CA on appeal from High Ct, Ch.Div (Mr Justice Pumfrey) before Sir Anthony Evans : 14th November 2001.

*1.* **SIR ANTHONY EVANS:** This is an application by Mr Peter Cave for permission to appeal against paragraph 2 of an order made by Mr Justice Pumfrey on 22nd June 2001. Paragraph 2 is concerned with the costs of what had been a failed committal application by Mr Cave against the defendants. The defendants, who are four in number, are: a company, Borax Europe Limited; Mr Sean Murray, its managing director; and Mr Lewis Silkin and Mr Ian Jeffery, who are partners in the firm of solicitors acting for the first defendant. The costs order was, first, that costs should be paid by Mr Cave on an indemnity basis, followed by: *"to be immediately assessed on a detailed assessment and payable forthwith"*.

2. I should mention two preliminary matters, so that they will form part of this judgment. First, I notified Mr Cave at the outset of this morning's application that I do hold a very small PEP shareholding in Rio Tinto Plc, which, as I understand it, is the parent company of the first defendant. Mr Cave indicated to me that he had no objection to my hearing the case. I can repeat what I said to him: that the fact that I own that shareholding has had no conceivable effect upon my exercise of judgment in this case. Secondly, I direct that a transcript of this short judgment be made at the court's expense and provided, first, to Mr Cave and, secondly, to the defendants' solicitors, so that they will have a full opportunity to study its contents.

3. The main burden of Mr Cave's application is for permission to appeal against the indemnity costs order that was made. In granting him permission to appeal, I do not wish him to think that he has any substantial grounds for optimism as regards that part of the order. That is not to say that he should have no grounds for hoping that the order might be changed to an order for costs at the standard rate. On the face of it, however, the order for indemnity costs was within the scope of the learned judge's proper jurisdiction on this occasion. There are two possible reasons why the order might be challenged, in my view. The first is that, as the learned judge indicated, it is unusual to make such an order for indemnity costs upon the failure of a committal motion such as this. Secondly, one (if not the main) reason the judge gave for making it was the fact that the motion was brought against the defendant company and Mr Murray, its managing director, when there was no evidence to support it against them. However, Mr Cave gave an explanation in his submissions and the learned judge does not refer to that explanation in his final ruling.

4. As regards the solicitor defendants, the learned judge seems to have been influenced by the fact that an allegation of what was termed "dishonesty" was made against the solicitors, perhaps giving rise to a suggestion that solicitors are in some special position when it comes to allegations of contempt such as this. They are in a different position if (as seems to be the case here) the allegation is one which involves an allegation of improper professional conduct, and to that extent the learned judge's remarks were unexceptionable. But if and in so far as it was suggested that solicitors are in a special position when they are defendants to a motion such as this, my present view is that that is something which should be guarded against.

5. However, my primary reason for giving permission to appeal is that the order provides that the costs are to be immediately assessed on a detailed assessment and are to be payable forthwith. Mr Cave tells me this morning that that assessment has in fact taken place and that, even on an indemnity basis, the costs claimed have been reduced from some £40,000 to some £32,000. That reduction lends support to one's initial impression that a claim for £40,000 of costs, even on an indemnity basis, for defending a committal motion such as this does seem to be particularly high. The assessment having taking place, no doubt further costs have been incurred in relation to that assessment.

6. The focus now is upon the provision in the order that the costs so assessed should be payable forthwith. Mr Cave tells me that he has already received a notice requiring payment within 14 days. The fact that the order was made in those terms is something of a puzzle to me. I have had the advantage of reading the whole of the transcript of what took place before Mr Justice Pumfrey on the day in question. It does seem from the transcript that the learned judge was reluctant to make such an order, and I doubt whether in fact he intended to do so. He was first addressed on the question whether costs should be ordered on an indemnity basis or not, and he indicated that they should. He then was asked by leading counsel appearing for the defendants to order an interim payment. The

judge, rightly in my view, said that in principle it was wrong to make an order which would have the effect of stifling the substantive proceedings which exist between the parties. There was evidence before him that a costs order of this magnitude would be likely to bankrupt Mr Cave. Rightly, in my view, therefore, he expressed considerable reluctance to make any order which would have that effect.

*7.* However, he did proceed to make the order that they should be paid forthwith. He made that order following a somewhat complicated discussion which was to the following effect. In the course of this regrettable litigation between the two parties it appears that Mr Cave obtained an order from a court in Holland, the effect of which was to require the defendants to provide a bond in Mr Cave's favour to await the outcome of the proceedings which are taking place in this country before the Employment Tribunal. The learned judge seems to have intended that the amount of costs payable under the order he made on this occasion should be enforced by deduction from the amount otherwise due under that bond, and that possibility of a set-off was discussed in some detail. Notwithstanding that discussion, the learned judge did proceed to say that the order should be for payment forthwith. However, he added*: "... but I see no point in accelerating the payment beyond that. What you do so far as set-off is concerned is a matter for you."*

8. Then he made a further observation (at p.73B of the transcript) to the effect that the order would have effect as a set-off only. I find it puzzling that in those circumstances, and against that background, the learned judge did proceed to make the order which he did. On that aspect of the matter, I have no hesitation in acceding to this application for permission to appeal.

*9.* The matter does not rest there, because the transcript also shows that, prior to the short midday adjournment of the hearing on the day in question, the learned judge (who clearly had taken great pains to immerse himself in the history of this most unfortunate dispute) expressed strong views as to the desirability of an attempt being made to settle the agreement with the help of a mediator. Mr Cave has told me (and I bear in mind that the defendants and their representatives have not had an opportunity to respond to this) that during the luncheon adjournment the defendants and their representatives simply left the building, returning only shortly before the afternoon proceedings began. He says that there was absolutely no suggestion by them that any discussion should take place, nor was he able to make any approach to them. When the learned judge sat again at 2.15pm, leading counsel for the defendants made a submission (at p.49 of the transcript) which did not answer directly the proposal that an attempt to mediate should be made. As often happens on these occasions, he stressed that his clients*: "... have always sought a commercial settlement and they have always wanted that to embrace all the litigation."*

*10.* But he then proceeded to refer, as I understand the transcript, to previous discussions which had already taken place, some open and some without prejudice. He added: *"We have doubts as to whether mediation will succeed, but we are more than content to try."*

11. Unfortunately, it seems that no further reference to mediation was made in the course of those proceedings, either by the parties or by the learned judge. It seems to me that, if there was a real prospect of mediation or a settlement agreement assisted by mediation, then that was a matter to bear in mind when the learned judge was asked to make an order for an interim payment, or before he made the order which he did that payment of this very large sum of costs should be made forthwith. The making of such an order would undoubtedly exacerbate the feelings of hostility between the parties and would reduce, rather than increase, the chances of a settlement agreement between them.

12. The learned judge said in terms that he thought that this was a storm in a teacup. Unfortunately, the storm has grown to ludicrous proportions. There are pending proceedings before the Employment Tribunal. There were these proceedings in which the defendants' costs alone were claimed in the sum of £40,000. All that was involved was a dispute about the safeguarding of a particular tape. There have also been (and may still be pending) committal proceedings by the defendants against Mr Cave. The court cannot do more than make both parties realise that they are in territory where the court could take the view that the costs are wholly disproportionate to the issues at stake. If both parties diligently seek a settlement, that may be possible, with or without the assistance of a mediator. If the services of

a mediator are necessary, the costs of that particular exercise could well be justified in the circumstances of the present case.

13. I therefore direct that the transcript of this judgment be supplied to both parties, so that both will realise that the views expressed by Mr Justice Pumfrey are certainly shared by me, and I have every expectation that they will be shared by any other judges before whom this matter comes. This is a case which calls out for sensible settlement discussions and, above all, for the avoidance of further wholly disproportionate and maybe unnecessary costs in resolving these disputes. What I have said applies to Mr Cave as well as to the defendants. Mr Cave has told me this morning that he is willing to embark upon settlement discussions. What I say is not directed exclusively at the defendants, but it will, I hope, be borne in mind by both parties. If, unfortunately, either no settlement discussions take place or no settlement agreement results, what I have said today will be on the record and available to both parties should it prove relevant in relation to any future applications for costs.

Order: application for permission to appeal granted; notice of appeal to be served within 14 days; transcript of judgment to be supplied to parties at public expense; costs order stayed pending outcome of appeal.

The Applicant Mr Cave appeared in person.
The Respondents did not appear and were not represented.