CA on appeal from TCC, Cardiff District Registry (His Honour Judge Moseley QC (sitting as a Deputy High Court Judge)) before Evans LJ; Judge LJ; Clarke LJ. 27th January 2000

J U D G M E N T : LORD JUSTICE EVANS:

1. This is an appeal against judgments given by His Honour Judge Moseley QC in the Technology and Construction Court sitting in Cardiff on 20th and 28th July 1999. He made an order, on the defendants' application under section 726 of the Companies Act, that the claimant company should provide a substantial sum, £100,000, in a total of five instalments by way of security for the defendants' costs of the action.

2. The grounds put forward in support of the appeal are set out in eleven paragraphs. They can be summarised as follows. First, the learned judge was wrong in that part of the judgment where he concluded that the claimant company does not have net assets sufficient to pay the likely costs of the defendants in the event that the action fails and an order for costs is made in their favour. Secondly, that the learned judge approached the exercise of his discretion under that section wrongly. Thirdly, that he was wrong to take no account of the fact that the claimant's financial difficulties upon which the defendants rely are attributable to the defendants' own conduct. Fourthly, that the judge was wrong in failing to give weight to the fact that there is, as the claimant asserts, a very high likelihood of success in its central claim for damages for breach of contract. Fifthly and finally, that the judge wrongly rejected the submission that the intent and effect of the application was to stifle the claim.

3. The writ was served and this application was made before the Civil Procedure Rules came into effect. However, the three hearings before the judge took place after that date and we can assume, as the learned judge did, that the present application should have regard to the content of those rules. We should bear in mind, of course, that the relevant provisions under the Civil Procedure Rules are still to be found in the erstwhile provisions of Order 23 of the Rules of the Supreme Court, together with section 726 of the Companies Act.

4. On the assumption that the overriding objectives of the Civil Procedure Rules apply in this case, it is perhaps doubly unfortunate that this application has come to dominate the litigation in the way that it has done. The result has been that no consideration of any sort has been given to the best means of resolving the issues raised in the action since this application was made in April last and, secondly, that costs of at least £40,000 seem to have been expended on this application and on this appeal alone. Those figures are based on the parties' estimates provided for the purposes of summary assessment of costs. In one of the leading authorities to which we have been referred, **Re Unisoft Group Ltd (No 2)** [1993] BCLC 532, the then Vice-Chancellor, Sir Donald Nicholls, opened his judgment with the words: *"This is an interlocutory application which has been permitted to get out of hand."*

5. In my respectful view, the same comment has to be made here.

6. The history of the matter, so far as is necessary to show what the principal issues in the litigation are, is as follows. Since the early 1990s the claimant company has been the owner of land in South Wales on which there were and are considerable quantities of colliery waste. The parties' estimate in 1996-1997 was that there was a total of about 3½ million tonnes of waste in three or possibly four tips in the neighbourhood of the Fernhill Colliery. The estimate of the defendants, Kier Construction Ltd, when the agreement which is now in issue was being negotiated, was that saleable coal might be recovered from that waste, amounting to about 12.5 per cent of the total, say 400,000 tonnes or more. The recovery process principally involved washing the coal and it required the use of sophisticated machinery for that purpose which had to be installed at the site.

7. Following extended negotiations, the claimant and the defendant company signed a written and, on the face of it, carefully drafted agreement which was dated 26th October 1996. Under the terms of the agreement, the defendants were to undertake the work of processing the waste and extracting saleable coal from it, and they were to find a buyer for that coal. At about the same time, although no formal agreement was made until the following year, they entered into an agreement with National Power to sell the recovered coal to them. One difficulty which has arisen is that the pricing basis in the agreement between the present parties and the pricing basis of the sale contract were not the same.

Under the agreement there is a price per tonne of £16.30 which, in effect, was to be payable by the claimant company to the defendants. Under the sale contract with National Power, there was a price formula which clearly requires technical explanation, but which appears to take account of the quality or calorific value as well as the weight of the coal.

8. The price clause in the agreement is Clause 8. The scheme which it reflects is that the defendant was to recover the sale price from National Power. The defendant was to deduct the fixed price per tonne, that is £16.30, which it keeps as its payment for the work of extraction and its profit. The defendant company then accounts to the claimant company for the balance of the sale price which it has received from National Power. There are other provisions (some of which I shall return to) which affect the detailed calculation of the amounts in accordance with that general scheme.

9. The agreement also recognises the need for the parties to obtain variation of a planning permission which had been given by the local authority, the Rhondda Cynon Taff County Borough Council, in 1994 and which was effective for five years.

10. In November 1997 the defendants installed their machinery on the site and commenced the work of extracting saleable coal. Much work was done and we understand from what we have been told that approximately 112,000 tonnes of coal were extracted and sold from a total quantity of waste somewhat in excess of 1 million tonnes. The rate of extraction therefore was rather less than 10 per cent, as opposed to the 12.5 per cent upon which the defendants' estimates had been based.

11. On 2nd October 1998 the defendants wrote a letter to the claimant company which we have at page 73. The letter referred to the negotiations with the planning authority which had continued up until that date. It referred also to a meeting between the parties which had been held on 21st July in the claimants' Cardiff offices. It is clear from a letter from the planning authority dated 20th July 1998 (page 67) that the local authority required revision of the proposed amendments to the planning consent, particularly with regard to the plans for restoring the site after extraction of the coal, and specifically that the local authority was unwilling to give permission for a stretch of the river (I think it is the River Rhondda) to be, if not diverted, enclosed in a culvert for a part of its length.

12. The agreement between the parties referred to the need to carry out works with regard to the river. That was Clause 9, where reference was made to the possibility of additional works which might be incurred in moving the position of the river adjacent to the site or with works to the culverts and associated drainage which may be required under a revised planning consent.

13. Reverting to the defendants' letter dated 2nd October, they made it clear that their primary concern was with the refusal, as at that date, of the planning authority to allow the culvert to be constructed. The letter therefore stated: *"The deletion of the culvert has required Kier Mining to review its mining plan."*

14. The next paragraph is equally significant. It begins: *"In addition to the above factors affecting the agreement, the recovery yields achieved thus far from the front and side tips are less than half than expected. Our current forecast shows that on conclusion of the side tip processing, scheduled for early February 1999, the total coal recovered from processing to that date will be 150,000 tonnes not the 309,000 tonnes expected."*

15. It is possible to infer from that letter that the defendants had formed a commercial view that the continuation of the agreement, in the light of the proposed revised planning consent, in particular without the possibility of constructing a culvert, was no longer economic for them. The letter then proceeded, without explaining why these matters should give grounds for renegotiating the agreement, to suggest that the claimant company should be prepared to reconsider the payment terms. The relevant paragraph begins*: "The loss of the expected level of tonnage will affect the full implementation of Clause 8.2(ii) which deals with the 'ultimate financial arrangement'."*

16. It then explains the figures and continues: *"The principle of this subject has been raised with you previously both in writing and meetings, and we now require your proposals for repayment of monies due under the 'ultimate financial agreement' within the next seven days."*

17. On the same date the defendants provided the claimant company with a revised planning proposal, which was then forwarded to the local authority. The local authority replied on 13th October in terms

which show that the authority was unhappy with the suggested restoration contours, as it was with regard to the culvert proposal. The letter indicated that certain paragraphs of the planning consent required to be revised in the view of the authority, and it concluded as follows: *"In conclusion, I would advise you to submit your planning application to amend the existing consent and the other outstanding details as soon as possible in order to reduce any possible delay regarding the restoration works."*

18. A later paragraph said that the authority expected to receive the amended proposals within 14 days of the date of the letter. That letter was received by the defendants on 19th October 1993.

19. On the evidence before us, the defendants did nothing during that 14-day period and made no contact with the planning authority. It seems from the affidavit of Mr Williams, on behalf of the defendants, that during that period they formed their own view as to what course they should take in the light of the situation in which they found themselves. The relevant passage from Mr Williams' affidavit reads: *"The requirement to seek amendment of the planning consent set out in the Council's letter of 13 October 1998 was unacceptable to Kier. In addition, further examination led to the conclusion that the proposed revised profiles would not be sufficiently stable. In the light of the foregoing, by letter dated 6th November 1998, ... Kier informed Fernhill that clause 3.2 of the Recovery Agreement had failed and accordingly Kier had ceased operations on site."*

20. That letter, dated 6th November, is among the evidence before us, and it is indeed to that effect. It is headed ***"Termination Notice"*** and it includes the following passages, including, after a reference to the local authority's letter dated 13th October: *"The letter sets out the Planner's view that the changes are so significant that they require a submission to amend the whole consent, and not just Condition 13. An entire revision of the contract is not acceptable to Kier Mining, and there is no feasible alternative restoration scheme."*

21. The letter detailed the further difficulties for the defendant if the planning authority were to maintain their existing views, and it concluded: *"In view of the above circumstances, we put you on notice that the Condition set out in Clause 3.2 of the Agreement has failed, and we have accordingly ceased operations under that Clause."*

22. The terms of Clause 3.2, upon which the defendants rely, are as follows: *"Kier will carry out all preparatory and restoration works and will provide FM [the claimants] with further details of the Works. Subject to obtaining a revision to the Planning Consent in terms and conditions acceptable to both FM and Kier, Kier will erect on the Site the Washery and Ancillary Equipment for carrying out the Works and will provide all labour machinery plant sundry materials and supervisory personnel to operate the Washery and Ancillary Equipment and to carry out the Works."*

23. There are, in Clause 2 of the agreement, express obligations whereby the parties agree to cooperate exclusively with each other to achieve the intended objects of the agreement. Those objects include obtaining planning consent for a revised scheme for the site and, in Clause 2.4: *"Act in fairness and in good faith to enable the other to discharge its duty and perform the intentions under this Agreement and accordingly will respond promptly to requests properly made by the other for information or assistance in connection with these intentions."*

24. The defendants did in fact leave the site forthwith and remove their machinery from it. Since then no further work has taken place there except, we are told, some further restoration works under whatever contractual arrangements may have been made for that purpose. We do not know the details.

25. It is convenient at this stage to identify the issue that was thus raised, by reference to Clause 3.2, as the central issue in these proceedings. The contention for the defendants is that they were justified in leaving the site and stopping work under the agreement because Clause 3.2 contained what was, in effect, an express condition precedent to their obligation, first, to commence the works and, secondly, to continue with the works. Their contention is that when it became apparent that there were the difficulties already described in obtaining the planning consent which they regarded as necessary, then the conditions were no longer acceptable to them, Kier, and they were free to leave the site as they did.

26. There is some uncertainty, from what we have seen and heard submitted, as to whether the defendants were or were not asserting that the agreement had come to an end. If the defendants were not entitled to leave the site at that time in that abrupt way, then, on the face of it, that was clearly a repudiatory breach of contract by them. It follows that the claimants are entitled to recover damages which are likely to be substantial, whether or not they, the claimants, also accepted that repudiatory breach as terminating the contract. On the face of it, however, it seems likely that the claimants did so accept that breach, if not earlier, by issuing the writ on 12th January 1999, although no express assertion is made to that effect.

27. In considering, as it becomes necessary to do, the merits of the claimants' contention that the defendants were in repudiatory breach of the contract, it is relevant to bear in mind, first, that there was an express, and if not an express there certainly would be an implied, obligation on the defendants to co-operate and use their best endeavours to obtain a satisfactory planning consent from the local planning authority and, secondly, on the evidence before us, having been invited to submit an amended proposal, the defendants chose not to do so in the period between 13th and 27th October.

28. The Statement of Claim contains the claim for damages already referred to and raises other matters of account between the parties. The assertion in broad terms is that on the actual sale proceeds received by the defendants from National Power, the defendants should have paid the claimants something in the order of £125,000 more than they had done. It is also asserted that the defendants should have obtained a further payment from National Power of some £243,000 and accounted for that also to the claimants.

29. The Defence denies liability. The nature of the Defence in relation to the Clause 3.2 claim has already been indicated. On the matter of accounts, it is asserted in the Defence that there are what are called simply "contra charges" of the order of £97,000 and that, in effect, there is no further payment due to the claimants out of monies in fact received from National Power. The allegations that more should have been received from National Power are denied.

30. A further matter is raised which is to the effect that, first, there was an option agreement which preceded the October agreement in 1996, under which the defendant paid £50,000 to the two directors of the claimant company and that, secondly, there was a subsequent payment of a further £250,000 to those directors on about 23rd October 1996, three days before the agreement was signed.

31. Clause 14 of the agreement is in common form and states that the agreement contains all relevant terms between the parties. The defendants apparently develop or wish to develop an argument that for some reason that clause does not preclude them from referring to the earlier payment on 23rd October and a payment which was made, they say, by them to the individuals in respect of the defendants' forthcoming liabilities to the claimant. Whether that elaborate argument is necessary in the light of Clause 8.2(2) of the agreement is, to my mind, doubtful. That clause reads: *"ii) As part of the ultimate financial arrangement and in addition to i) above, the sum of £1 per tonne commencing on the sale on 100,001th tonne of coal sold and continuing for the next 300,000 tonnes of coal sold."*

32. I shall say no more about this issue, save that it would appear on the face of that agreement that it was an arrangement whereby a further £300,000 was to be allowed in account by the claimant in favour of the defendants in those circumstances. It appears that once the 100,000 tonnes had been sold there was in fact an allowance of £1 per tonne, which meant that £12,000 of the £300,000 was in fact accounted for in that way. On that basis, a question may arise as to whether there is any, and if so what, obligation on the company and/or the two individuals to account for the remaining £288,000 if and when the agreement comes to an end, and on the assumption that the whole of the £300,000 has not been accounted for. Why it is necessary to rely upon the earlier alleged oral agreement is not clear to me at present.

33. The reply was served on 21st April together with an amended Statement of Claim. This summons was taken out on 22nd April and it was supported by an affidavit sworn by Mr Williams on 10th May 1999. There had been the necessary letter request for security in a rather smaller sum on 1st April. The costs set out in the document supporting Mr Williams' affidavit amounted to no less than £241,000,

those representing the estimated costs of the whole of the proceedings up to the end of a projected 10-day trial.

34. Since then, unfortunately and regrettably, this application has dominated the proceedings, even to the extent that the Case Management Conference, which was duly held on 2nd July, was ineffective because the view was taken was that this application had to be decided first. There followed the two further hearings on 20th July and 28th July. The first judgment was concerned with the question of principle. The second with the amount and implementation of the security for costs order. In effect, the second judgment is not appealed against. We have heard arguments relating only to the first.

35. I therefore proceed to summarise the judgment as follows. The learned judge had before him evidence in the form of trading accounts for the claimant company during the period when it was trading, when it was receiving money from the defendants, and when it was able to make payments against its very considerable debts. There was later evidence (in fact a great deal of further evidence, because by the time the matter came before the learned judge on 20th July, an enormous body of evidence had accumulated) both as to the value of the land which the claimant company owned and/or the mining rights associated with it and, secondly, with regard to various other items of debt which showed that the liabilities were indeed substantial.

36. The learned judge admirably summarised this evidence and it is not necessary for me to rehearse that part of his judgment. On the first issue, that is to say the value of the land and/or the mining rights, he had before him evidence from an independent consultant, Mr Alistair Smith, on behalf of the claimant. He had visited the site, he said, and had taken samples. Using the quantities derived from the defendants' own pre-contract estimates and his own view of an appropriate sale price for the coal to be recovered, he said that the coal content had a potential sale value of £6.33 million. As the later evidence showed, the cost of production might be of the order of £4½ million, but on that basis the claimant company clearly had an asset of substantial value.

37. As the judge said, that report was strongly attacked by the solicitor appearing on behalf of the defendants: *"... who puts forward in rebuttal of the report the facts set out in the affidavit of Mr Cawthorne, a director of Kier Mining, who has been actively involved ... in the Fernhill project."*

38. The gist of Mr Cawthorn's evidence was that the lower rates of recovery, which had in fact been experienced, together with rather more technical evidence regarding the value of the coal, was such that the likely sale proceeds were very considerably less than estimated by Mr Smith, and that given the costs of production there was no prospect of selling any recovered coal at a profit.

39. It has to be borne in mind that those estimates had to be given on the basis that some new contractor would move in and incur the associated costs, which would not have been necessary had the defendants' machinery remained there at the time when they in fact withdrew from the contract. The learned judge concluded that part of his judgment as follows: *"The test is whether there is reason to believe that the company will be unable to pay the defendant's costs. If the situation is as Mr Cawthorne sets out in his affidavit, there is reason to believe that the company will be unable to pay the defendant's costs because on the basis of Mr Cawthorne's affidavit the value of the mineral rights cannot be £160,000: it can be nothing at all, because if the costs of extracting the coal exceeds its value the mineral rights are worthless. If one deducts £160,000 from the balance sheet, the bottom line figure of £71,000 becomes unrealistic."*

40. The learned judge then dealt with three specific matters which were substantial debts owed by the claimant company. He said, and this was his second conclusion: *"It seems to me against that background that even leaving out of account the three debts that I have referred to there is reason to believe that the company will be unable to pay the defendant's costs if the defendant is successful."*

41. We have heard much argument as to whether the learned judge in the passage which I read previously was in fact deciding that he accepted Mr Cawthorn's evidence, and implicitly therefore was rejecting Mr Smith's evidence, and therefore reaching a conclusion in favour of the defendants, or whether he was stating his conclusion on some other basis: *"If the situation is as Mr Cawthorne sets out in his affidavit, there is reason to believe ..."*

42. In which case he was considering, not whether that was the appropriate conclusion to make, but whether there was evidence before him sufficient to support that conclusion, were he to make it.

43. It seems to me that it is unnecessary for us to decide whether or not the learned judge's approach was correct, although I incline to the view that he was in effect deciding that issue in favour of the defendants' evidence. If he was deciding that issue in favour of the defendants, a further question would arise, which again has been the subject of debate during the hearing before us. For reasons which will become clear, the issue being debated between Mr Cawthorn and Mr Smith was to a large extent an issue which arises in these proceedings, if only in relation to the measure of damages; that is to say, what is the recoverable percentage of coal in these waste tips?

44. Whether a judge on an application for security for costs should hold in the defendant's favour that the defendant is right on such an issue, in order to justify a finding that the claimant company does not have sufficient assets, seems to me to raise a difficult question. One is surprised by the prospect that for the purposes of a security for costs application, which happens to raise one of the same issues as those that have already arisen on the pleadings between the parties, the judge can make an inference in the defendant's favour for the purposes of the application, whilst at the same time purporting to express no view on the merits as regards the same issue in the proceedings themselves.

45. The reason why that issue does not arise in the present case, it seems to me, is this. Miss Jefford, for whose submissions we can express our gratitude, has submitted that the first question for the judge was a simple question of whether, on the evidence before him and on the premise that the defendant is to succeed in the action, it has been shown that there is reason to believe (in the words of the statute) that the claimant company would be unable to satisfy a costs order in the defendants' favour. I am prepared to make that assumption in the present case. I do so without expressing any final view, either on the detailed matters that have been put before us or on the specific issues to which I have referred. I make the assumption on the basis, also, that it seems quite clear to me that, to put it at its lowest, the claimant company, since the withdrawal of the defendants from this agreement, has been in a difficult financial situation. If it had funded its own costs of the action and was then faced with a bill for the defendants' costs of the order of £240,000, I can well accept that, on the evidence before us, it would have, to say the least, very considerable difficulty in doing so.

46. Miss Jefford then invites us to proceed to consider the question of the exercise of the Court's discretion. She reminds us that the question for this Court is whether the learned judge was clearly wrong to exercise his discretion in the way in which he did. That proposition, however, must be subsumed to the fact that the learned judge did make two particular findings on this matter, in relation to the exercise of discretion, which are challenged by Mr Walters on behalf of the claimant but which are defended by Miss Jefford. The first was concerned with the question whether the claimant can assert in the present case that there is a high probability of it succeeding in the claim. The relevant passage in the judgment reads simply as follows: "I have no reason to doubt that the claim is *bona fide* and it is impossible on the basis of the information available to me and the limited argument concerning the merits to reach any sound conclusion concerning the prospects of success. It seems to me that the claimants have reasonable prospects of success, as do the defendants. So the merits of the case do not weigh heavily in the balance either way."

47. If this Court were to take the view on the evidence that it is possible to form some view as to the prospects of success and that is favourable to the claimants, then clearly we are differing from the judge and on that basis we are entitled to interfere with his exercise of the discretion. Similarly, the learned judge dealt next with this point: *"... whether Fernhill's lack of means has been brought about by the defendants' conduct. Mr Walters concentrated on the profit and loss account aspect of the accounts and pointed out that the reason why Fernhill has at present no income is due to the conduct - whether blameworthy or not does not matter -of Kier in bringing to an end the contract, the result of which is that it has no income. I accept that argument but it does not seem to me to affect the balance sheet aspect of the problem i.e. the bottom line figure in the balance sheet is not in my view a realistic figure and in my view Kier has no responsibility for that state of affairs. So that aspect of the factors that I must take into account in exercising my discretion does not lead me to the conclusion that I ought not to order security for costs."*

48. Similarly, if this Court takes the view that it is a relevant factor that the claimant company's financial difficulties, such as I have assumed, are largely, if not solely, due to Kier's conduct in leaving the site when it did, then again we are entitled to reconsider the exercise of the Court's discretion.

49. In relation to the first of these matters, that is the probability of success, it seems to me, for reasons which have been foreshadowed, that this is a case where it is possible and indeed necessary to say that the claimants appear, on the evidence before us, to have a very substantial and certainly a high probability of succeeding on their central allegation that the defendants were in repudiatory breach of contract by writing the letter of 6th November 1998 and by withdrawing from the site as and when they did. On the face of it, there was not the slightest justification, in my view, for their failure at that time to continue with negotiations with the local authority. The fact that, as their previous letter had indicated, they were also influenced by the commercial aspects of the situation, serves to underline my belief that on the evidence we have seen the Court is extremely unlikely to hold that, as a matter of law, the defendants were entitled to write that letter and to withdraw when they did. I say no more because this is an interlocutory application, but it does seem to me that the circumstances are such that it would cause a high degree of injustice to claimants whom I have assumed to be impecunious, if they were unable to proceed with this claim against the defendants in these circumstances. I therefore would hold that the merits of the claimants' case on this central issue do weigh very heavily in the balance in their favour.

50. As regards the next point, that is to say the fact that the present position of the claimants is due, as clearly it is, to the conduct of the defendants in withdrawing from the contract, again it seems to me that the judge was wrong, as he did in effect, to overlook that factor. It seems to me that it is certainly relevant and related to the first factor, provide very strong grounds for weighing the balance in favour of the claimants in this case.

51. A third matter has been mentioned, which is whether the order has the effect of stifling the claim by the claimants, there being no express evidence to that effect. It seems to me that on the defendants' own evidence, one can rule out the possibility that any bank or other financier would be willing to support the claimants in their pursuit of this action. What is left is the question whether the directors, who on the defendants' case have received three years ago substantial sums of money, are likely or able to finance the proceedings by the company. They will in, in any event, have to bear the costs incurred by the company in so doing. To impose upon them an additional burden of providing £100,000 in cash by way of security for the defendants' costs, seems to me sufficient to demonstrate that a very substantial impediment would be placed in their way in pursuing this action.

52. The purpose of the rule regarding security for costs and section 726 and the exercise of the Court's discretion, in my view, is to avoid any injustice to a defendant who is sued by an impecunious claimant, such as would arise if the claim were to fail. It is also necessary to avoid, at the other extreme, injustice to a claimant who has a meritorious claim and who may be prevented from bringing the claim if he is required to provide advance security for the defendant's costs. Even if he is not prevented, such an order may place a major hurdle in the path which he must follow if he is to obtain justice. It is necessary to bear both these extremes in mind and it is also necessary, so far as possible, to avoid a situation where the Court has to form a view on the merits of the case, in order to decide whether or not to order security for costs. The overall requirement in the exercise of the Court's discretion is that the result should be a just one. It seems to me that it was unjust to make the order which the learned judge made in the present case.

53. For the reasons given, in my view, we are entitled to overrule his exercise of discretion. I would do so and allow this appeal.

LORD JUSTICE JUDGE:

54. On the evidence currently available, if the claimant's action were to fail, it appears to me unlikely, and I am certainly prepared to assume, that the defendants would be able to recover their costs of the litigation.

55. The claimant company is dormant. Whatever the value of the intangible assets lying on its land (and, for my part, this issue occupied a disproportionate part of the hearing before the judge) the winning of the coal would involved significant further expenditure of money which the company cannot apparently afford, and which would have to be raised by interesting another organisation in the possibility of commercial benefit to be gained by an investment of funds notwithstanding, first, the termination of the present defendants' involvement in the enterprise, and second, the need for further planning permission. It seems improbable that all the necessary and complex steps would be taken up by the claimants with any necessary level of enthusiasm, when the primary beneficiary would be the defendants whose actions had, so far as the claimants were concerned, and whatever the findings of the judge on the subject, created the financial crisis.

56. Nevertheless, an order for security for costs under section 726 of the 1985 Act is not the inevitable result of the Court concluding: "... that there is reason to believe that the company will be unable to pay the defendants' costs if successful in his defence."

57. If the claim has any merits (and on behalf of the present defendants it is not suggested for present purposes, at any rate, that it does not) then it becomes arguable that the claimants' impecuniosity, and in particular the financial difficulties involved in winning the coal hereafter, were a direct result of the defendants' wrongful termination of the contract. If so, the damages which they would be entitled to recover might very well include something to compensate them for the disruption to their business consequent on that wrongful termination.

58. On this premise, if the defendants had performed their contractual obligations, the claimants would not be the dormant commercial enterprise which they now are, nor in need of resuscitation from another commercial source. The longer the argument has gone on, the clearer it has become to me that the claimants' case has genuine merits, well worthy of ventilation and, in the absence of settlement, eventual resolution by the Court. The effect of an order for security for costs, if not quite stifling this claim into extinction, would undoubtedly create significant problems for the claimants. In short, a claim with real merits brought against defendants whose breach of contract, if proved, caused or made a significant contribution to the impecuniosity which is at the heart of the present application, would be required to surmount significant costs hurdles before they could bring this case for eventual consideration in Court.

59. In the particular circumstances of this case, for the dormant company to be required to find an additional £100,000, or even a reduced sum, in addition to finding the funds for its own costs, would not, in my judgment, be just.

60. Not having had the benefit of the lengthy and rather more wide-ranging arguments deployed before us, it seems to me that Judge Moseley failed to attach any or any sufficient weight to these particular considerations.

61. Accordingly, I agree with Lord Justice Evans that this appeal should be allowed.

LORD JUSTICE CLARKE:

62. I also agree that this appeal should be allowed for the reasons given both by Lord Justice Evans and Lord Justice Judge.

ORDER: Appeal allowed with costs in the sum of £10,596.10; claimants to have their costs of the hearings on 20th and 28th July, but the costs of 2nd July shall be costs in the case. So far as the costs below of 20th and 28th July are concerned, failing agreement, the learned judge should be asked to carry out that assessment on the next appearance before him. (Order not part of approved judgment)

MR G WALTERS (Instructed by Messrs Berry Smith, Bridgend CF31 1BZ) appeared on behalf of the Appellant
MISS N JEFFORD (Instructed by Messrs Fenwick Elliott, London WC2R 0HS) appeared on behalf of the Respondent