In the Matter of an Arbitration between
Surefire Systems Ltd (Claimant)
and
R. Mansell Ltd (Respondent)

Victoria Station

ARBITRATOR'S FIRST INTERIM AWARD

ON AN APPLICATION FOR
SECURITY FOR COSTS

1. Mansell have made application for an Award ordering that Surefire give security for Mansell's costs in the Arbitration. The Parties have provided me with Affidavits. Having heard the very helpful arguments of Mr Peter Coulson of counsel, instructed by Mr Richard Laudy of Messrs. Masons, solicitors for Mansell and Mr Roderick O'Driscoll of Messrs. Roderick O'Driscoll and Partners, solicitor for Surefire, in a hearing at Roman House, City Road, London, on Monday, 5 January 1998, I have determined the application, and now make and publish this, my FIRST INTERIM AWARD WITH REASONS as follows:

2. I am a Chartered Engineer, appointed as Arbitrator by the courtesy of Mansell and of Surefire. I do not profess Law and, indeed, I am not qualified to do so. It is not for me to seek to comment upon or to analyse the legal authorities which have been provided for my assistance. The Parties are, however, entitled to know what thoughts were in my mind and why I have come to my conclusions. Accordingly, these are the reasons of an ordinary man, set out to explain how I have considered the present application. It is not usual, and may not be strictly necessary, for the reasons for determining an application to be set out at length. My reasons on this occasion are in some detail, in view of the importance of the issues and in acknowledgement of the care with which both Advocates have prepared and submitted their material to me.

3. The power for an arbitrator to make an order requiring security for costs in arbitration is not new, although there was no such power at common law. In *re an Arbitration — Unione*

Stearinerie Lanza and Weiner [1917] 2 KB 558, Viscount Reading MR said that security was not necessary for the arbitrator to do his job and to make his decision. The learned Master of the Rolls put it in these words:

> "The dispute obviously can be determined whether security for costs be given or not. The object of the application for security for costs is not to enable the proceedings to continue in order that it may be determined by the reference whether there is a valid claim by the party in the position of a plaintiff, but to put an obstacle in the way of his proceeding until he has done an act which will provide security to the party in the position of the defendant that, should he obtain an order for costs, the amount will be paid. That has nothing to do with the arbitrator ascertaining the true position between the parties in order to determine the case."

4. In my respectful opinion the logic of that is beyond dispute. To it should be added the fact that, where two parties have agreed, as a part of their contract, that differences between them will be arbitrated, there must be at least a presumption that an arbitration between them is among the matters they had in contemplation as risks they would accept.

5. Nevertheless, the power has been granted to arbitrators from time to time by virtue of sets of institutional rules, of which the Institution of Civil Engineers Arbitration Procedure and the JCT Arbitration Rules are examples. Apart from such rules, before 1996, a party seeking security would have to go to the Court. The High Court had the same power to make orders in respect of security for costs in arbitration as it had in relation to an action in the High Court.

6. With the introduction of the Arbitration Act 1996, the role of the Court changed. The effect of Section 38 (2) and (3) is that, unless the parties agree otherwise, an arbitral tribunal may order a claimant to provide security for the costs of the arbitration. Moreover, as the relevant part of the Arbitration Act 1950 has been repealed, Section 1 (3) confines the intervention of the Court to the specific provisions of the Act, rather than allowing a broader jurisdiction. The relevant words of Section 38 read:

> " (2) Unless otherwise agreed by the parties, the tribunal has the following powers.
>
> (3) The tribunal may order a claimant to provide security for the costs of the arbitration.

This power shall not be exercised on the ground that the claimant is-

(a) an individual ordinarily resident outside the United Kingdom, or
(b) a corporation or association incorporated or formed under the law of a country outside the United Kingdom, or whose central management and control is exercised outside the United Kingdom."

The qualifying note, relating to persons resident overseas, does not apply in the present reference.

7. In the present application, Mansell seek an order in the form of a reasoned award and, in response to my somewhat pedantic question, neither Mr Coulson nor Mr O'Driscoll has suggested to me that I should distinguish between an award and any other form of order, or that I should adopt any other form.

8. An arbitrator must act fairly, particularly when exercising his or her discretion. That is sometimes described as acting judicially, but that is misleading in my view. A Judge acts within the framework of practice in the Court. The Arbitration Act 1996 does not provide that the arbitrator apply the criteria which the Court would apply. I am content that, had Parliament intended it to do so, an appropriate form of words would have been adopted. That would have been a simple matter for the draftsman. The Act provides no criteria for a decision that security for costs be given, other than the general requirements of fairness and economy set out in its earlier sections. In that context, the expression "acting judicially" must mean acting fairly and using judgement in accordance with the principles of Natural Justice (and within the statutory framework of the Act), rather than ascertaining and following the practice of the Court. The learned and experienced authors of *The Arbitration Act 1996 - A Commentary* (Harris, Planterose and Tecks, Blackwell Science, 1996) suggest:

"In particular, any reference to the rules and existing case-law relating to security for costs in the Court context has been avoided. Whereas early drafts of the Act made the tribunal's power co-extensive with that of the Court, stating, 'The tribunal shall exercise its power on the same principles as the Court', the deliberate omission of any such statement makes it clear that the power given to arbitrators is not intended to be so restricted.

> The inference would seem to be that arbitrators may exercise their discretion very flexibly, and in a manner which may very well diverge from that which the Court would adopt, so long as what they do is in keeping with their s.33 duty, in particular to act fairly and impartially."

If that is a correct view, then it confers a particularly heavy burden of responsibility upon the arbitrator, who has, as I will seek to show, the inherently intractable task of balancing opposing principles which cannot logically be reconciled, perhaps without the comfort of knowing with any certainty that the Court is available to consider the matter anew. Nevertheless, if read with caution, the practice of the Court and the wisdom of the judiciary may assist an arbitrator seeking guidance.

9. Some readers of this Interim Award may know that, before this reference, and in the context of academic debate, I have suggested that it could be argued that, where arbitration arises under a prior agreement, and there is an element of doubt about any procedural matter, then the benefit of the doubt should be resolved in favour of hearing and determining the reference. I have not found it necessary, in dealing with this application, to consider whether or not that proposition is sound or, if sound, applicable. Had I thought it appropriate to consider it, I would have invited the Advocates' views. It has not entered into my thinking and I have added this paragraph, while drafting this Interim Award, solely to dispel doubt.

10. There are two principal bases for the ordering of security for costs in the Court. One derives from the inherent jurisdiction of the Court. The other, which applies only to limited companies governed by the Companies Acts, is statutory. Section 447 of the Companies Act 1948 provides:

> "Where a limited company is plaintiff in any action or other legal proceeding, any judge having jurisdiction in the action 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"

In arbitration, however, the power to require security for a respondent's cost of his defence is that of Section 38 of the Arbitration Act 1996, set out above. Notably the power appears

not to be confined to limited companies but to be more widely drawn.

11. Of some historical importance in the practice of the Court is the judgement in *Sir Lindsay Parkinson & Co Ltd -v- Triplan Ltd* [1973] 2 All ER. 273, CA. I would like to review the criteria suggested by the Court of Appeal in that case, to explain how I have exercised my discretion in the present application. There are some aspects of the judgement which seem to me, as a layman, to give difficulty in the context of arbitration and I have sought to identify the difficulties and, I hope, to deal fairly with them.

12. In *Triplan*, as set out in the *Supreme Court Practice* (Jacob et al, Sweet and Maxwell[1]) the principles enunciated by Lord Denning M.R. provide that among the circumstances which the Court might take into account are the following:

(1) whether the plaintiff's claim is bona fide and not a sham;

(2) whether the plaintiff has a reasonably good prospect of success;

(3) whether there is an admission by the defendants on the pleadings or elsewhere that money is due;

(4) whether there is a substantial payment into Court or an "open offer" of a substantial amount;

(5) whether the application for security was being used oppressively, e.g. so as to stifle a genuine claim;

(6) whether the plaintiff's want of means has been brought about by any conduct of the defendants, such as delay in payment or in doing their part of the work;

(7) whether the application for security is made at a late stage in the proceedings.

13. An order requiring security for costs is capable of having a draconian effect. It may have the result of excluding a plaintiff from justice altogether. An arbitrator needs to be reasonably satisfied that such an order is necessary and fair before making a decision in favour of the applicant. Conversely, an arbitrator also needs to be reasonably satisfied that a claimant is not using his own lack of funds as a shield from behind which he may launch a speculative claim against a respondent who may defend himself successfully only to find himself without recourse. The authorities are clear that a careful and just balance requires to be made. Nonetheless, an application for security for costs is not a trial or hearing of the substantive issues. As in any other decision making process, logic requires the applicant to demonstrate that to make the order sought is both

necessary and fair in all the circumstances.

14. In the present matter, the application for security for costs falls to be determined upon affidavits submitted on behalf of the respective parties and on argument presented at a hearing for the purpose. It follows that the more detailed investigation of a hearing at which witnesses may be examined has not been available. Nor would such a process be appropriate, likely as it would be to become an unacceptably abbreviated simulation of the reference itself. Consequently, and quite properly, I have to make my decision on the material made available to me.

15. There are some matters, peculiar to this application, which I should record for the sake of completeness.

16. Mr O'Driscoll objected to the use of a tape recorder at the hearing. He explained that Surefire felt there to be an atmosphere of distrust between the parties and that they were not content that Mansell might not use the record for some purpose other than that of the arbitral proceedings.

17. Mr Coulson told me that the record would be kept by Messrs. Masons, that a copy would be provided for Mr O'Driscoll and a copy for me, and that it was agreed that the record was to be confidential and privileged, not to be used for any purpose other than the purposes of this reference. Mr O'Driscoll was content to withdraw his objection on that basis and I now record that both parties have so agreed in my presence and are so bound, as am I. I directed that recording continue.

18. An affidavit made by Mr Steven Waite, of Mansell, in support of Mansell's application, was provided with, among other annexures, a report by Steven Frankham Associates alleging certain defects. I ruled that report inadmissible for the purposes of the application. After hearing the application and during a later part of the meeting, there was some informal discussion of that report and some comments were made by Mr Simmonds of Surefire. I have put those out of my mind. My reasons for disregarding both the report and the remarks made are these: first no application was made for leave to adduce expert evidence with the application and I would not have given such leave if asked to do so. That is because I have to determine the application without

investigating the merits of the parties' respective cases; that is a matter for the substantive hearing. That I have to decide on the basis of affidavit, without further evidence, also means that, even were the report admitted, I would not be able to weigh it, or the remarks of Mr Simmonds, with any certainty, without seeing and hearing the author of the report. That is simply not a matter for an application of this kind.

19. I should perhaps say that, even had I admitted the report by Steven Frankham Associates, I would have had some difficulty in dealing with it at the present stage without allowing an expert report to be prepared and submitted for Surefire. Moreover, a substantial element of the opinion expressed in the report is, quite properly, based upon findings by C&M Fire Alarms, presumably a competitor company of Surefire, which findings would have to be in evidence in the usual way before being taken as the basis for Steven Frankham's opinion. All that must be for a future occasion and, indeed, properly might be the subject of discussion between experts.

20. I should also say that the same principle applies to aspects of the affidavits of Mr Neenan for Surefire and of Mr Waite for Mansell. For reasons which are entirely understandable, both gentlemen deal with aspects of the merits of their respective cases to a degree which is not required, as I understand it, for the determination of an application for security for costs. Although the efforts of all concerned are much appreciated and have necessarily been of assistance to me in my understanding of how to prepare for the substantive hearing, I have ignored what I have found to be the unnecessary parts of both affidavits in making this Interim Award. I need not identify those parts in detail, they are those which deal with the merits of the issues. Where I have taken account of what is provided in the affidavits, I will say so.

21. An applicant respondent needs first to satisfy the arbitrator that his discretion should be exercised at all. I leave to one side those Rules of Court, which deal with plaintiffs outside the jurisdiction and with plaintiffs whose address or other circumstance lead to doubt about their intentions. Such are not issues in the present reference. The question of residence outside the jurisdiction is dealt with in the Arbitration Act 1996; it is not a ground. The Respondent has raised no question about the location of the Claimant. Although, arguably, the arbitrator's power does not derive from the Companies Acts[2] but from the Arbitration Act 1996, I find the evidential criterion of the Companies Acts to be helpful. Credible evidence I take to be evidence which is, on its face,

inherently capable of belief. More than a mere assertion but evidence which may not have been tested.

22. In the present matter, I find the evidence of a voluntary arrangement to be credible testimony that there is reason to believe that the Claimant company, Surefire, would be unable to pay the costs of the Respondent, Mansell, if successful in his defence. Surefire's own words make it clear that its financial position is largely, if not entirely, dependent upon the outcome of this reference (or of this reference and the references in the related contracts). I have not considered, for this purpose, the argument that, if successful, the Respondent would be paid in part. I find it unnecessary to do so.

23. I therefore find that the Respondent has satisfied me that this is a matter in which the power to require security for costs properly may be invoked and in which I properly may exercise my discretion.

24. Although the principles in *Triplan*, mentioned above, may well not be binding on me, I do believe that I should consider them, bearing in mind that this is not a proceeding in the Court but a reference to arbitration, following a contractual agreement to arbitrate, and that therefore the risk of having to arbitrate is something that both parties must have had in contemplation when entering into their contract.

25. My attention was drawn to a number of other authorities, notably that of *Keary Developments Ltd -v- Tarmac Construction Ltd and another* [1995] 3 All ER 534, CA, in which the *Triplan* principles are reviewed in the context of a matter in which a leading shareholder of the plaintiff company already had been concerned in the mounting of two unsuccessful actions against main contractors, the unsuccessful company having then become bankrupt and unable to pay the successful main contractor's costs. Mr Coulson urged me to separate the statements of principle from the facts of that case, but I can only believe that their Lordships had the justice of the matter before them very much in mind when making the judgement and that I should view any comparison with the present matter in that light.

26. I approach the *Triplan* principles, and my general duty to act fairly between the parties, on the basis that this is an application by the Respondent who must satisfy me that it would be right to make an order requiring security for the Respondent's costs. The logical rule is that it is for the party making an assertion to prove it.

27. Mr Coulson suggested to me that, once the first hurdle had been cleared, that of establishing the likelihood that a Claimant would be unable to meet the Respondent's costs, the burden of proof passed to the Claimant, to show cause why security should not be ordered.

28. I do not accept that the matter is as simple as he suggests, for three reasons. One is that, in arbitration, an order requiring security for costs is capable of having draconian effect and, indeed, depriving a party of any access to justice whatsoever, through the workings of Sections 41(6) of the Arbitration Act 1996. Were a peremptory order to be made and not obeyed, I would have power to dismiss the Claim finally. The Claimant would not then be able to raise his Claim anew. I hold that, when a draconian remedy is sought, then it is for the person seeking that remedy to show very clearly why it should be given.

29. A second reason is provided by Lawton LJ in *Triplan*, where he says, of the discretion under Section 447 of the Companies Act 1985,

> ". . .and that discretion ought not to be hampered by any special rules or regulations, nor ought it to be put into a straightjacket of burden of proof. It is a discretion which the Court will exercise having regard to all the circumstances of the case."

Mr O'Driscoll reminded me of that by referring to *Roburn Construction Ltd -v- William Irwin (South) and Co. Ltd.* (1991) CILL 700 CA. I should only add that, if such freedom of action is appropriate in the Court, it is appropriate *a fortiori* in the context of modern arbitration in the spirit of the Arbitration Act 1996.

30. The third reason is to be found in *Aquila Design (GRP Products) Ltd -v- Cornhill Insurance plc.* [1988] BCLC 134 CA. There, in the Court of Appeal, Fox LJ used these words of the facts of the case before the Court:

> "The essential matters are in dispute and they are matters for the trial. However, it seems to me that the Court has no reason to conclude that it [the action] is being brought without reasonable prospects of success."

Those words are simply not consonant with the proposition that it is for the Claimant (or Plaintiff) to prove that he has a reasonable prospect of success. They are consonant with the alternative proposition that, for an application to succeed, it is for the Applicant to give the Court reason to conclude that the action will has no such prospect. If that is right then the mere fact that a Respondent has a good counter to the Claimant's Claims, itself perhaps having a reasonable prospect of success, is insufficient, without more, to ensure the success of an application.

31. The Respondent has not suggested that the Claimant's claim is a sham, which I take to include examples where someone other than the nominal Claimant is actually running or funding the reference. Indeed, Mr Coulson was good enough to tell me that he accepted the good faith of Surefire's Claim. He also assured me of the good faith of Mansell's Counterclaim, without demur on the part of Mr O'Driscoll. I need not consider that point further.

32. The second criterion, that of whether the plaintiff has a reasonably good prospect of success, looked at in the light of the logical rule I have mentioned, requires the Respondent to demonstrate that the Claimant has no reasonably good prospect of success.

33. Now, the Respondent's own counterclaim is a significant element in the present reference. Mr Coulson says, and I simplify the point, that the Counterclaim is sufficient to extinguish the Claim, that both are *bona fide*, and that it cannot therefore be said that the Claim has, on the face of it, a high chance of success. I do not think that is the correct way to approach the matter. To allow a counterclaim which is commensurate with a claim automatically to extinguish the claim when considering an application for security for costs is, would be, to my mind, tantamount to determining the substantive issues without hearing them.

34. Mr Coulson told me on a number of occasions that I had to find a high chance of success for Surefire if they were to defeat his application. He did not at first accept the phrase "a

reasonably good prospect of success" as describing the correct criterion and I regret to say that I did not have my copy of RSC available for his assistance. With every deference to learned counsel, I am not satisfied that Mr Coulson is right about the proper criterion. I see a clear difference between a reasonably good prospect and a high chance.

35. Mr Coulson also argued that there were deficiencies in Surefire's pleadings. That has been conceded. Necessarily, when applications for security for costs are made, at an early stage, the pleadings may not be fully developed. In my view, that would be one reason for the use of the word "prospect" in Triplan as reported. Mr Coulson argues that I have to consider the prospects for the pleadings as they are. Mr O'Driscoll effectively suggests that the prospects for Surefire's case must include the prospect of amendments, already presaged, to deal with some aspect of causation and quantum. I prefer Mr O'Driscoll's argument as more in line with the practicality of the matter.

36. On the material I have seen to date, I find, in very general terms, and without seeking to determine any of the issues in the Reference, that the Claimant has a reasonably good prospect of success. That does not mean that I believe it will succeed or that I do not believe it capable of being extinguished by a proper Counterclaim. Those remain matters to be determined.

37. It is, to my mind, important not to overstate the implications of the words "a reasonably good prospect of success". Perhaps it would be helpful if I commented that a man throwing a single die may have a reasonably good prospect of throwing a six, just as any one of a well-matched field of horses may have a a reasonably good prospect of success in a race. Of course, he has a better prospect of not throwing a six, but that is not the criterion to be considered. To put it differently, it is perfectly possible for both a Claimant and a Respondent to have cases with a reasonably good prospect of success. Only the hearing or the trial will show which is the better.

38. As to whether there is an admission by the Respondent on the pleadings or elsewhere that money is due, the logical rule here places the burden on the Claimant, save only that I look to the face of the pleading to see if there is an admission in terms. I do not find one, but I note that it is a part of the Respondent's case that certain Claims are insufficiently substantiated. The Respondent's case is very largely in the Counterclaim.

39. It is a matter for the Claimant, in his response to the application, to say if there has been the equivalent of a substantial payment into Court or an "open offer" of a substantial amount. It is sometimes said that knowledge of an offer will prejudice an arbitrator. I do not accept that, nor do the learned members of the Department of Trade's Advisory Committee on Arbitration Law. They say, in their *Report on the Arbitration Bill* (February 1996) at paragraph 196

> "We are not disturbed by this. It seems to us that a tribunal, properly performing its duty under Clause 33, could and should not be influenced by such matters, if the case proceeds to a hearing on its merits, nor do we accept that the disclosure of such information or intention [concerning an actual or prospective offer of settlement] could somehow disqualify the tribunal from acting."

I would go further and say that I cannot see an offer to settle as logically probative of anything other than a sense that continued contention is unproductive. In any event, the Respondent has not advised me that any offer has been made.

40. I should note here what appears a misunderstanding which came to light at the hearing. In April 1997, both parties say, an agreement was made that Mansell would make some payments "*ex gratia*" to a total of about £170,000. I understand that, according to Mansell, that was not additional money but money to be paid "on account" to assist with cash flow. As it was at a time when Surefire had already been paid a substantial amount, I am not clear without more (and do not need to be clear for the present application) whether it was on account of additional payments, such as payments for variations, or merely part of what was already agreed. It appears not to have been added to Surefire's reckoning for Victoria and Surefire appear to be of the view that, at least in part, it has not been paid. There appears to have been some understanding by Mansell that there were difficulties, and Mr O'Driscoll has urged me to treat this payment on account as an admission of monies due. I have looked no further into this, because I find it practicable to determine the present application on other grounds.

41. As to whether the application for security is being used oppressively, e.g. so as to stifle a genuine claim, I am not sufficiently persuaded that the Respondent wishes to do anything other than merely protect his rights. If the words "being used oppressively" are to be interpreted as implying an oppressive intention on the part of the Respondent, then I have no clear and first hand evidence

of such an intention of the Respondent. Nevertheless, I am conscious that an Order requiring security is capable of having an oppressive effect, regardless of an applicant's intention. Mr Neenan says he has spoken to the supervisor of the Voluntary Arrangement and that, as a result of his enquiries he has concluded that Surefire's creditors will not provide security. In *Keary*, the assertion was that an order for security may prevent the Plaintiff from pursuing the claim. Importance was attached to the use of the word "may". Mr Neenan is more certain, he uses the word "will" (although he may not be right - I have to go on the affidavits as they are). That is not an attractive basis on which to determine a matter of moment. In the judgement in *Keary* Peter Gibson LJ said:

> "However, the Court should consider not only whether the plaintiff company can provide security out of its own resources to continue the litigation but also whether it can raise the amount needed from its directors, shareholders or other backers or interested persons."

But there are other considerations in *Keary*. There had been a change of circumstances. There had been the previous cases which failed. An opportunity to provide further evidence had been offered but not taken. The conduct of those associated with the Plaintiff, as described in the judgement, was such as to encourage any reasonable observer to say, as did in effect their Lordships, "You had better look around for some other support".

42. Returning to the present matter, at least Mr Neenan says that he has made his enquiries. It seems to me apparent on the evidence that, if the Supervisor of the Voluntary Agreement, representing the interest of the creditors (who appear to include the directors, or companies associated with the directors, concerned in the present matter), will not provide security, then it is unlikely that anyone else will be found to do so. And so I must find.

43. As it happens, I have not found it necessary to consider this ground as of primary importance in making my decision, although it is one of a number of factors to be considered. Had I done so, I might have had to consider whether the Claimant's accounts revealed a probability that their claim, with its implications for the rights of their creditors (who are not my concern[3]), would not be heard if security were to be required. Moreover, I might also have had to consider further the allegations made by Surefire as to remarks made by Mansell's personnel on certain occasions, the words alleged seeming capable, if actually spoken, of being consonant with an oppressive intent. I

ought also say, in passing, that the words alleged, if spoken and if true, would be capable of having a bearing on a further ground for consideration, that of the cause of the Claimant's want of means, to which I now turn.

44. I have had to look closely at whether the Claimant's want of means has been brought about by any conduct of the Respondent, such as delay in payment or in doing their part of the work. It seems to me, and I hold that, if I am not to determine the substantive issues in the reference in the course of considering this application, which would require a full hearing and defeat the purpose of the application, I must apply the rule of *prima facie* credible evidence to this test.

45. The evidence brought by the Respondent in support of this application includes the details of the *Proposal for a Company Voluntary Arrangement* made for the Claimant (Exhibit TDP1 with the affidavit of Mr Plummer). It is not going too far to say that it is the foundation, or perhaps the keystone of the Respondent's application. That document, proffered in the application by Mansell themselves, speaks, on page 11 of the exhibit, of the contracts with the Respondent main contractor, and says

> "All four projects have increased substantially in value and extra works have had to be negotiated with the main contractor who has been slow to agree the additional costs. As a result, in recent months, the cash flow resources of the Company have been under strain with substantial concerns as to the present liquidity if all creditors were to be paid as and when due."

That is the Respondent's own evidence, questioned later by Mr Waite.

46. I find that the accounting details, also proffered by the Respondent, appear on their face to show it likely that the Claimant does indeed rely heavily on payment by the Respondent. I note that Mansell have submitted further material with the Affidavit of Mr Waite, but two factors affect my consideration of that. First, there is conflict between the evidence offered with the Affidavit of Mr Plummer (the Arrangement) and that offered with the Affidavit of Mr Waite. Furthermore, it is the former which formed the basis of the Respondent's Application and I am not entirely satisfied that Mr Waite's Affidavit is no more than an Affidavit in Reply and that it does not introduce new matters not canvassed by Mansell or Surefire. For the purposes of this application, however, I

ought not attempt to determine an evidential conflict when to do so would pre-empt a substantive issue in the Reference and which may well become clear in the light of evidence at the main Hearing.

47. I am also conscious that the words "doing their part of the work", could be held to include making site working locations available and the administration of the Contract. The Claimant so alleges in his submissions to date. Indeed, the question of responsibility for delay is central to what seems likely to be an important part of the reference. That leaves at least an open question, to be determined in the reference, as to whether the Claimant has been affected by a failure, on the part of the Respondent, to do their part of the work. I may not determine that issue until it has been fully heard.

48. There may be a question as to whether the Claimant's want of means has been brought about solely by the Respondent's conduct. The *Triplan* guideline does not use words such as "solely" or "exclusively". I hold, therefore that all that I need to consider is whether it is likely that the conduct of the Respondent was a substantial cause, even if not the sole cause, of the Claimant's impecuniosity.

49. Relying on Mr Waite's affidavit, Mr Coulson pointed out that, in September 1996, only £134,000 of the amounts claimed by Surefire had not been paid. He referred to the balance sheet of 30 September 1996 and to an indebtedness of £874,941, (although the company's indebtedness was in fact shown as £847,387) and suggested that the outstanding amounts were trivial by comparison. I was left at the hearing with the view that deponents and counsel may not have been quite right and that some confusion between Surefire's creditors and debtors might not have arisen, but nothing turns on that.

50. Now, Surefire were not technically insolvent according to the accounts at that time. They had, according to the balance sheet, net assets in the sum of £42,901. That balance sheet included all Surefire's debtors at the time and therefore took credit for the £134,000 unpaid by Mansell. If one subtracts the amount unpaid by Mansell (as if it were written off as would be a bad debt), Surefire's surplus becomes a deficit of £91,099

51. On the basis of the September 1996 account alone, therefore, non-payment by Mansell of the amounts claimed at that time by Surefire would, of itself, have sufficed to render Surefire insolvent. Moreover, the amount of £134,000, far from being a drop in the ocean, is significant by comparison with either surplus or deficit.

52. The "on account" payments were to have commenced in April 1997 and were not therefore a consideration in September 1996. Moreover, according to the material I have considered (the pleadings in their present form and the affidavits), Surefire allege that there has been considerable additional expenditure and, of course, Mansell do not say that no money would be due on the Claim alone, but rely upon the set-off and counterclaim to extinguish whatever otherwise properly may due.

53. Whether I look, as Mr Coulson urges me, to the accounts of September 1996 and the sum of £134.00 or to the Claim as it appears now, and the evidence of the voluntary arrangement, provided in the first instance as a part of Mansell's own evidence, it remains the case that I find it probable, for the purposes of this application, that Mansell's conduct is a cause of Surefire's lack of means. Mansell's case, as I understand it, appears to be not that such is not the case, rather that it is deservedly the case. That is another matter, to be determined at the right time.

54. Mr Coulson argued that I was concerned, not with whether Surefire's want of means had been caused by Mansell's conduct generally, but only with whether or not it had been brought about by Mansell's conduct in respect of Victoria, the subject of the present reference. I do not accept that. There is nothing in the authorities to support it and it flies in the face of justice and common sense.

55. Even were that not so, Mansell and Surefire have several Contracts together and have honoured me by agreeing that I be arbitrator in all matters between them. At present no formal thought has been given to consolidation or combination of the references, some of which are not yet on foot. That is in part because all of us, Surefire, Mansell and myself, have in mind that the determination of issues in respect of Victoria may simplify or even resolve the differences in respect

of other contracts. I have no doubt that , were these disputes to be in the Court, they would be taken more or less together and that any decision there in respect of security for costs would depend upon the whole picture.

56. I should also note that Lord Denning's guideline speaks of "any conduct of the defendants" and, *semble*, is not restricted to allegedly wrongful conduct. In forming a view as to whether it is more probable than not, in the light of the material given to me in the context of the application, that the Claimant's want of means has been brought about (whether in whole or in part) by the conduct of the Respondent, I form no view as to whether or not that conduct was wrongful conduct. That is a matter for the substantive hearing. I recognise that a Court might well not take such an approach, but I would hold it wrong for an arbitrator to form any view as to the culpability of either of the parties before him without hearing fully the relevant evidence and argument in the substantive hearing. For the reasons I have given, and on the balance of the argument and evidence, I find, for the purposes of this application, that Surefire's want of means has been brought about (whether in whole or in part) by the conduct of the Respondent.

57. For the avoidance of doubt, I repeat that I have not considered, for the present purpose, the allegations, made by Surefire, and denied by Mansell, that Mansell personnel have admitted, perhaps even claimed, to Surefire's personnel and to others, that Surefire's want of means was Mansell's responsibility. It has not been necessary for me to do so.

58. Mr Coulson raised one other matter. He pointed out that Surefire's Claims appeared to have risen very sharply over a short period of time. Mr O'Driscoll observed that Mansell's Counterclaim seemed to have done much the same. Sauce for the goose is sauce for the gander. I find both to be right, but of no assistance to me. I am aware that forensic investigation, once experienced lawyers and their experts become involved, will often turn up aspects of Claims which simply have not occurred to the ordinary businessmen going about their business.

59. The final *Triplan* test is that of whether the application for security is made at a late stage in the proceedings. That is not a point which arises in the present reference, although I note that Mansell have committed themselves to the cost of some expert testimony.

60. In considering the authorities I have been given and in listening to the arguments of the two Advocates in the present matter, one common thread is clearly ascertainable. The exercise of discretion in dealing with an application of this kind is not a matter of applying simple rules, one at a time, to achieve a formulaic answer. It is a matter of forming, without prejudicing the determination of the substantive issues, a preliminary view about the a combination of matters, some interrelated and some not, and of conducting a balance which is essentially a balance of possible injustices: one that a claimant without means may put a respondent at risk, to use the vernacular, of " a hiding to nothing"; the other that a respondent in a relatively dominant position may shut out a claimant from his due. In the present reference, it is a fine balance, but having regard to the whole of the considerations I have discussed in these reasons, I have concluded that, on the facts of this matter as known to me at present, the interest of fairness will best be served if I do not grant the application.

61. The Respondent's application has alerted me, however, and will, I hope, alert all concerned, to the dangers of allowing a reference of this kind to become the subject of unnecessarily detailed work. For example, the estimates for experts do not seem to me to take account of what presently appear to me to be the circumstances: first that the parties know very well which of the differences between them is crucial and which not and secondly that the parties are themselves practitioners in the business of managing contracts. To a large extent, the principles of planning, in the sense of planning sequential programmes, are a matter of plain logic and thus open to explanation by the parties themselves in written material.

62. I am not at all sure that I see the value in appointing an expert tribunal and then providing additional experts, when the likelihood is that much of what is offered as evidence of opinion is equally capable of being described as inference or even argument. I say that as one who has been called upon to assist a Court with technical issues almost precisely as those in the present matter.

63. I may need to hear what the Advocates may have to say if I have to consider the position of a trainee when his or her role is merely to attend his superior or to carry out ministerial tasks. The seemingly high margins of some professionals often are properly applicable because

they take account of support staff to a greater or lesser extent.

64. Mansell's concern as to the costs of the arbitration, no doubt a reason, and a proper one, for their application, reflects a concern expressed at an earlier stage by those representing Surefire, who suggested a limit for the recoverable costs of the arbitration. I share that concern. The Parties have been asked to consider the operation of Section 65 of the Arbitration Act 1996 and I have not been advised on any agreement between them that it should not apply. It seems to me that I should encourage the Parties to look into the possibility of limiting the number of detailed issues which require determination and to let me have their reasoned assessment of what amount I should take into account were I minded to direct that the recoverable costs of the arbitration be limited to a specified amount. For the avoidance of doubt, I record that, in making my decision on this application, I have not taken into consideration the possibility of a limit on recoverable costs.

65. I have been made aware of an intention by Surefire to seek an Interim Award of a sum of money. I asked the Advocates whether that ought have any bearing on the present application. Both agreed that it should not and I have put it out of my mind when considering this application.

66. Neither Party has canvassed any point as to the costs of the application. Both Parties are competently represented. I am satisfied that each will have been aware that it was unlikely that an extempore decision would be given and each had a full opportunity to raise the matter on the day, although I did not prompt them to do so. In the ordinary way costs would follow the event, subject to the exercise of discretion upon grounds which are fairly well known. Section 61(2) of the Arbitration Act 1996 appears to codify the existing law, but may, in practice, emphasise the rather more formulaic approach now favoured by the Court. Nonetheless, I think it right, in all the circumstances, to allow one last opportunity for the parties to make brief submissions as to how I should dispose of the costs of the application.

AND I NOW AWARD AND DIRECT THAT:

1. The Respondent's application be and is dismissed, save as to the costs of the application and

2. The Parties have leave to make brief written submissions (no more than 1000 words) as to the disposal of the costs of the application within seven days of this, my Interim Award, following which date a determination will be made.

Given under my hand in Wallington, Surrey, this Seventh day of January, 1998,

G. M. Beresford Hartwell

Geoffrey Michael Beresford Hartwell
a Chartered Engineer
as Arbitrator

Cromwell House
78 Manor Road
Wallington
Surrey

In the presence of:

A. Witness

Secretary
XX Old Street
Town
County

[1] My library version is the Centenary Edition of 1982 but it is my understanding that these principles remain unchanged in current texts. Mr Coulson expressed doubt about the precise words I used at the hearing and I have revisited the text.

[2] There are two reasons for this view: the first, somewhat academic, is the proposition that arbitration is not a legal proceeding in the sense of a proceeding at law. The power of the Court to order security in arbitration previously was derived from the Arbitration Act 1950 Section 12 (6)(a).

The second reason is that the Companies legislation confers the power on the *judge having jurisdiction in the action* and not on an arbitrator.

[3] I should explain what may appear a dismissive and even a cavalier remark. On the face of it, an Arbitrator is the creation of the Parties, appointed to deal with the issues between them and for no other purpose. By contrast, a Judge has a duty to have regard to the public interest and perhaps therefore to other creditors.

Section 1(b) of the Arbitration Act 1996 provides that "the parties shall be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest". Seemingly, the question of those safeguards is a matter for the Court, rather than for the Arbitrator, as there is no scope for the Arbitrator to hear other interests.