[2000] WASCA 69

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	**:**	THE FULL COURT (WA)
CITATION	**:**	FFE MINERALS AUSTRALIA PTY LTD -v- MINING AUSTRALIA PTY LTD [2000] WASCA 69
CORAM	**:**	PIDGEON J MURRAY J OWEN J
HEARD	**:**	2 DECEMBER 1999
DELIVERED	**:**	22 MARCH 2000
FILE NO/S	**:**	FUL 135 of 1999
BETWEEN	**:**	FFE MINERALS AUSTRALIA PTY LTD Applicant AND MINING AUSTRALIA PTY LTD Respondent (First Plaintiff)

Catchwords:

Corporations Law - Application for security of costs - Appeal from Master refusing order - What is required to establish "Credible Testimony"

Legislation:

Corporations Law s1335

Result:

Leave granted
Appeal allowed

Representation:

Counsel:

Applicant	:	Mr M H Zilko
Respondent (First Plaintiff)	:	Mr W S Martin QC & Mr T J Kavenagh

Solicitors:

Applicant	:	Phillips Fox
Respondent (First Plaintiff)	:	Corsers

Case(s) referred to in judgment(s):

Beach Petroleum NL v Johnson (1992) 10 ACLC 525
BPM Pty Ltd v HPM Pty Ltd (1996) 14 ACLC 857
Buckley v Bennell Design and Constructions Pty Ltd (1974) 1 ACLR 301
Churchills Ltd v Pilcher [1940] NSW Weekly Notes
Edinburgh Entertainments Ltd v Stevenson (1925) SC 848
Europa Holdings Ltd v Circle Industries (UK) PLC (1993) Butterworths Company Law Cases 320
Harpur v Ariadne Australia Ltd [1984] 2 Qd R 523
Jones v Dunkel (1959) 101 CLR 298
Nelson v Sunday Times Publishing Co (1905) 7 WAR 306
Northampton Coal, Iron and Wagon Company v Midland Wagon Co [1878] 7 Ch D 500
Second Lenbourne Pty Ltd v Beagle Management Pty Ltd [1999] FCA 486 (21 April 1999)
Sir Lyndsay Parkinson & Co Ltd v Triplan Ltd [1973] 1 QB 609
Southampton, Isle of White and Portsmouth Improved Steamboat Company (Ltd) v Pinnock (1863) 11 The Weekly Reporter 978
Southern Cross Exploration NL & Ors v Far and All Risks Insurance Co Ltd & Ors [1985] 1 NSWLR 114
Tipperary Developments Pty Ltd v WA (1996) 22 ACSR 241
Warren Mitchell Pty Ltd v Australian Maritime Officers' Union (1993) 11 ACLC 1238
Westralian Goldmines Ltd v Westralian Minerals & Drilling Pty Ltd (In Liq) (1986) 4 ACLC 167

Case(s) also cited:

Ekamper v Stambulich, unreported; SCt of WA; Library No 970639; 7 November 1997
HPM Pty Ltd v BPM Pty Ltd, unreported; SCt of WA; Library No 950243; 19 May 1995
Morgan v Babcock and Wilcox Ltd (1929) 43 CLR 163
Second Lenbourne Pty Ltd v Beagle Management Pty Ltd (1999) FCA 486
State of Western Australia v Bond Corporation Holding Ltd (1991) 5 WAR 40

1 **PIDGEON & OWEN JJ**: The applicant is the defendant in a writ issued at the suit of two plaintiffs namely the respondent, which is a private company and Michael Yovich, who is the sole director and a principal shareholder in the company.

2 The applicant made application to a Master for an order that the company provide security for costs of the action. The application was made pursuant to the provisions of s 1335(1) of the *Corporations Law* which reads:

> "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 security is given."

3 The affidavit filed on behalf of the applicant in support of the application deposed to the fact that the company's paid up capital was $4,001 and there was no land registered in the company's name. The affidavit exhibited the financial returns of the company for the years 1990-1995. During this period proprietary companies were required to file financial returns. This requirement ceased at the end of 1995. These returns showed that, save for 1995, the company made an operating loss for each year after the payment of tax. They also showed that the company up until at least 1995 did not have assets which would allow it to meet any costs order against it. The affidavit of the applicant concluded by saying: "By reason of the matters deposed to herein, I verily believe that the first plaintiff will be unable to pay the defendant's costs of the action if the defendant is successful." The company did not file any answering affidavit.

4 The learned Master refused to make an order. He said what the section requires is that the applicant produce credible testimony that the respondent would not be able to meet any costs order made against it. He considered a submission by counsel for the applicant that the rule in ***Jones v Dunkel*** (1959) 101 CLR 298 would aid the applicant. The Master considered that case had no application. He said the onus rested squarely on the applicant. The Master concluded with the following reasons: (AB14)

> "Does the fact that in 1995 the first plaintiff would not have been able to meet any costs order made against it, mean that it will not be able to meet such a costs order in 1999? To conclude that it does would, in my view, be nothing more than speculation. It would involve an assumption that the company has continued to trade in precisely the same way in the last four years as it traded between 1990 and 1995. In my view the evidence led by the defendant does not satisfy the test of being credible testimony as required by s 1335. The application should fail for this reason."

5 The applicant is seeking leave to appeal. The question of leave and the merits of the appeal were heard together. The first and primary ground of appeal is that the learned Master erred in concluding that the applicant had failed to establish by credible testimony that there was reason to believe the respondent would be unable to pay the applicant's costs.

6 The reasons of the learned Master indicated that he was undertaking the exercise of considering whether or not it had been proved that the company would not be able to meet a costs order, whereas the section refers to no more than requiring some credible evidence giving rise to a belief. The question arises as to whether this does require the person applying to prove any matter before the court can exercise jurisdiction under the section. It is a section which has been on various statute books in an almost similar form for a period in excess of 135 years and was recently enacted in the *Corporations Law* by the use of the longstanding words. Although the section has been in use for this long period of time there are very few cases in any jurisdiction dealing with the principles of the section and in Australia most reported cases have been decisions by single judges. We propose to make reference to the history of the section as this throws some light on the intended meaning of the expression "credible testimony".

7 The power to order security for costs was first introduced by the *Joint Stock Companies Amendment Act 1857* (20 & 21 Vict c 14 (Imp)). This enactment inserted s XXIV which reads:

> "Where a Limited Company is Plaintiff or Pursuer in any Action, Suit, or other legal Proceeding, any Judge having Jurisdiction in the Matter may, **if it be proved to his Satisfaction** that there is Reason to believe that if the Defendant be successful in his Defence the Assets of the Company will be

> insufficient to pay his Costs, require sufficient Security to be given for such Costs, and may stay all Proceedings until such Security be given."

8 It can be seen that this section is similar to the section under consideration with the exception of the specific reference to "assets" and with the further exception of the words published in bold. These words required a matter to be proved. The section was repealed and re-enacted by s 69 of the *Companies Act 1862* 25 & 26 Vict c 89 (Imp). The new section replaced the words in bold by words referring to "credible testimony" so that the new section reads:

> "Where a Limited Company is Plaintiff or Pursuer in any Action, Suit, or other legal Proceeding, any Judge having Jurisdiction in the Matter may, **if it appears by any credible Testimony** that there is Reason to believe that if the Defendant be successful in his Defence the Assets of the Company will be insufficient to pay his Costs, require sufficient Security to be given for such Costs, and may stay all Proceedings until such Security is given."

9 The section was re-enacted in England by s 278 of the *Companies (Consolidation) Act 1908* which reads:

> "Where a limited company is plaintiff or pursuer in any action or other legal proceeding, any judge 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 costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given."

10 This deleted the specific reference to "assets" but is otherwise similar to the earlier enactments. What is significant is that it is in identical form (subject to gender changes and the omission of Scottish procedure) to s 1335 of the *Corporations Law.* The subsequent English *Companies Acts* have also retained the section in this form as did a number of the State Companies Acts.

11 The change first appearing in the 1862 Act of deleting the reference to proving a matter to the satisfaction of the Judge and replacing it by the phrase "if it appears by any credible testimony that there is reason to believe…" must be interpreted as meaning that there was a lessening of the threshold requirement of the person making the application. Proof

was no longer required. What was required was that there be credible testimony giving rise to a belief. We would see the rule in ***Jones v Dunkel*** as having no application in determining this question. This rule normally arises when a matter is sought to be proved and in that situation the question is what inferences can be drawn. Here the applicant is not seeking to prove the state of the company's finances. The applicant is required to do no more than place on the record credible testimony and the exercise of the court at this stage is in judging the testimony and its quality rather than seeing if a matter has been proved by inference. The company, at this stage, is not being asked to explain or contradict something for the purposes of avoiding an inference being drawn. If there is credible testimony, then the court has jurisdiction to make the order and a company which called no evidence to show it could meet a costs order would run the risk of having an order made against it.

12 As we mentioned despite the long standing of the section, there have been very few cases in the United Kingdom or Australia dealing with the matters to which we have alluded. In 1863 in the case of ***Southampton, Isle of White and Portsmouth Improved Steamboat Company (Ltd) v Pinnock*** (1863) 11 The Weekly Reporter 978, Romilly MR dealt with a case brought under the 1857 Act where the reason to believe was required to be proved to the satisfaction of the Judge. The solicitor for the defendant made an affidavit expressing a belief that the company would not have assets to pay its liabilities and he set out reasons for that belief, including why he considered the company had no assets. The company filed no answering affidavit. The nature of the claim for which the company was suing, of itself, indicated insolvency. The Master of the Rolls said the position would be different if there were an answering affidavit, but as matters stood, he considered he was bound to make the order as it would be overruling the intention of Parliament as contained in the section if he did not do so. For that reason he did not follow an earlier reported case which he doubted in any event was correctly reported. The plaintiff company had submitted that the defendants were required to "prove to the satisfaction of the court that the assets are insufficient." It is of interest to note that the editors of the report, when setting out this argument, inserted the following footnote:

> ""But see the *Companies Act, 1862*, s 69, where the words 'If it appears by any credible testimony' are inserted instead of the words 'If it be proved to his (the Judge's) satisfaction' which occur in the abovementioned s 24."

13 A few cases reported subsequently indicated that the application was made when there was some positive indication of a company not having assets or being unable to pay its debt such as the return of execution *nulla bona*, or of a company being in liquidation. In ***Northampton Coal, Iron and Wagon Company v Midland Wagon Co [1878] 7 Ch D 500*** Jessel MR said at 503 that the fact of a plaintiff company being in liquidation would be sufficient "reason to believe, the assets to be insufficient unless evidence to the contrary was given." In this State O 25 r 2(e) of the *Rules* provided, independently of the *Corporations Law* and of the earlier equivalent sections in the various *Companies Act,* that a company in liquidation was a ground for ordering security. There has been no equivalent rule in England. The application is there made under the *Companies Act.* An indication that the section was seen to be of limited application is the statement in the successive editions of *Odgers Principles of Pleading and Practice* that security for costs may be sought where the plaintiff "is an insolvent company" and reference is made to s 447 of the 1948 *Companies Act*. (see 22nd edition at p 259) A further indication that the section was seen to be of limited application was the Scottish case of ***Edinburgh Entertainments Ltd v Stevenson*** (1925) SC 848. There the defendants produced balance sheets as to the company's financial position and the company filed an answer. Lord Anderson at 853 said that this was an application which was not frequently made in Scotland. He said that the court was referred to only two reported cases on the point. His Lordship continued:

> "The reason probably is that the general principle of our law on this matter of security is that a litigant who is solvent is entitled to litigate without having to find security for costs, however much he may be temporarily embarrassed financially. The section, therefore, seems to me to lay a heavy onus on the litigant who appeals to it. That the onus is heavy is borne out by the consideration that the sanction is a serious one, namely, that the Court, if security is ordered and not found, may stay proceedings and prevent the pursuer from getting his case decided."

14 His Lordship said in respect of "credible testimony":

> "Now, I agree with an observation which fell from your Lordship in the chair that the *prima facie* connotation of the phrase 'credible testimony' is testimony by witnesses, either oral or in the form of affidavits such as they use in England. That seems to be the natural significance of these two words."

15 His Lordship went on to say that a company's balance sheet would amount to credible testimony.

16 The matter was considered recently in England by the Court of Appeal in ***Europa Holdings Ltd v Circle Industries (UK) PLC*** (1993) Butterworths Company Law Cases 320. There the approach was made in two stages. The first stage is to ask whether the court has jurisdiction to award security and the second stage is a question of discretion. Dillon LJ at p 321 said that on the wording of the section the court only has jurisdiction "if it appears by credible testimony that there is reason to believe that the company will (and we stress that the word is will and not may) be unable to pay the defendant's costs if successful in his defence". His Lordship then went on to say that even if there is jurisdiction because inability to pay the defendant's costs has been shown by credible testimony, the court has a general discretion to award or not to award security. In some of the earlier cases (such as ***Southampton etc v Pinnock***) it was held that the court did not have discretion. The Court of Appeal, on the question of discretion, followed the majority decision in ***Sir Lyndsay Parkinson & Co Ltd v Triplan Ltd*** [1973] 1 QB 609.

17 There have been few cases on the point in Australia. In ***Churchills Ltd v Pilcher*** [1940] NSW Weekly Notes at 108 the Full Court of New South Wales considered an appeal from a refusal by Bavin J to make the order where there was evidence of a company being unable to meet an order as to costs. There was no answering affidavit by the company. Bavin J said, "All the cases that I have had under this section have been cases where the company was either in liquidation - that seems to be itself a ground - or cases where there were admissions by the company itself or unquestionable evidence from the books of the company, or facts relating to the company which show that it could not pay." Jordan CJ said, on appeal, that to restrict the jurisdiction to cases of the types enumerated is to tie the hands of the tribunal in a way not contemplated by the legislature. He thought for that reason that the learned Judge acted on a wrong principle. Jordan CJ, in reasons to which the other Judges agreed, considered that the material before the court did supply reason for believing that the company would be unable to pay the costs if it was unsuccessful. His Honour said, "No doubt the evidence is not conclusive, but it is my opinion amply sufficient to make out a *prima facie* case." He went on to say that the plaintiff company, which is in possession of the whole of the facts, had thought it prudent to offer no explanation of the material which has been placed before the court by the defendant. He continued:

> "The material to which we have been referred by Mr Lloyd does appear to me to supply, by credible testimony, evidence that there is reason to believe that the plaintiff company will be unable to pay the costs of the defendant if successful in his defence."

18 As to the question of discretion his Honour went no more than saying, "Assuming that the matter is one of discretion by reason of the fact that the section provides that a Judge having jurisdiction may make the order in question". The report did not show what was the material in the affidavit.

19 Similar principles have been considered in this State when the courts have considered s 3 of the *Newspaper Libel and Registration Act 1884*. This provided that if the plaintiff was an uncertificated bankrupt or has liquidated or compounded with his creditors, or is without fixed domicile, or "is to the belief of the defendant and some other person of repute without visible means of paying the costs of such action if unsuccessful, then the court or Judge may order all proceedings to be stayed until security of costs are given." This Court held in ***Nelson v Sunday Times Publishing Co*** (1905) 7 WAR 306 that the use of the word "may" gave the Judge a discretion.

20 Recent cases in Australia indicate that courts are approaching the matter on the basis of there being a threshold question as to whether the court has jurisdiction followed by an examination whether the court would exercise its discretion and we are satisfied that this is the proper approach. One of these cases is the decision of Waddell J in ***Southern Cross Exploration NL & Ors v Far and All Risks Insurance Co Ltd & Ors*** [1985] 1 NSWLR 114. In that case his Honour had evidence from both the applicant and the company and took the view that the threshold question was to be decided on the whole of the evidence. If the threshold question gave the court jurisdiction there was the discretion. Lee J took a similar view in ***Warren Mitchell Pty Ltd v Australian Maritime Officers Union*** (1993) 11 ACLC 1238 as did von Doussa J in ***Beach Petroleum Nl v Johnson*** (1992) 10 ACLC 525 at 526 and Murray J in ***Tipperary Developments Pty Ltd v State of Western Australia*** (1996) 22ASCR 241. The authorities were earlier reviewed by Street CJ in ***Buckley v Bennell Design and Constructions Pty Ltd*** (1974) 1 ACLR 301. His Honour, after examining the authorities, reached the view (at 305), that the Court had an unlimited discretion. There was in that case a question of delay which was the principle reason for the Court not exercising its discretion. Street CJ (at 303) considered that the section, when originally enacted in

England, reflected the concern of the legislature that, in permitting the incorporation of a limited liability entity, it was necessary to ensure that persons who might have dealings, whether voluntary or involuntary, with such an entity should have a measure of protection and he referred to the possibility of a defendant to litigation commenced by the entity being involuntarily prejudiced by the limited liability character of the plaintiff. The earlier decisions in the United Kingdom did not appear to have regard to this. We would consider, nevertheless, that what was said by Street CJ must reflect the intention of the legislature by reason of such a section being enacted in a Companies Act.

21 We consider that the wording of the section and the weight of the authorities supports the proposition that there is initially the jurisdictional question as to whether it appears by credible testimony that there is reason to believe that the corporation had been able to pay the costs. Once the Court has jurisdiction there is an unlimited discretion.

22 The learned Master said in his reasons (AB 12):

> "What the section requires is that the applicant produce credible testimony that the respondent would not be able to meet any costs order made against it. This test has been described as "the threshold hurdle.""

He then referred to the decision in ***Tipperary Developments Pty Ltd v State of Western Australia***. The learned Master was correct in saying that there was the threshold hurdle which was required to be cleared to give the Court jurisdiction. We consider however, with respect, that the learned Master placed the hurdle too high. He said that there must be credible testimony "that the respondent would not be able to meet any costs order made against it". The applicant is required to establish no more than that there is "reason to believe".

The Master's final question and answer is a further indication that he was requiring the applicant to prove the fact that the company now would not be able to meet a costs order. The Master said "Does the fact that in 1995 the first plaintiff would not have been able to meet any costs order made against it, mean that it would not be able to meet such a costs order in 1999? To conclude that it does would, in my view, be nothing more than speculation". In order to determine whether he had jurisdiction he was required to do no more than judge the quality of the evidence to see if it objectively gave rise to a "reason to believe".

23 For these reasons we consider that the approach of the learned Master was incorrect. The question of the proper approach involves an important principle of law in an area where there are few cases and for that reason we would grant leave to appeal.

24 It becomes necessary now to determine whether there was before the Master the necessary credible testimony to give him jurisdiction. In view of the history of the section we would, for our part, see no requirement to attempt to define further the expression. The words speak for themselves and in that sense the expression is similar to expressions such as "beyond reasonable doubt". For the reasons we have set out we are not in accord with one proposition referred to by Lee J in ***Warren Mitchell Pty Ltd v Australian Green Offices Union*** when his Honour said at 1241 "qualification of the word 'testimony' by the word 'credible' suggest that evidentiary burden is undertaken by the parties seeking the order". We would not see any burden as nothing is sought to be proved. The legislature that first enacted the words, used them to replace words referring to proof and in our view, were dispensing with a requirement to prove a matter. What is required is an evaluation of the evidence led by the applicant to see whether that leads to a reason to believe that the corporation will be unable to pay the costs of the defendant.

25 In the present case there is evidence that it is anticipated that the total costs would be in the vicinity of $44,000. There is evidence of a limited share capital and no land on the register. There is no evidence of an apparent lack of other assets although the financial returns which were produced would suggest this. It was submitted by Mr Martin on behalf of the company that the absence of registered land is of no probative value as the company may well be the beneficiary of land held on trust. We consider that the absence of land combined with the low share capital does give rise to an appearance that there is reason to believe that there are no assets in this area to meet the costs. It is open to the company to negate such belief by identifying sufficient land to meet the costs and the company alone would have that knowledge. We consider the evidence led combined with the absence of evidence in objection gives rise to the necessary belief that the company is not in a position to pay the costs referred to. We consider that the Master had jurisdiction. The question therefore is whether his discretion should have been exercised in favour of making an order.

26 There are a number of factors present which would have an important bearing on discretion. The first is, that the sole director of the company and principle shareholder, Mr Yovich, is, himself, a co-plaintiff.

If the action proceeds as the one action with one set of costs being ordered in the event of the actions being dismissed then Mr Yovich would be liable for the full amount of costs and it could then be said that he has, by being a plaintiff, voluntarily abandoned any corporate protection. It is submitted on behalf of the applicant that his claim is of a more limited nature. It is not possible on the material before this Court to determine that question. The pleadings are not before us. There are other matters that could also possibly go to discretion. They are that the company has brought action arising out of a contract that was entered into with the applicant and there may be grounds why the company should not be precluded from pursuing that action. Mr Martin requested that if the Court allowed the appeal on the basis that there was jurisdiction in the Master then the company should be given the opportunity of filing an affidavit as to its ability to pay costs. We feel it is proper that this should be done. Firstly, there have been conflicting authorities on the question as to what is necessary to establish jurisdiction. We do not consider that the company should be deprived of the opportunity to file an affidavit by reason of misapprehension of the law in this area. Such affidavit may have relevant material on the question of discretion. An ability to pay portion of the costs combined with the type of claim it is may give rise to a possible injustice if the company were denied from proceeding with it.

27 We consider that leave should be granted, the appeal allowed and the matter remitted to the Master to consider how his discretion should be exercised and whether or not to make the order. The company should have leave to file an affidavit as to its means. If such an affidavit showed an ability to pay the estimated costs, then in normal circumstances, if the matter is being judged in the first instance that would be a matter to show that there is no reason to give rise to the belief referred to in the section and consequently there would be no jurisdiction. That would be the normal way for the matter to be dealt with. It would also go to discretion because if there was an ability to pay, then the discretion would not be exercised. In the way this matter has developed this would now be a matter that can be considered in discretion.

28 **MURRAY J**: The question arising in this matter is the proper application of the *Corporations Law*, s 1335(1), the terms of which have been quoted by Pidgeon and Owen JJ, which deals with the circumstances in which a plaintiff corporation may be ordered to provide sufficient security for the costs which may be incurred if the defendant is successful in the action. I regret that in this matter I find myself expressing a minority view.

29 I need not repeat to any great extent what Pidgeon and Owen JJ have written in respect of the background to the application for leave to appeal. It is sufficient to note that the respondent and one Yovich, the secretary and sole director and shareholder of the respondent, a private company originally registered in January 1982, commenced an action against the applicant in February 1999.

30 The evidence in support of the application for security for costs was principally in the form of the respondent's annual returns for the financial years 1990 to 1995 inclusive. As the learned Master found, those returns showed for each year a net deficiency of assets over liabilities. They further showed that the company was trading. The respondent was apparently said to have provided services to the applicant for which it had rendered invoices which had not been paid. The information before the court by way of the annual returns was to the effect that for each of the financial years 1990 - 1993 inclusive, the respondent made an operating loss after tax. It was said to have broken even in 1994 and to have made an operating profit after tax in 1995 of $2,520. It was perfectly apparent that the respondent's financial position as at June 1995 was precarious.

31 No evidence of this kind was available for the financial years thereafter. The applicant's solicitors sought such information from the respondent, but it was never provided and at the hearing of the application for security for costs, no evidence was tendered for the respondent. It appears that for the years following 1995, there was no legal obligation upon the respondent as a private company to lodge returns of its financial position.

32 Apart from the evidence referred to above, the only other evidence on the application for security for costs was that the respondent apparently owned no land in WA, although it may have been the case that Mr Yovich did own land in which, together with other joint owners, he had an equity of some substance. The evidence before the Master was to the effect that at a relatively early stage in the litigation the applicant had incurred costs and disbursements of over $24,000.

33 Nonetheless, the learned Master dismissed the application for security for costs. The Master recognised that now that the respondent was not required to lodge annual financial returns, its financial position as a private company might be said to be particularly within its own knowledge, but there was no obligation upon the respondent to place such

information before the court and the Master expressed his conclusion as follows:

> "It (the respondent) is a trading corporation in its own right. The question then is this. Does the fact that in 1995 the [respondent] would not have been able to meet any costs order made against it, mean that it will not be able to meet such a costs order in 1999? To conclude that it does would, in my view, be nothing more than speculation. It would involve an assumption that the company has continued to trade in precisely the same way in the last four years as it traded between 1990 and 1995. In my view the evidence led by the [applicant] does not satisfy the test of being credible testimony as required by s 1335."

34 Pidgeon and Owen JJ have expressed the view that the learned Master misconceived the nature of his inquiry in respect of what has been described as the threshold or jurisdictional question raised first by s 1335 before it is open to the court to consider in the exercise of its discretion whether or not it will make an order for security for costs. The first question posed by the section is whether "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 …". Clearly that does not require that it be established that the corporation will be unable to pay the costs of the defendant if successful, but that, I think, is not what the learned Master posed to himself as the threshold question. He used a shorthand formulation of the test and returned at the end to the terms of s 1335(1) which he had previously quoted in full.

35 The learned Master made it clear that in his view he could draw no conclusion one way or the other as to the inability of the respondent to pay the applicant's costs if it was successful in its defence. He concluded that there was no credible testimony to establish the position, because he felt unable to project forward in time the information that he had as to the respondent's financial position and trading history as at June 1995 so as to draw any conclusion about its situation, not as at August 1999 when the matter was before the learned Master, but as at the time in the future when the question of the payment of costs would be likely to arise.

36 The thrust of the application for leave is not to assert an error of the kind discussed above, but to argue that the evidence before the learned Master was indeed sufficient to be regarded as credible testimony to provide reason to believe that the respondent would be unable to pay the

applicant's costs in due course if it was successful in its defence of the action. In particular, the application for leave is grounded upon the proposition that the respondent's failure to produce at the hearing of the application its financial statements for 1997 and 1998 pursuant to a notice to produce enabled the learned Master to infer that those financial statements would not assist the respondent's position in resisting the application and enabled him to conclude that there was reason to believe that the respondent would be unable to pay the applicant's costs if successful in its defence.

37 That proposition relies upon what is generally referred to as the rule in ***Jones v Dunkel*** (1959) 101 CLR 298 that the unexplained failure of a party to give evidence may, in appropriate circumstances, lead to an inference that the uncalled evidence would not have assisted that party's case, so entitling the court the more readily to draw an inference against that party which might otherwise fairly be drawn from the evidence which was adduced.

38 In taking the view that that rule would not assist the applicant in this case, the learned Master referred to my decision in ***Tipperary Developments Pty Ltd v WA*** (1996) 22 ACSR 241 where, at 244, I said:

> "That is, of course, an important limitation upon the operation of the rule. It is limited to assisting the court to draw an inference which is available from circumstantial evidence. The absence of evidence to the contrary may not, however, be directly converted into circumstantial evidence itself tending to prove the fact in issue against the silent party, as was made clear in *Jones v Dunkel* itself. The rule cannot be used to fill gaps in the evidence or to convert conjecture or suspicion into a matter of inference: see per Kitto J at 308, Menzies J at 312 and Windeyer J at 321. Therein lies the impediment to the application of the rule in this case."

39 I would adhere to those views and would conclude that the learned Master cannot be said to have erred once he took the view, which was well open to him, that the financial and trading history of the respondent after June 1995 was entirely a matter of speculation. In my opinion that view was open to the learned Master for the reasons he gives. Who knows, it may be asked rhetorically, what might have been done with this small private company in the four years or more which had elapsed since June 1995, particularly having regard to the fact that in that year the company apparently traded at a profit, albeit only a small one. The

decision whether the testimony before the court established, or gave reason to believe, that the respondent would be unable to pay the applicant's costs of defence if successful was one for the Master and not for this Court.

40 For those reasons I would conclude that the grounds of the application are not made out and that leave to appeal should be refused. The application did not get to the point where the learned Master was required to consider the exercise of his discretion to order security for costs.

41 I need say no more, but I think I should record my views on two matters about which the majority have expressed an opinion. I respectfully disagree with the view expressed by Pidgeon and Owen JJ that, "The applicant is required to do no more than place on the record credible testimony and the exercise of the court at this stage is in judging the testimony and its quality rather than seeing if a matter has been proved by inference." Nor can I agree with the view of the majority that the applicant carries no burden of proof "as nothing is sought to be proved." I respectfully do not think that the history of the legislation, well exposed by Pidgeon and Owen JJ, reveals that the legislature which first enacted the section in terms almost identical with its present form was thereby dispensing with a requirement which the legislation previously contained to prove the prospective inability to pay.

42 In ***Buckley v Bennell Design and Construction Pty Ltd*** (1974) 1 ACLR 301, Street CJ reviewed the relevant authorities and expressed the view that sections like s 1335 and its predecessors are concerned to govern the situation which, in litigation, might flow from the fact that the plaintiff is a limited liability company with the ability to bring an action before the courts in the same way as a natural person. The defendant, if successful, might have incurred costs which it may not be able to recover; hence the power to order security for costs. But in a real sense, the power may have a draconian quality to it in that, if the plaintiff is unable to provide the security ordered, its capacity to pursue the litigation will be stultified. It is important then that the court which is being moved to consider the exercise of its discretion to make such an order under the section, should be told only to embark upon that exercise when presented with credible testimony.

43 I see no reason in that context to give the word "credible" a meaning other than that which it would ordinarily bear. In ***Warren Mitchell Pty Ltd v Australian Maritime Officers' Union*** (1993) 11 ACLC 1238 at

1241, Lee J said, "The use of the word 'credible' suggests a requirement that the evidence to be relied upon has some characteristic of cogency." I respectfully agree. To my mind credible testimony is testimony which has the quality of cogency. It has the capacity to persuade and may be relied upon.

44 The testimony provided by the applicant in this case was clearly of that kind. It was in the form of a search of the land titles records and a number of annual returns of the company. There was nothing to suggest that they did not tell the truth about the company's financial position so far as they went. That was the difficulty. The learned Master considered that they did not go far enough to be persuasive of the relevant incapacity at the time material to when the question had to be decided: that time in the future when it might be the case that the successful defendant would be seeking to enforce an order for costs.

45 The historical analysis undertaken by Pidgeon and Owen JJ of the statutory precursors to s 1335(1) suggests that the provision took substantially its present form as early as 1862. In ***Westralian Goldmines Ltd v Westralian Minerals & Drilling Pty Ltd (In Liq)*** (1986) 4 ACLC 167 at 173, Brinsden J refers to the earlier view of the courts that the section did not confer a discretionary power, but a power which was required to be exercised if the basis of the jurisdiction was established. That is a readily understandable view in the context of a provision that a Judge:

> "…may, if it be proved to his Satisfaction that there is Reason to believe that if the Defendant be successful in his Defence the Assets of the Company will be insufficient to pay his Costs, require sufficient Security to be given for such Costs, … ."

46 It may be that the wording of the section was changed to ensure at least that, if the courts were to approach the exercise of the power upon the basis that there was no discretion, they should not move to award security for costs except upon the basis of credible testimony, so as to avoid such orders being made too readily. As Brinsden J notes in ***Westralian Goldmines***, it was really not until the English Court of Appeal decided ***Sir Lyndsay Parkinson & Co Ltd v Triplan Ltd*** [1973] 1 QB 609 that it was accepted that even where there was credible testimony as required by the section the court had a discretion whether or not to order security for costs.

47 As to what is required to meet the threshold or jurisdictional question posed by the section, in ***Westralian Goldmines*** the Full Court rejected the proposition that there should be a predisposition in favour of granting security. At 169 Wallace J said that:

> "…the correct approach is that satisfaction being achieved upon credible evidence that there is reason to believe that the respondent will be unable to pay the costs of the applicant if successful simply activates an unfettered discretion."

Brinsden J expressed himself in similar terms and Pidgeon J concurred. In my view the courts have always proceeded upon the basis that there is an onus upon an applicant for security to prove by credible testimony that there is reason to believe that the plaintiff corporation will be unable to pay the applicant's costs if successful in its defence.

48 Apart from ***Westralian Goldmines***, it is clear that that was the approach taken, also by the Full Court, in ***BPM Pty Ltd v HPM Pty Ltd*** (1996) 14 ACLC 857 where the particular point at issue was, once the threshold question has been established, whether an evidentiary onus is borne by a plaintiff company resisting giving security to establish the grounds upon it which it relies in respect of the exercise of the court's discretion. The same view was expressed by Lee J in ***Warren Mitchell***, a case upon which I relied for the same view in ***Tipperary Developments Pty Ltd v WA,*** and which was followed by Goldberg J in ***Second Lenbourne Pty Ltd v Beagle Management Pty Ltd*** [1999] FCA 486 (21 April 1999).

49 In that regard it must be remembered what is the threshold fact which must be proved. It may be described as a future hypothetical fact. The court is required to look forward to the time when the litigation may be finally determined and to suppose that judgment is given for the defendant. The court is then required to ask itself whether the testimony which it accepts as credible establishes that the plaintiff corporation will then be unable to pay the defendant's costs of the action. In ***Beach Petroleum NL v Johnson*** (1992) 10 ACLC 525, von Doussa J accepted that the onus to establish that threshold fact lay upon the applicant, but pointed out that it was not necessary to establish on the balance of probabilities that every eventuality which could lead to the eventual payment of the costs would then be excluded. As his Honour put it at 527:

> "When the Court is required to make a judgment which anticipates future events the Court of necessity is required to

> judge the degree of probability that a particular event might occur. The Court can do no more than evaluate the chances."

50 I would not resile from the view I expressed in ***Tipperary*** at 244 that:

> "No particular onus of proof arises in relation to [matters affecting the exercise of the discretion], although I think it to be the case that, subject to the evidentiary onus attaching to a party who wishes to rely upon a particular fact or circumstance, the discretion to order security will not be exercised unless upon the whole of the evidence, proper ground for the exercise of the discretion is made out. And certainly it is the case that unless the relevant inability to pay costs at the time when they may be awarded is established by the defendant, upon whom the onus rests in this regard, the occasion for the exercise of the discretion provided by the section simply will not arise."

51 Having said that I have sympathy for the position of a defendant who, as was apparently the case with the applicant, has difficulty in assembling the credible testimony necessary to establish the jurisdictional or threshold fact required of it by the section. However, such a consideration may not, of course, divert the court from a clear view as to the meaning and requirements of the law. Further, so far as this case is concerned, I note that Mr Yovich, whose trading vehicle the respondent company apparently is, is a plaintiff on the face of the record, apparently because he was a party with the respondent to the alleged agreement made with the applicant upon which the plaintiffs rely.

52 It may be that in those circumstances the applicant may take some comfort from a remark made by Connolly J, with whom Demack J agreed, in ***Harpur v Ariadne Australia Ltd*** [1984] 2 Qd R 523 which may be apposite. At 532, speaking of the precursor to s 1335(1) contained in the *Companies Code*, his Honour said:

> "The mischief at which the provision is aimed is obvious. An individual who conducts his business affairs by medium of a corporation without assets would otherwise be in a position to expose his opponent to a massive bill of costs without hazarding his own assets. The purpose of an order for security is to require him, if not to come out from behind the skirts of the company, at least to bring his own assets into play. If however he is already available for whatever he is worth, the object of the legislation is seen to be satisfied."

53 However that may be, I am not persuaded that the learned Master fell into error in relation to his approach to the section or in his conclusion as to the facts. I would refuse the application for leave to appeal.