CA on appeal from QBD. (Mr Donaldson QC sitting as a Deputy High Court Judge) before Evans LJ; Hutchison LJ ; Hobhouse LJ. 16th April 1997.

JUDGMENT : LORD JUSTICE EVANS:

1. What is to be done when a builder claims £50,000 as the sum remaining due to him under a building contract, and has referred the claim to arbitration; when the employer says that he has paid all that is due for the works that were done, and counterclaims a rather larger sum, mostly as damages for delay; and the employer then asks the Court to order the builder to provide security for his, the employer's, costs as respondent in the arbitration, which he or his solicitor on his behalf estimates will be not less than £76,000?

2. The employer's application came before Master Foster on 13th June 1993, when the builder was not represented, being at that time in liquidation. The Master's order required the builder to provide security. For some reason, the Order as drawn up described the builder as the applicant and it does not state the amount of security which was to be provided, but it has been treated as requiring the provision of £37,000. The builder appealed but was unsuccessful before Mr David Donaldson QC, sitting as a Deputy Judge of the Queen's Bench Division. The employer applied to have the amount of security increased to the full £76,000, and the amount was increased to £60,000. The builder now appeals to this Court with leave given by Staugthon LJ, who said in effect that this cannot be right. His reasons for giving leave to appeal were these: *"The judge said that the claim was for £57,000 and the cross-claim for £58,000. In these circumstances it seems to me the height of folly for one side to spend £76,000, or even £60,000, in conducting the litigation. The parties should cut their coat according to their cloth. I would require some convincing that it is* ***impossible*** *to take part in a six-day arbitration for less than £60,000."*

3. So the stage has been reached, after a building dispute which cannot be described as unusual or unusually complex in any way, has been referred to arbitration, and in the nature of things neither the claim nor the counterclaim is likely to succeed in full. The amount truly at stake is much less than the figures of £50,000 or so which are put forward. Yet the claimant is told that he cannot proceed with the arbitration unless he first provides security for £60,000 of the respondent's costs, in addition to bearing his own costs until such time as he may obtain a costs order which he can enforce against the respondent.

4. The respondent's application was made on the basis that security should be ordered for their costs of preparing for and conducting a six-day hearing before the arbitrator. No thought, it appears, was given either before the Master or the judge to the possibility of identifying the issues which arise in the arbitration and of limiting the scope of the reference, at least in the first instance, to those issues which are essential for the ultimate resolution of the dispute.

5. That was doubly unfortunate, because the arbitrator himself raised that very possibility in a directions letter which he wrote to both parties on 19th March 1992. The arbitrator is Mr Brian Fender, and the relevant part of his letter reads as follows: *"I have examined the Defence and Counterclaim relative to the Claim and note that there is a substantial degree of agreement. Dispute appears to turn mainly on the alleged agreement of March 1990 and a number of other items for which valuations are not agreed. The arbitration can therefore be confined to those matters."*

6. Unfortunately, that sensible, helpful and entirely proper suggestion made no impact on either of the parties. Mr Mehana, who was acting on behalf of the claimants, of which he is a director, proceeded to file their reply and defence to counterclaim. Mr Rubin, the architect who was representing the respondents in the arbitration, then produced their list of documents so that the arbitration could take its course.

7. That was the situation when the claimants, Cohort, were placed in liquidation on 13th July 1992. A liquidator was appointed on 27th August 1992. The respondents instructed solicitors in the latter part of September, and the solicitors gave notice by letter dated 2nd October that they would seek a security for a costs order in the High Court, which they did by summons dated 19th November 1992.

8. The application was supported by the affidavit of their solicitor, Mr David Adam Quastel of the firm Cannon Silver Quastel, dated 18th January 1993. He produced what he described as follows: *"...a*

complete copy of the breakdown of time expended to date by the Respondent's agent [that was Mr Rubin, the architect] up to that date which discloses a total amount of time spent amounting to 437 hours from Mr T Rubin and 104 hours of Mr J Webber. Mr Rubin is charged out at £60 per hour plus VAT and Mr Webber at £35 per hour. As can be seen the total costs of the case incurred up to that date including disbursements amount to £30,365.14 plus VAT and at 17.5% amounting to £5,313.89 giving a total of £35,679.04."

9. That schedule related to a period from the commencement of the arbitration on 19th August 1991 until 2nd November 1992.

10. Apart from the totals referred to by Mr Quastel, one should note two items in particular:

First, the claim for: *"Respondent's statement (11 pages) Schedules incorporating costings and comments (50 no A3 sheets)."* The claim was for 220.25 hours spent by Mr Rubin and 104 hours spent by Mr Webber.

The next item: *"Preparation of Respondent's Counterclaim including liaison with Respondent."* was for 12.2 hours spent by Mr Rubin.

Secondly: *"Preparation of our letter dated 21.4.92 and preparation of Respondent's Lists of Document (17 pages) from files including numbering correspondence in six lever arched files in chronological order."* was for 112.2 hours attributed to Mr Rubin.

11. Counsel for the respondents, Mr Deacon, does not seek to defend these as responsible figures for the respondents to put forward for the purpose of obtaining security for their costs, though he emphasises that he does not accept that it is not an accurate record. If it is accurate, then it is remarkable. Mr Rubin was the architect involved in the building project throughout, from mid-1989 until August 1990. He says in a later affidavit that his scale fee was or would have been about 8% of the contract price, which price the respondents say was not greater than £117,500. His fee therefore was, say, £10,000. On that basis, the arbitration fees are a bonanza for Mr Rubin if he is able to claim £35,000 for the additional work involved in preparing the respondent's case for arbitration, in relation to the self-same contract, during a period of similar length from August 1991 until November 1992. Mr Quastel, the respondent's solicitor, does no more than put this schedule forward in support of the respondent's application, but the respondents must bear the responsibility for seeking the Court's order on the basis that this was a reasonable estimate of their costs likely to be recoverable if they were to succeed in the arbitration.

12. Mr Quastel also produced his own estimate of the further costs which would be incurred if the arbitration was to proceed to a six-day hearing. These included 121 hours of work by himself and a further 148 hours by "the expert", meaning apparently Mr Rubin, who would require, it was said, no less than 40 hours to prepare his report on the matters which he had already considered at such very great length.

13. Happily, this estimate of the respondent's future costs of the arbitration is now relevant only as the background to the learned judge's judgment, to which I will come after summarising the history of the works and of the dispute.

14. The contract or the contractual arrangements were made in about May 1989. The contract itself was not in writing; it was either oral or was implied from conduct, but it would seem, nevertheless, that is incorporated written terms. It was to construct a single-storey extension to premises at 323 Green Lanes, London N4, and to refurbish the ground floor of the existing building at an agreed price of £117,410. The plaintiffs started work in June 1989. Several difficulties arose. Progress was slow. Both parties blamed the other. There was a meeting in February or March 1990, where the plaintiff says that the contract price was increased to £130,000. The defendant's representative, Mr Rubin, denies that; he says that no agreement was reached.

15. By August 1990 the works were not complete. The defendant's representative, Mr Lester, met the plaintiff's representative, Mr Mehana, on the site. It was agreed that the plaintiffs would cease work and leave the site forthwith, which they did. It was also agreed, or was their joint intention, that the plaintiffs should be paid for the work that they had done. There is a difference, however, as to what that payment was to be. The plaintiff, Mr Mehana, says, perhaps optimistically, that it was agreed that

the plaintiffs would be paid the full amount of the revised contract price, that is to say £130,000, although the work had not been completed, plus additional items which had been carried out, outside, he says, the scope of the contract since February or March 1990, a total of £139,000. £89,000 having been paid, the claim therefore is put forward in the sum of £50,000. The defendant says that that the obligation was to pay whatever sum was fixed as a valuation for the work already done by Mr Rubin as architect. He prepared an initial valuation in about September 1990, which produced a total sum due of £96,838. Payments had been made totalling £89,300, leaving a balance due of £5,538. Mr Rubin certified that that sum was due and payable by an interim certificate issued on 18th October 1990. That apparently was rejected by the plaintiffs and no further payment was made.

16. Later, and in an attempt, we were told, to reach an amicable settlement of the claim, Mr Rubin prepared a further valuation report, dated 20th April 1991. It is not clear what total sum results from that valuation, but clearly it is suggested that the total is in excess of the £95,000-odd figure which had been certified previously.

17. The dispute was referred to arbitration on 2nd August 1991. The arbitrator gave directions on 30th August 1991. The claim, as re-amended, was submitted finally on 10th January 1992. The defence was served on 6th March 1992. The defendants said that the amount due to the plaintiffs was significantly less than the amount of Mr Rubin's previous valuations. It was put apparently as £91,290, of which the defendants claimed the right to withhold 5% as a retention, meaning a net sum due of £86,725. In addition, there was a counterclaim for, first, what was said to be the costs of repairs or of remedying defective work in the sum of 10,255, and secondly, a claim for unliquidated damages for delay in the amount of £48,000 plus VAT. That delayed counterclaim was for a period of 32 weeks, based on the proposition that the plaintiffs were 14 months on site and should have taken no longer than 10 months to complete the work. That meant a period of 16 weeks of delay. There was a claim for a further 16 weeks for "quotations, repairs and completion" of the works. That 32-week period was claimed at the liquidated rate of £1,500 per week, a figure taken from the contract terms, although no completion date had been entered there. The counterclaim, therefore, depends upon the defendant's assertion that 10 months was a reasonable period for completion. The contract was silent as to a completion date, although the defendants say that that was because the plaintiffs failed to provide their estimate. The fact remains that the defendants have to prove what was a reasonable period for the work in fact done, and secondly, what damages they did in fact suffer in the absence of a liquidated damages clause.

18. The present application was made following the appointment of the liquidator, which had been made in August 1992. The liquidator was notified of the application, but he had no assets and took no part in the proceedings before the Master. Mr Mehana then applied to have the winding-up order lifted so that he could pursue these and certain other claims against other persons with which we are not concerned. That application was opposed by the present respondents, for reasons which are not entirely clear. But despite their opposition, the winding up was stayed by order of Judge Evans-Lombe on 12th April 1994. Mr Mehana then sought leave to appeal out of time against the security for costs order made over a year before by Master Foster. The respondents issued a further summons seeking to increase the figure above £37,000. The learned judge extended the time for appeal, and in the result he considered simply the overall question: should security be ordered, and, if so, in what sum? He stated the position as follows: *"To a significant extent these two summonses interact because, to my mind, and, as I understand it, to the mind of counsel who helpfully addressed me, the real question is, looking at the matter as of today, what security, if any, should be ordered."*

Then a little later: *"That way the entire matter will be before me on the appeal which I have now given leave for from the master's order and the cross-appeal, if a cross-appeal be necessary, for which I have also granted leave. Both parties consented to my taking that course and, I think, very sensibly consented in the hope that this appeal will resolve matters of security for costs once and for all."*

As already stated, the learned judge did not consider and was not invited to consider whether the scope of the arbitration could and should be limited as the arbitrator had suggested in March 1992.

19. The learned judge directed himself by reference to the principles set out in **Sir Lindsay Parkinson & Co v TriPlan Ltd** [1973] QB 609, as summarised in the notes to Order 23, rule (1) of the Rules of Supreme Court (reference to be found in the annual practice at page 413). He went through the "checklist" of relevant factors, as he called it; and it is not necessary to refer to his observations in detail. In the course of considering whether the effect of the order was to stifle a genuine claim, he said this: *"...one has to note that Mr Mehana has indicated that he is prepared to finance the arbitration and that, on the claimant's side, will involve the expenditure of substantial sums of money. I was told by his counsel that he had available in terms of budget, as I understood it, £10,000 in relation to costs already incurred and £3,000 in relation to costs to be incurred. It may be that one ought to regard those figures with some degree of scepticism. Nonetheless, I must accept the possibility that the limitations on Mr Mehana's funds are such that if he is required to give full security, or anything like it, the effect may be that he is unable (and hence the company is unable) in fact to finance this litigation, having regard to the sums of security which he will have to put up. I approach the case making that assumption in favour of Cohort.*

Nonetheless it seems to me that this is a case where even if at the end of the day and even if the effect is that Cohort is unable to proceed with the arbitration, it is right and proper that I should give precedence to providing security in some sum for Spring Hotels."

20. He then proceeded to deal with the possibility that the arbitration might not run its full course because it would settle. He said: *"I am told, and I accept, that there is no sign of that in terms of approaches by one party to another even on the horizon. I do not think one can discount it as a possibility, however, in this case, having regard to the quantum involved, though I take into account in that regard both the interest which will attach to the capital amount of the claims and the costs. But, having regard to the modest size of the claim and the very substantial costs that are involved out of proportion to the claim, that is inevitable when it takes six days to litigate a sum of this size. Having regard to those matters I cannot dismiss as so farfetched as to be worthy of no consideration the possibility that there will be some settlement."*

As regards the quantum of costs, he said: *"I have come to the conclusion that there is, perhaps, some, though not enormous, excess or fat in the bills."*

He then said the Court should stand back and take a view in the round. He did so and settled on the figure of £60,000.

21. In my judgment, the first thing which should be done in any case of this sort is to consider what the proper scope of the arbitration should be. The initial question, of course, is whether it is established that the Court has a discretion to make an order under section 726(1) of the Companies Act 1985. Clearly, it does have such a discretion here. The plaintiff (which is nominally the company but in fact Mr Mehana) does not suggest otherwise. The question is, how should the discretion be exercised? I would approach that on the basis that the discretion which is permitted by section 726(1) of the Companies Act is equivalent to the discretion given more generally by rule (1) of Order 23 of the Rules of Supreme Court, where the overriding requirement is that the order should be just as between the parties.

22. The starting point, in my judgment, inevitably must be the amount of the respondent's costs, either those already incurred or those which are estimated will be incurred if the arbitration proceeds. What the future costs will be depends upon what form the arbitration will take. It is not inevitable that all issues should proceed to a full hearing. In arbitration, as well as in litigation, the parties should recognise an obligation to have their dispute determined justly and as speedily and economically as possible. Those are the objectives described by Lord Woolf in his recent report ***Access to Justice***. Those will be the objectives of the new rules which are now being drafted. But they are, or should be, the Court's objective now under the existing rules, particularly when there is an opportunity, such as is given by a defendant's or a respondent's application for security for costs, for the Court to influence what form the proceedings should take. In my judgment, this approach could and should be adopted by the Court of Appeal, even if it was not expressly raised below. But it is unnecessary to rule on that formal question of procedure here because, happily, counsel have agreed that this is a case where much can be done at this stage to confine the arbitration to those issues which really matter and which are likely to be decisive to the arbitration as a whole.

23. What form arbitration proceedings take depends, of course, upon the arbitrator. That is a matter entirely for him, and the Court cannot and would not seek to do more than require the parties to make an appropriate application for directions to him. But here the arbitrator has already recognised what should be done. Now that the parties are agreed that his suggestion should be taken up, five years after it was made and many thousands of pounds worth of costs later, the position is more straightforward. I would endorse the arbitrator's approach and I would expect the parties to cooperate with each other and with him in taking the matter forward on that basis.

24. What emerges is this. There are three essential disputes, which I will state in general terms: first, what were the terms of the original contract under which the plaintiffs undertook the work?; second, were those terms varied, and, if so, in what respects, by agreement reached orally in February or March 1990?; and third, on what terms did the plaintiffs cease the work and leave the site in August 1990? None of those issues involves detailed schedules or accounts. When those factual issues are decided, it is, I would hope, unlikely that the parties will not be able to work out and agree for themselves what the state of accounts between them is. At worst, the arbitrator could be asked to decide on the documents what the figures should be. There might be a dispute as to whether the plaintiffs were liable for delay, either before August 1990 or as a result of late completion. But as regards the latter, if the respondents, through Mr Lester, agreed that the plaintiffs should leave the site and be paid whatever sum was due to them under the contract terms (whatever those terms were), then it seems unlikely that the defendants could counterclaim damages so as to reduce that sum unless they expressly reserved the right to do so.

25. The parties, therefore, have agreed that the arbitration will go ahead, if it does go ahead at all, and subject to the ruling of the arbitrator, on that basis. That transforms the situation which presented itself to the learned judge, and it therefore becomes necessary to consider afresh what order should be made in these circumstances as to security for costs.

26. On the face of it, the £10,000 figure which has been mooted by the plaintiffs is ample or at least adequate security for the future costs for the defendant of an arbitration conducted on this basis. That sum may or may not have been offered by counsel before the learned judge, as the passage already read demonstrates. It was offered by counsel before us. But it has to be said that, even now, there is no such offer made formally by affidavit, and there easily could have been if that truly was the maximum figure which the plaintiffs could contemplate providing as a condition of allowing the arbitration to proceed.

27. If the future costs of the arbitration are taken care of in that way, the remaining question is what further sum, if any, should be ordered in respect of the sum already incurred. These are limited to those claimed in respect of Mr Rubin and his assistant in the period up to November 1992. That is because no work has been done in the arbitration since then. Although the defendant's solicitors have incurred costs, we are told involving £10,000, those have been in relation to opposing the winding-up application and in making this application. Those figures show how the costs of satellite litigation can themselves become entirely disproportionate to the sums which are truly in dispute.

28. In relation to costs already incurred, the first question is, should any order be made? I would hold, yes. The statutory conditions are satisfied. The defendants are entitled to be safeguarded against the risk that there will be a costs order in their favour in the arbitration which they are unable to enforce, even by set off, against any sums which they are bound to pay, whether under an award or whether as to liability or costs. The method in which the statutory discretion should be exercised has been established by three authorities in particular. First, **Sir Lindsay Parkinson & Co v TriPlan Ltd** (supra). Secondly, the judgment of this Court given by Bingham LJ in **Okotcha and another v Voest Alpine Intertrading GmbH [**1993] BCLC 474. The point stressed there was that the amount need not necessarily be fixed by reference to the plaintiff's own resources. In that respect, the judgment reflected the earlier judgment of Saville J in **Flender Werft AG v Aegean Maritime Ltd and another [**1990] 2 LLR 97. The third authority is **Keary Developments Ltd v Tarmac Construction Ltd and another [**1995] 3 All ER 534. There, in the judgment of Peter Gibson LJ, principles were set out at page 539 and following. Two may be singled out for mention. First, number 5, at page 540F: *"The court in*

considering the amount of security that might be ordered will bear in mind that it can order any amount up to the full amount claimed by way of security, provided that it is more than a simply nominal amount; it is not bound to make an order of a substantial amount."

29. Principle number 6 refers again to the proposition that it would be unjust to stifle a valid claim, but only in circumstances where the plaintiff shows that it will be unable to proceed if security in a stated figure is ordered. That reflects both the **Okotcha** judgment and also the more general principle established in Order 14 cases by the House of Lords' judgment in **MV Yorke Motors v Edwards** [1982] 1 WLR 444.

30. To those authorities I would add only the following general observations. When the plaintiff is insolvent then the defendant is unlikely to be able to recover his costs of defending the proceedings which he would normally expect to do if his defence is successful. Since the outcome is uncertain, this can only be expressed in terms of risk. Even if it is clear that the plaintiff is and will remain insolvent, his ability to satisfy a costs order made against him may depend upon what other orders are made in the arbitration or litigation. For example, costs orders in his favour which the defendant could satisfy by the exercise of set off.

31. The real problem, in my judgment, lies in deciding what weight to give to the parties' respective chances of success in making and defending the claim. Certainly, the Court must be satisfied that the defence is arguable, or, putting the matter differently, that the defence gives rise to triable issues. In that situation, and assuming that the claim itself is similarly arguable, is it necessary or even permissible to consider the merits any further?

32. I am not persuaded that it is realistic to ignore the merits beyond this, for the simple reason that the burden of unfairness to the plaintiff, if an order is made with which he cannot comply, must depend on the value of the claim which he has to forgo, which depends in its turn on a broad assessment of its chances of success. Similarly, the risk for the defendant of having a costs order in his favour which the plaintiff cannot satisfy must depend upon the chances of such an order being made and therefore on the eventual outcome of the proceedings. At the same time, it is abundantly clear and well established by authority that the Court should not and does not enter into any detailed assessment of the risks that may be involved.

33. However, in my judgment, it is unnecessary to pursue these matters further in the present case. I am satisfied that this is a case where a further order can be made beyond the £10,000 security for future costs without unfairness or injustice to the plaintiffs. The figure of £37,000 put forward by the respondent's solicitor on their behalf so far exceeds the maximum that might be regarded as reasonable costs for the work attributed to Mr Rubin and his assistant in preparing the respondent's defence in an arbitration of this sort that the Court, in my judgment, must assess a proper figure. That has to be limited by reference to the costs of presenting the defence, as distinct from making the counterclaim. £10,000 is broadly equivalent to Mr Rubin's scale remuneration for the whole of his duties as architect of the work. Having regard to this fact, and in all the circumstances of the present case, I consider that £10,000 is the appropriate sum to order in respect of past costs. I would not make any deduction for the sum of £5,000 (or it may be more) which was certified or admitted as being due to the plaintiffs but which has not been paid. That is evidence which certainly diminishes the chances of the plaintiffs not obtaining an award in their favour, which would carry some, if not all, of their costs. Therefore it minimises the risk of an order for costs in the respondent's favour which the plaintiff could not satisfy. But I do not think that the authorities permit any such close examination of the likely outcome on the arbitration upon an application such as this.

34. I return to the question asked at the beginning of this judgment: what is to be done when a situation of this sort does arise? The full panoply of Court procedures and the legal costs involved are simply out of scale to the parties' dispute.

35. I hope that we will have demonstrated two methods which can and should always be adopted by the Court: first, the issues should be carefully identified so that the proceedings can be limited to those

which really matter; secondly, the costs or proposed costs should be scrutinised so that they do not become disproportionate to the amounts which realistically are in dispute.

36. When the matter is referred to arbitration, the arbitrator's powers are probably wider, certainly no less than the powers of the Court, to make sure that the proceedings are kept under sensible but tight control.

37. The third response is primarily a matter for the parties themselves. This is the need to explore all avenues which could lead to agreement, not necessarily a settlement of the dispute itself, but as to what are the central issues and how the dispute can be most efficiently resolved.

38. Agreement of this sort may be assisted by an independent third party, perhaps the arbitrator, or perhaps a qualified exponent of what is now called ADR, but that is not essential. The primary responsibility rests with the parties themselves; and the duty of their legal representatives is to keep them fully informed as to the opportunities which always exist, whatever the nature of the dispute, for it to be resolved speedily, economically and with justice to both parties.

39. The present case, even at this late stage, when very large amounts of costs have been incurred, is clearly one where these possibilities should be actively pursued.

40. I therefore would allow the appeal, by reducing the amount of security ordered to £20,000. That is to be on terms that the parties will invite the arbitrator to make directions which will result in the three issues already identified being decided as preliminary issues in the arbitration. The precise terms of the issues can be included in the Court's order. I would record that the parties, through counsel, have agreed that such an application to the arbitrator will be made.

LORD JUSTICE HOBHOUSE:

41. I agree with my Lord that this appeal should be allowed but would for myself have only reduced the aggregate sum ordered to £30,000. I can state my reasons shortly.

42. There is no basis for interfering with the Judge's decision to order security. But, as regards the amount of the security, it is necessary for this Court to exercise afresh the discretion as to what security should be ordered. The situation has changed in two respects since the matter was before the Judge.

43. First, it has emerged that certain of the figures upon which the Defendants have relied in their application relating to costs already incurred cannot be supported - indeed Mr Deacon for the Employers has frankly accepted that they must be reduced. I agree with Evans LJ that the number of hours charged are far greater than can be justified; the sums claimed would never be allowed on taxation. In my judgment, the appropriate aggregate figures for past costs is not the £37,000 ordered by the Master and upheld by the Judge but should be £20,000.

44. Secondly, in response to detailed probing by the Court, it has been accepted by both parties that it should be possible very considerably to simplify and reduce the length of the proceedings necessary to achieve an effective determination of the dispute. On this basis £10,000 becomes an appropriate figure to order in respect of the costs to be incurred up to the completion of the arbitration. This makes the aggregate sum for which security should be ordered the total sum of £30,000. It is this sum which I would order in substitution for the orders of the Judge and the Master.

45. I am conscious that my Lords consider that a lower aggregate figure of £20,000 is the appropriate one having regard, in particular, to the costs already incurred. I wholeheartedly endorse the view that even £20,000 is more than ought to have been spent by each side on this relatively limited dispute. However the parties agreed on arbitration not litigation and chose to conduct the arbitration without making use of experienced professional litigators; this has rendered the preparation less efficient and more expensive in hours worked than should have been the case. Similarly, the expense of the arbitration proceedings has been increased by the failure of the Claimant, the contractor, to present his case in a clear and consistent fashion and this has added to the difficulties of the Employers. It must also be observed that both the Arbitrator and the Employers have at the earlier stages unsuccessfully sought the Claimant's cooperation in reducing the issues and facilitating the economic resolution of the dispute. This is borne out by the correspondence which has been placed before us between the

arbitrator and the parties exchanged in 1992. As regards this, I will quote what is said by Mr Rubin in relation to that stage at paragraph 9(1)(e) of his first affidavit: *"Having regard, however, to the Arbitrator's remarks and the commercial realities of the case, I then said that I would be happy to arrange a meeting between SHL and Mr Mehana to see if any agreement could be reached, to which Mr Mehana replied that he was not interested in having any meetings at all unless he was first guaranteed payment of £30,000. I said that I could not see any reason why Cohort should be paid anything further at all and the matter was left there."*

46. It should also be recorded that in this Court the Employers have, through their counsel, Mr Deacon, again gone out of their way to help towards the end of facilitating the economic resolution of the dispute. In my judgment, the employers should in no way be penalised as a result of what has happened.

47. It has been submitted that we should investigate and take a view about the merits of the parties' respective cases in the substantive dispute. In particular Mr Ash has submitted that we should disregard the set-off pleaded by the Employers and give the Claimant a credit of £5,000 plus interest. In my judgment, each side's case is fully arguable, including, on a reduced scale, the Employers' set-off; the Employer's case is no less arguable than the claimants. I do not agree that we should assume that the Claimant will in any event recover any sum.

48. It has been held in **Porzelack v Porzelack** [1987] 1 All ER 1074, and in the many cases which have followed and applied it, that on an application for security for costs the Court should not seek to investigate in detail the likely outcome of the action. The Employers' case is triable; no further investigation of the rival cases or attempt to arbitrate the outcome of the arbitration is appropriate. We do not have the material which enables us to do so. That is in any event the role of the arbitrator who is the parties' chosen tribunal.

49. The present case is a case for an order for security under section 726 of the Companies Act 1985. The claim is being made for the benefit of the creditors of an insolvent company. There is no evidence whatever of any relevantly limited means of those for whose benefit the claim in the arbitration is being made, only a reluctance on their part to invest more than a limited sum in its prosecution unless they can persuade the Court to allow them to do so without being fully at risk for the costs which the determination of their claim will involve.

LORD JUSTICE HUTCHISON:
I agree that this appeal should be allowed for the reasons given and to the extent indicated by Evans LJ in his judgment, with which I am in full agreement.

ORDER: Appeal allowed; order of Mr Donaldson QC (sitting as a Deputy High Court Judge) dated 15th March 1995 be varied in the following terms:

Security be reduced to £20,000 on the agreement of the parties, to apply to the Arbitrator for directions that the following three issues, as defined by the parties, be tried as preliminary issues in the Arbitration:
(a) On what contractual terms did the claimant being work on the site in June 1989?
(b) Was there any agreement varying the terms of the building contract made in February/March 1990, made by Mr Ruben and Mr Mehana? If so, what was agreed?
(c) On what terms did the claimant cease work and leave the site in August 1990?

AND The witnesses to be limited to three, namely Mr Mehana, Mr Ruben and Mr Lester;

Plaintiffs to provide security in the sum of £20,000 within 42 days in a form acceptable to the Solicitors for the Defendant, or, failing that, a form acceptable to the Court; unless such security be provided by the Defendant, the Arbitration proceedings will be stayed, pending further application to the court; any further applications be made to the Master; Defendant's costs before the Master be undisturbed; Defendants to pay half the Plaintiff's costs of this appeal and half of its costs before Mr Donaldson QC, such costs to be taxed if not agreed.

MR E ASH (instructed by Messrs Timmis Desai, London WC2) appeared on behalf of the Applicant
MR R DEACON (instructed by Messrs Cannon, Silver Quastel, London W1N) appeared on behalf of the Respondent