) (repealed), s 35(2).

6 *High Court Procedure Act* 1903 (Cth) (repealed), s 35(3).

7 As provided by s 76(i) of the Constitution and *Judiciary Act* 1903 (Cth), s 30(a).

8 *High Court Procedure Act* 1903 (Cth) (repealed), ss 32 and 33.

general Rules as to security were followed by particular Rules in relation to "Security for Costs".

12 Order XXV r 9 of the statutory Rules provided:

"A plaintiff ordinarily resident beyond the Commonwealth may be ordered to give security for the costs of the cause, whether he is or is not temporarily within the Commonwealth".

That the intent of the legislature was that the original Rules should apply to any cause or matter in the original jurisdiction of the Court is made clear by the reference throughout that part of the Rules which concerned "security for costs" to the name by which the parties were described. The party who has been ordered to give security for costs is repeatedly referred to as the "plaintiff"⁹. However, the treatment of the subject is scarcely comprehensive. The only case specifically dealt with, where an order for costs "of the cause" is expressly mentioned, is that where "[a] plaintiff [is] ordinarily resident beyond the Commonwealth"¹⁰. The other circumstances which might attract an order for security to proceedings originating in the Court were not expressly dealt with.

13 I remind myself that at the time these original Rules were made by the Parliament it was contemplated, and long thereafter followed, that the Court should have a substantial original jurisdiction. For the better part of the century, until the establishment of the Federal Court of Australia¹¹ and other federal courts and the enlargement of powers of this Court to remit proceedings to other courts¹², many and varied were the causes heard by single Justices in the original jurisdiction of the Court. They were by no means confined (as today they largely are) to proceedings brought pursuant to the Constitution and involving its interpretation¹³. In such a wide variety of proceedings, it would be difficult to imagine that this Court, busy from the outset, would not have enjoyed the power to order security for costs of causes or matters in its original jurisdiction where such a power was common to every other superior court of the nation and inherent in the performance

9 See eg O XXV rr 9, 10 and 13.

10 See O XXV r 9.

11 *Federal Court of Australia Act* 1976 (Cth).

12 *Judiciary Act* 1903 (Cth), ss 42 and 44.

13 Constitution, ss 75 and 76; cf now *Re Minister for Immigration & Multicultural Affairs; Ex parte Abebe [No 1]* (1998) 72 ALJR 574; 151 ALR 711.

of the functions of such courts¹⁴. In such courts, as in part in the High Court, it became common by statute, rules and express legislative provisions¹⁵ to provide expressly for the making of orders for security for costs of actions, suits and causes. However, such express powers would not ordinarily expel the inherent power of a superior court of record to provide for security for costs where necessary or appropriate to the performance of its function as a court¹⁶. Only if the legislation governing security for costs amounted to a comprehensive statement of the court's powers (as distinct from an endeavour to preserve and partly regulate the exercise of such powers) would it exclude the residuum of the inherent power enjoyed by a superior court of record, as such, for the purpose of controlling justly and efficiently proceedings before it¹⁷.

- 14 In 1928 the Rules of this Court were changed from those scheduled to the *High Court Procedure Act*. However, once again, the Rules did not deal comprehensively with a provision of security for costs, other than of an appeal. This notwithstanding, in *Willey v Synan*¹⁸, Latham CJ, in a proceeding in the original jurisdiction of the Court, said of the new Rules¹⁹:

"Order XXVIII, rule 17, of the *High Court Rules* assumes that there is a general power to order security for costs to be given in any case in which it is just that such security should be given. This rule is not included in the English Rules of Court, but it is unnecessary to consider the rule in this case because the application for security for costs was made under Order XXVIII, rule 9, on the ground that the plaintiff is ordinarily resident beyond the Commonwealth."

14 cf *J H Billington Ltd v Billington* [1907] 2 KB 106 at 109 per Lord Alverstone CJ.

15 See eg *Companies (New South Wales) Code*, s 533; *Corporations Law*, s 1335 discussed by Rogers CJ Comm D in *BIL (NZ Holdings) Ltd v ERA House Ltd* (1991) 23 NSWLR 280 at 284.

16 *BIL (NZ Holdings) Ltd v ERA House Ltd* (1991) 23 NSWLR 280 at 286 per Rogers CJ Comm D.

17 *Thunderdome Racing v Dorian Industries* (1992) 36 FCR 297 at 308 per Olney J.

18 (1935) 54 CLR 175 at 178.

19 O XXVIII r 17 (Saving) in the 1928 Rules provided "[n]othing in the eight last preceding Rules shall be construed to affect the power of the Court or a Justice to require security for costs to be given by any party to any cause or matter in any case in which it is just that such security should be given".

- 15 When the present Rules of the Court were made in 1952, no general provision was included in relation to the ordering of security for costs in relation to proceedings in the original jurisdiction of the Court. Order 70 r 7 provides expressly for a Court or Justice to order that "the appellant give security". The rule elsewhere refers to "the appellant"²⁰ and "respondent"²¹. It is expressly addressed to appeals and is silent in relation to the original jurisdiction of the Court. More general reference is made to security for costs in O 71 rr 5 and 6:

"5. When security for costs is required or ordered, the security shall be of such amount, and be given at such time or times, and in such manner and form, as the Court or a Justice directs.

6. (1) A plaintiff ordinarily resident outside the Commonwealth may be ordered to give security for costs notwithstanding that he may be temporarily resident within the Commonwealth.

(2) A defendant setting up a counter-claim not arising out of the plaintiff's claim may be ordered to give security for costs in a case in which a plaintiff making the like claim might be so ordered."

The provision of r 5 is perfectly general. However, it does not, in terms, afford a foundation for ordering security for the costs of proceedings in the original jurisdiction of the Court. The provisions of r 6 are such that they clearly contemplate that orders for security for costs might be given in the original jurisdiction of the Court where parties go by the appellation of "plaintiff" and "defendant". Yet, once again, no express power is given by the Rules to order that such parties provide security for costs²².

- 16 The scope of O 70 r 7(1) of the current Rules was considered by Toohey J in *Bahr v Nicolay [No 1]*²³. By reference to the express provision for security for the costs of an appeal and the then absence of provisions for security to be ordered in the case of an application for special leave to appeal, his Honour concluded that the Rule could not be invoked to afford a basis for ordering security in respect of the costs of an application for special leave. No party disputed the correctness of that decision. However, the plaintiffs questioned his Honour's further holding, viz, that the Court retained an inherent power to order security in relation to an

20 High Court Rules, O 70 r 7(3).

21 High Court Rules, O 70 r 7(4).

22 As was noted by Olney J in *Thunderdome Racing v Dorian Industries* (1992) 36 FCR 297 at 306.

23 (1987) 163 CLR 490.

application for special leave to appeal where it could be shown that such power was necessary to preserve the subject matter of the litigation or to prevent any proceeding being rendered futile in the absence of an order for security²⁴. The plaintiffs pointed out that these remarks were strictly obiter, because, in the result, Toohey J declined to order the provision for security for costs. It is unnecessary for me to determine the plaintiffs' criticism in these proceedings.

17 A review of the foregoing history of the provisions as to security for costs in this Court presents an apparent problem if the eye of the historian is fixed exclusively on the language of the statutory provisions and the Rules of Court. Because of the absence in them of express, clear and detailed provisions empowering the Court or a Justice to order security for costs of proceedings brought in the original jurisdiction of the Court, it would be easy to jump to the conclusion that the omission was deliberate. The mind might speculate that this was because it was not intended to afford such a facility, save in the case of a plaintiff ordinarily resident outside the Commonwealth²⁵. Such an inference would be incorrect. It would arise from a lack of appreciation of the legal history which preceded the establishment of this Court.

18 By that history, it was long regarded as inherent in the powers of the courts established pursuant to the Royal prerogative to order the provision of security for costs where that course was necessary or just²⁶. Only when the procedure of appeal was, by statute, grafted onto the powers of such courts, did it become necessary, or at least prudent, to provide expressly for the ordering of security for costs as ancillary to appeals²⁷. The view was apparently then taken that, appeal, being itself a creature of statute, the regulation of its terms would require statutory provision²⁸. This explained the introduction of the specific power for the English High Court and Court of Appeal to order security for the costs of an appeal. It was doubtless upon that footing that the *High Court Procedure Act* so provided for this Court in 1903. The generality of the provision for security for costs in relation to proceedings other than appeals, lying in the original jurisdiction of a superior court of record, could be left safely to the inherent power of such a court. Although this Court was not created out of the Royal Prerogative but by the Constitution, it enjoys and has exercised the inherent or implied powers traditionally belonging to

24 (1987) 163 CLR 490 at 493-494.

25 High Court Rules, O 71 r 6(1).

26 cf *J H Billington Limited v Billington* [1907] 2 KB 106.

27 *Commissioner for Railways (NSW) v Cavanough* (1935) 53 CLR 220 at 225 per Rich, Dixon, Evatt and McTiernan JJ.

28 *J H Billington Limited v Billington* [1907] 2 KB 106 at 110 per Lord Alverstone CJ.

the Royal Courts of Justice of England and proper to a final court of appeal²⁹. It also enjoys and has exercised large powers implied from its functions. Once this history is understood, the apparent *lacuna* in the Rules of the Court is explained.

- 19 Clearly this is the way in which Latham CJ approached the matter in *Willey v Synan*³⁰. The fact that there are no other reported cases in which security has been ordered for the cost of proceedings in the original jurisdiction of the Court does not mean that no such cases exist. In days of discernment, such practice decisions would not have been thought worth reporting. The matter must therefore be looked at as one of principle. The Rules of Court contemplate that a power exists and expressly provide for one instance of its exercise. The power exists by history and out of the very nature of the Court and the need to arm it with the powers to function as such. Whether an inherent or implied power exists in this Court in relation to its appellate jurisdiction (or in applications for leave or special leave to appeal adjunct to such jurisdiction) beyond that afforded by or under statute (as Toohey J thought in *Bahr v Nicolay [No 1]*) does not need to be resolved in this case. Whatever the position in relation to appeals or applications for leave or special leave to appeal, the position in relation to the original jurisdiction is clear. The Court enjoys a broad inherent or implied power, in its discretion, to order the provision of security for costs. The plaintiffs, whilst contesting the other heads of power propounded for the Bank, accepted the inherent power and the width of its operation.

Other heads of power propounded

- 20 Although the Bank relied on the inherent jurisdiction of the Court to order the provision of security for costs, it also propounded two other specific heads of power based on statute. The first was the general power in s 26 of the *Judiciary Act* 1903 (Cth) by which the Court and every Justice "sitting in Chambers" has jurisdiction "to award costs in all matters brought before the Court". I doubt that this express power, or the elaboration of it in the Rules³¹, was intended to cover the provision of security for costs, given that that topic, so far as expressly dealt with, was addressed particularly in the language of the *High Court Procedure Act*³²

29 cf *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 137; *State Rail Authority of NSW v Codelfa Construction Pty Ltd* (1982) 150 CLR 29 at 38-39 per Mason and Wilson JJ, 45 per Brennan J.

30 (1935) 54 CLR 175.

31 High Court Rules, O 71 r 1(1).

32 s 35.

and elsewhere in the original and later Rules³³. I find it unnecessary to examine further this suggested basis of jurisdiction.

21 Additionally, the Bank relied on s 1335 of the Law. That section enacts:

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

This provision of the Law derives from the Uniform Companies Code³⁴. It may be traced to earlier provisions of companies legislation. On the face of things, it is perfectly general in its expression and is designed to achieve an understandable objective of company law. However, by s 58AA(1) of the Law, provision is made in relation to the meaning of "court" and "Court" where those two words appear in the Law. The word "court" is defined to mean "any court when exercising the jurisdiction of this jurisdiction". Where appearing in upper case, the word "Court" is defined to mean certain specified courts exercising jurisdiction³⁵. This Court is not one of the specified courts.

22 Where the word "court" appears in s 1335, it does so in lower case. Accordingly, the first definition contained in the Law applies. It means "any court when exercising the jurisdiction of this jurisdiction". The latter expression is awkward. However, especially by reference to the definition of "the Supreme Court of this or any other jurisdiction", it is clear that it is intended to mean the jurisdiction of Australia in which the Law is relevantly operating. With application to this case, such jurisdiction is that of New South Wales. Although this Court is, by the Constitution, part of the judicature of New South Wales, an application to its original jurisdiction (such as the plaintiff companies have here made) is not one which comfortably falls within the phrase "any court when exercising the jurisdiction of [New South Wales]". When performing its functions under the Constitution, this Court is exercising the jurisdiction for which that document provides. It is doing so for, and in relation to, the entire Commonwealth. It is not,

33 Now High Court Rules, O 70 r 7(1).

34 See eg *Companies (New South Wales) Code*, s 533; cf *BIL (NZ Holdings) Ltd v ERA House Ltd* (1991) 23 NSWLR 280 at 284.

35 The section (s 58AA(1)) refers to the Federal Court, the Supreme Court "of this or any other jurisdiction", the Family Court of Australia and a court to which s 41 of the *Family Law Act* 1975 (Cth) applies.

as such, exercising the jurisdiction of a component part of the Commonwealth such as New South Wales.

23 Accordingly, I do not consider that s 1335 of the Law, as elaborated by the definition of "court", has application to the proceedings of a corporation in this Court, invoking as the plaintiffs' proceedings do, s 76(i) of the Constitution.

24 This conclusion makes it unnecessary for me to consider the subsidiary challenge by the plaintiffs to the Bank's attempt to invoke s 1335 of the Law in these proceedings. This was that it represented an endeavour by State legislation (being the Law as relevantly enacted by the Parliament of New South Wales) to confer jurisdiction or impose limits upon a court created by or under the Constitution (namely this Court) which it was the purpose of the plaintiffs' proceedings to have declared unconstitutional. No notices of this point had been given by the plaintiffs³⁶. Accordingly, it was mentioned but not elaborated. In the conclusion which I have reached it is unnecessary to resolve it.

25 The result is that, in my view, this Court does have power and jurisdiction to order the provision of security for the costs of proceedings in its original jurisdiction. It does so notwithstanding the lack of express mention of that power in legislation or under the Rules in a way applicable to the circumstances of this case. The power is inherent in this Court by reason of its constitutional and legal functions, its history and the history of the superior courts of record of England which preceded it. It is not necessary to supplement the inherent power by the terms of the *Judiciary Act* 1903 (Cth). It is not possible to invoke the Law.

Considerations relevant to the exercise of discretion

26 Without any pretence to having conducted an exhaustive analysis of the decisions in this Court where orders for security for costs have been sought, in appeals, a number of propositions can be stated which it may be useful to collect:

1. There is no absolute rule to control the exercise of the discretion to order security for costs where that jurisdiction derives from the inherent power of the Court. The jurisdiction, as one reposed in a court, is to be exercised judicially and for the purpose for which it exists³⁷. An analogous discretion has been described as "absolute"³⁸. It would be wrong to attempt to hedge

36 Pursuant to the *Judiciary Act* 1903 (Cth), s 78B requiring notices to be given to Attorneys-General where a cause "involves a matter arising under the Constitution or involving its interpretation".

37 *King v Commercial Bank of Australia Ltd* (1920) 28 CLR 289 at 292.

38 *Lucas v Yorke* (1983) 58 ALJR 20 at 21; 50 ALR 228 at 229.

the jurisdiction about by rules or practices, even where derived from a number of instances. This is because what should be done in each case depends entirely on the circumstances of the case. The governing consideration is what is required by the justice of the matter.

2. There is therefore no absolute rule (applicable statute apart) that the impecuniosity of a party will entitle its opponent to an order for security for its costs. Where the power to so provide exists in uncontrolled terms, it would be to fetter the jurisdiction impermissibly to adopt such a rule or even a *prima facie* entitlement³⁹. By the same token, the inability of a party to meet the costs of an unsuccessful proceeding is not irrelevant to the exercise of the jurisdiction⁴⁰. Litigation is inevitably expensive and burdensome. To add to the burdens of a party successful in the outcome, those of paying its costs with little or no prospect of recovery under an order for costs may, in particular circumstances, be a reason for offering a measure of protection to that party by way of security for costs⁴¹.
3. Another consideration that has sometimes been judged to be relevant is the strength of the case of the party resisting an order that it provide security for costs and an evaluation (necessarily tentative) of its prospects of success. Thus, the fact that a party has secured special leave to argue its case on appeal has been thought a relevant consideration in some circumstances⁴². Similarly, if a proceeding appeared hopeless and such as was bound to fail, the lack of apparent merit in a party's case might be a reason for ordering it to provide security for the costs to which, it appears, it is needlessly putting its opponent. Such a consideration would need to be exercised with care, given that the real merits of a case might not emerge until the final hearing or might not sufficiently emerge in the necessarily brief proceedings typically involved in an application for security for costs. Furthermore, if a party asserts that its opponent's proceedings are manifestly lacking in legal merit,

39 *King v Commercial Bank of Australia Ltd* (1920) 28 CLR 289 at 292-293; *Lucas v Yorke* (1984) 58 ALJR 20 at 21; 50 ALR 228 at 228-229; *Webster v Lampard* (1993) 67 ALJR 393 at 394; 112 ALR 174 at 175.

40 cf *Hall v Snowdon, Hubbard & Co* [1899] 1 QB 593 at 594.

41 *Dillon v Baltic Shipping Co* (1991) 65 ALJR 647 at 649; 102 ALR 482 at 486.

42 *Webster v Lampard* (1993) 67 ALJR 393 at 394; 112 ALR 174 at 175-176; *Devenish v Jewel Food Stores Pty Ltd* (1990) 64 ALJR 533 at 534; 94 ALR 664 at 666.

other remedies are available to it to protect it from needless vexation⁴³. In appeals there is the barrier of leave or special leave⁴⁴.

4. Further considerations which, in the particular circumstances of the case, have been held relevant to the grant or refusal of an order for security for costs in relation to a proceeding in the Court have been:
 - (a) That the hearing of the proceeding is close at hand⁴⁵ or that the moving party has delayed its application for such an order⁴⁶.
 - (b) That the parties or some of them are legally aided⁴⁷.
 - (c) That the proceeding raises matters of general public importance quite apart from the interests of the parties⁴⁸.
 - (d) That the nature of the proceeding is such that, even if unsuccessful, an order for costs in favour of the winning party might not be made or might be limited⁴⁹.
 - (e) That the costs orders made earlier in the proceedings have followed an unusual course or have involved countervailing orders which must be weighed against those liable to be made in the proceedings in question⁵⁰.

43 High Court Rules, O 58 r 4(3) and O 63 r 6.

44 See generally *Judiciary Act* 1903 (Cth), ss 35(2) and 35AA(2).

45 *Webster v Lampard* (1993) 67 ALJR 393 at 394; 112 ALR 174 at 176.

46 *Devenish v Jewel Food Stores Pty Ltd* (1990) 64 ALJR 533 at 534; 94 ALR 664 at 665-666.

47 *Webster v Lampard* (1993) 67 ALJR 393 at 394; 112 ALR 174 at 176.

48 *Devenish v Jewel Food Stores Pty Ltd* (1990) 64 ALJR 533 at 534; 94 ALR 664 at 666.

49 *Singer v Berghouse* (1993) 67 ALJR 708 at 709; 114 ALR 521 at 522.

50 *Singer v Berghouse* (1993) 67 ALJR 708 at 709; 114 ALR 521 at 522.

- (f) That a party to the proceedings is, or will at judgment be, or be likely to be, absent from the jurisdiction and has no or few assets within the jurisdiction⁵¹.
- (g) That if an order were made it would effectively shut a party out of relief according to law in circumstances where that party's impecuniosity is itself a matter which the litigation may help to cure⁵².

Doubtless there are as many further considerations as there are cases. The foregoing help to illustrate some of the matters which courts, including this Court, have felt to be relevant to the exercise of the discretion to order security for costs, where that discretion is invoked.

A proceeding bound to fail?

27 The Bank submitted that an important discretionary consideration in this case was that the plaintiffs' application for relief in this Court was "doomed to fail". This was because it was properly categorised as nothing more than a collateral challenge to the winding up order in the Federal Court which the plaintiffs were prosecuting with the sole objective of frustrating the operation of the Federal Court's order.

28 In support of these propositions, the Bank pointed to the fact that those Justices of this Court in *Gould v Brown* who were of the opinion that State cross-vesting legislation could not, conformably with the Constitution, vest State jurisdiction in a Federal Court, confined the remedies which they provided. They did so by answering only that question reserved for the Full Court of the Federal Court by Black CJ, the answer to which was strictly necessary to vindicate the interests of the appellants. This was question 3. As a matter of discretion, Gummow J declined to grant relief or to answer questions 1, 2, 4 and 5 of the questions reserved⁵³. He did so on the basis that it was inappropriate to answer the questions and that the issues which they raised should be resolved by the

51 *Brundza v Robbie & Co [No 2]* (1952) 88 CLR 171; *Bloch v Bloch* (1980) 55 ALJR 26; *P S Chellaram & Co v China Ocean Shipping Co* (1991) 65 ALJR 642; 102 ALR 321.

52 cf *Farrer v Lacy, Hartland & Co* (1885) 28 Ch D 482 at 485 per Bowen LJ.

53 *Gould v Brown* (1998) 72 ALJR 375 at 433; 151 ALR 395 at 473.

Federal Court itself when dealing with the balance of the proceedings before it - not by this Court⁵⁴. Gaudron J agreed with this approach⁵⁵. McHugh J, without discussing the matter, agreed in the order proposed by Gummow J⁵⁶. From this, the Bank argued that, even were a new majority to be found in this Court inclined against the validity of the cross-vesting legislation, relief would be denied to these plaintiffs on the ground that they lacked standing or should not be heard in a collateral attack on the orders winding them up.

29 It is with hesitation that I endeavour to evaluate this argument and its prospects of success before this Court, differently constituted as it would be hearing a second challenge to the validity of the cross-vesting legislation. In my respectful view, some of the principles which were established in the courts of England in cases far distant from a challenge to constitutional validity under a fundamental law such as the Australian Constitution may need to be reconsidered in their application to the latter class of case. The Constitution hovers over every law of this land. Where properly invoked, by a party with an interest, the demonstration of constitutional invalidity may raise considerations of public significance going far beyond the interests of the parties. It may require the provision of relief, even where an attack is collateral.

30 The plaintiffs in these proceedings have at all times complained that the Federal Court lacked jurisdiction to make orders winding them up. They are obviously affected by such orders in a drastic and immediate way. They cannot challenge those orders effectively in the Federal Court. If, in these proceedings, they can demonstrate to this Court that the Federal Court had no jurisdiction, the orders of winding up, although made by a superior court, would have no legal foundation. It would seem unthinkable that, in such circumstances, the plaintiffs would be denied relief effective to redress their complaints. In any case, the plaintiffs indicated that they would be pressing this Court to provide such relief. It is not much to the point to complain that they are insolvent companies. That is inherent in the orders for winding up which the plaintiffs contest. It is worth remembering that the moving parties in *Gould v Brown* were in a like position. A significant number of proceedings which are cross-vested to the Federal Court relate to corporations said to be insolvent. It was for that purpose that, in addition to the general scheme of cross-vesting, a special scheme was enacted by

54 *Gould v Brown* (1998) 72 ALJR 375 at 433; 151 ALR 395 at 473.

55 *Gould v Brown* (1998) 72 ALJR 375 at 403; 151 ALR 395 at 431.

56 *Gould v Brown* (1998) 72 ALJR 375 at 415; 151 ALR 395 at 447.

complementary federal⁵⁷, State⁵⁸ and Northern Territory⁵⁹ legislation. If that legislation is constitutionally invalid, as the plaintiffs assert, it is desirable that this be decided as quickly as possible. The challenge to the special scheme for cross-vesting of matters under the Corporations Law is most likely to arise in the case of a corporation contesting an order for winding up. As I presently understand the plaintiffs' assertions, fresh as I am from the expression of a contrary view in *Gould v Brown*⁶⁰, I am unconvinced that the plaintiffs are doomed to fail. Nor am I convinced, on the substantive constitutional issues which they wish to agitate, that they would be denied effective relief, were they to succeed on those issues.

Exercise of discretion

31 Although I regard the case as finely balanced, I have ultimately concluded that security for costs should not be ordered. I take into account the admitted impecuniosity of the plaintiffs and the long course of the litigation in which the parties have been embroiled. I do not feel able to draw any inferences, in the evidence before me, that external funding of the litigation exists which would be likely to continue were security for costs to be ordered. The consideration critical to my decision is the obvious importance to the plaintiffs, and also to the public, of an early resolution of the constitutional questions left without effective answer by the decision of the Court in *Gould v Brown*. Those questions are bound to arise soon. In a case where cross-vested jurisdiction was assumed by the Federal Court, pursuant to the special scheme relating to corporations, it is likely to arise in a case such as the present where a corporation, despite its objections to jurisdiction, has been wound up.

32 I would not be inclined to put in the way of the resolution of this important constitutional question which the plaintiffs are equipped and wish to argue against the Bank, an impediment requiring them to provide security for the costs of the Bank. Given that they admit to insolvency, such an order might effectively bar their access to this Court and to its resolution of the application of the Constitution which they invoke. As it seems to me, it is desirable that the challenge which they bring should be resolved quickly so that the many proceedings under way in courts

57 The Corporations Law of the Australian Capital Territory is contained within the *Corporations Act* 1989 (Cth) as amended by the *Corporations Legislation Amendment Act* 1990 (Cth). See *Acton Engineering Pty Ltd v Campbell* (1991) 31 FCR 1 at 8-11; *BP Australia Ltd v Amann Aviation Pty Ltd* (1996) 62 FCR 451 at 479.

58 *Corporations Act* 1990 of each State.

59 *Corporations (Northern Territory) Act* 1990 (NT).

60 *Gould v Brown* (1998) 72 ALJR 375 at 434ff; 151 ALR 395 at 474ff.

throughout this country are relieved of the uncertainty which has been produced by the present state of authority, or lack thereof.

- 33 Having come to this conclusion, it is unnecessary for me to consider various other arguments which the plaintiffs pressed upon me. One of these was that, although in terms the companies were plaintiffs in the proceedings in this Court, they were effectively doing no more than resisting an attempt by the Bank to wind them up. Upon that footing, the plaintiffs argued that they were really in a position analogous to that of defendants and thus should not be prevented from defending themselves effectively by being required to meet an order for security for costs⁶¹. Nor do I have to consider whether, in this Court, a different approach should be taken to such applications where a party with an interest invokes the Constitution from that which would be proper to a contest involving no such consideration.

Orders

- 34 The Bank's application for security for costs is dismissed. The Bank must pay the plaintiffs' costs of the application. I certify that the case was one proper for the attendance of counsel in chambers. The parties have liberty to approach the Registrar with a view to arranging a directions hearing at which an early listing of the substantive proceedings may be ordered.

61 *Tomlinson v Land and Finance Corporation* (1884) 14 QBD 539; *Maatschappij voor Fondsenbezit v Shell Transport and Trading Co* [1923] 2 KB 166 at 173; *Stanley-Hill v Kool* [1982] 1 NSWLR 460 at 464.