JUDGMENT : The Honourable Mr Justice Pumfrey: Chancery Division. 24th June 2004.

1. This is an application for security for costs in an action arising in somewhat unusual circumstances.

2. The Claimants, Tripp Limited, are the wholly owned subsidiary of Tripp Holdings Limited, itself the subsidiary of a company incorporated in the British Virgin Islands called Sandrini Investments Limited. The claim arises in these circumstances. The Defendants, whom I shall deal with for these purposes globally, are concerned in the supply to the Claimants of luggage bearing the mark "Tripp" or the mark "Equator". They have sought to apply to register those marks -- "Tripp" in New Zealand and "Equator" in the United States of America and Spain. They have also sought to apply to register the "Tripp" mark in Australia.

3. The Claimants, understandably, are not happy about one of its suppliers registering its marks in these jurisdictions, but the Defendants say they are entirely free to do so because the Claimant has never traded in those jurisdictions and owes no relevant goodwill. Thus, they say the marks are anybody's to use in those jurisdictions, and they are going to use them.

4. The Claimant puts its case in a manner which does not appear with complete clarity from the Particulars of Claim, as a passing off claim, but also on the basis of a term to be implied in the previous contractual relationships between the Claimant and the Defendants -- the implication being that a supplier of goods to the Claimant will not go off and apply for trademarks consisting of the customer's name, or the customer's other marks, in jurisdictions where the customer does not presently have trading activity.

5. The Claimant applied for interlocutory relief amounting to a mandatory injunction to return the marks -- that is to say, to transfer the applications presently standing in the Defendants' name into the name of the Claimants. That has been disposed of.

6. There is now outstanding an application on behalf of the Defendants for security for costs. The position of the Claimants is as follows. It is, as I have indicated, the wholly owned subsidiary of Tripp Holdings Limited, which is not a party to the proceedings. Its balance sheet, as at the 24th January 2004, reveals a company which is gravely indebted. I think it is accurate to say that, on a balance sheet basis, the Company is insolvent.

7. As is so often the case in the trading activities of groups of this description, the greater part of the Company's indebtedness is indebtedness to the holding company through which the finance for the continuing trading has been provided. The Group balance sheet reveals that the holding company is again, on a balance sheet basis, insolvent, but the indebtedness to the banks, which creates this impression on the balance sheet, is clearly a loan which does not become payable for some years.

8. There is also current financing which is being repaid. There is no apparent default on the current loans as they are falling due. Thus, it would appear that, on the other major test for solvency and ability to pay its debts as and when they fall due, the holding company and the trading company are solvent. The fact remains, however, that the trading company is not cash-rich. In order to provide itself with working capital it has a facility with the bank of £3 million. That facility has only been drawn upon in the current year to the extent of £800,000, or thereabouts, leaving what is described by Mr. Creedon, who gives the relevant evidence on behalf of the Defendant/company, as "headroom". He says this of the facilities presently enjoyed by the Group: *"The loans were restructured into medium and long-term tranches. The long-term tranche for £6 million is in fact an issue of ten year loan notes on which repayments are not starting to be due until four years from now. The medium-term loan of £3 million was structured over a five-year period, with repayments taking place in the last three. We are now nearly half way through this repayment period, quarterly repayments in equal amounts, and by the end of this month will have repaid £1.5 million, whilst always keeping more than adequate headroom in our facilities. We have three year rolling cashflows in place and anticipate no difficulties. Indeed, we expect to repay the balance of the loan from cash generated from operations, rather than to have to use up any of the overdraft facilities."*

9. He observes that the Company has been consistently profitable.

10. The Company is perhaps rather more profitable than the figures would immediately suggest, since one of the largest items in the profit and loss account is an unexplained administrative expenses

charge of £3 million, which very substantially affects the net profit figure. This is a payment out from the Group, these are clear, since the same entry appears in relation to the Group. It may be, and I say no more than that, that this is a charge made by others who charge effectively directly against the profits earned by the trading company.

11. The question for me, since this is an application under section 726(1) of the Companies Act 1985, is whether it appears, by credible testimony, that there is reason to believe that the Company will be unable to pay the Defendants' costs if successful in his defence.

12. As is well-known, if I am satisfied that that is the position then I have a general discretion as to the amount of security to be ordered. The general principle, as is equally well-known, is that I must in those circumstances make an order for security which is neither illusory nor oppressive.

13. Mr. Engelman, who appears on behalf of the Company, points out that the word is "will" not "might". He observes that it is difficult to say that a company which is trading is profitable, has been profitable for the last three years and is trading with a view to paying off long-term indebtedness and will not be able to pay a sum in relation to costs should it be unsuccessful in the action.

14. If a company finances working capital requirements by borrowing, as this Company does -- since it is plain that there is no cash in the accounts, indeed there is no figure in the balance sheets for cash-in-hand or at the bank -- then the question of whether it will be unable to pay an award of costs if the Defendants should be successful becomes a somewhat difficult one; the reason being, of course, as Mr. Hinchcliffe (on behalf of the Defendants) has pointed out, that the Court has no power to compel the Company to draw down against its facility for the purpose of paying this debt. The inevitable result would, of course, be the insolvency of the Company, since the successful Defendant could petition upon the judgment for costs.

15. At the same time it is simply unrealistic, in relation to a company which is trading profitably, to say that this is a company which will not in fact pay its debts for precisely that reason; that a failure to do so will necessarily result in an insolvency and its winding-up.

16. It seems to me that the correct analysis in the present case is as follows.

17. The Company, being a profitable trading company, has from time to time sufficient cash-in-hand to enable it to trade. Its debtors' figure is low, suggesting that it is efficient in collecting its debts, and that, accordingly, it is trading in a satisfactory manner at the same time.

18. It follows, therefore, that it may or may not be able to pay any bill of costs, depending on its precise cashflow position, at the moment the bill is tendered -- necessary so since a bill of costs will not reflect any profitable trade.

19. It is always said -- and on the authorities this is unavoidable -- that the question of whether a company can meet its debts in the form of a bill of costs has to be answered at the time of the application, although evidence as to what may happen in the future is admissible.

20. It seems to me that the Company can pay its debts at the moment. It has a facility which is undrawn down, comfortably in excess of potential liability for costs, and it has a continuing substantial trading activity.

21. Of course it is correct that a company can, by voluntary act, decline to drawn down against the facility and, accordingly, decline to pay, but that is always the case. It can equally well refuse to pay if it is sitting on a cash mountain. In either case the money is available, but the company refuses to pay it.

22. In those circumstances, I am not satisfied that the requirements of the statute are met. I will not exercise my discretion to order security for costs.

MR. PUMFREY J : *I take it, Mr. Engelman, you want the application dismissed with costs.*

MR. ENGELMAN: *Yes, please.*

MR. HINCHCLIFFE: *I think the only issue on costs -- you have seen my skeleton argument --(inaudible)-- the costs of the adjournment. Unfortunately my learned friend and I have different recollections of what occurred. I have my notes.*

MR. PUMFREY J : *I have no recollection at all. Do I make you both give evidence? Who asked for the adjournment.*

MR. HINCHCLIFFE: *Mr. Engelman asked for the adjournment.*

MR. PUMFREY J : *To put in evidence.*

MR. HINCHCLIFFE: *To put in evidence.*

MR. PUMFREY J : *After a fortnight.*

MR. HINCHCLIFFE: *After a fortnight, seemingly to get the evidence of Mr. Creedon, which is two pages.*

MR. PUMFREY J : *I suppose the costs are of renewing the application.*

MR. HINCHCLIFFE: *Yes. We have costs schedule from last time and a costs schedule from this time. The difference is about £1,700.*

MR. ENGELMAN: *We are prepared to accept the costs.*

MR. PUMFREY J : *What I was going to do is give you an order for costs save insofar as increased by the adjournment. In other words, there is an order for costs, save insofar as increased by the adjournment. Because you will not have a bill of costs drawn up to satisfy that requirement, I will give you one week to do it in writing, if you cannot agree it. I would hope that this could now be agreed on the basis of a summary assessment. They are entitled to be assessed.*

MR. HINCHCLIFFE: *Obviously we will see a bill of costs and we will have a look at that and take a view in the light of the size of it.*

MR. ENGELMAN: *I would hope that we do not have to return to your Lordship on a summary assessment.*

MR. PUMFREY J : *If anybody comes back again on this there will be punitive orders for costs if anybody seems to be unreasonable -- either side.*

I do not want to do this, because we have a mediation coming up. So far as this is concerned, Mr. Engelman, what you can do is this. I will give you two days to get out a summary assessment sheet and get it across to the solicitors on the other side. You have two days to decide whether you agree it or not, and make an offer against it. If it becomes impossible then it will come back for summary assessment. If I find that either party has been unreasonable in their attitude to the bill of costs then I shall make the party who turns up and has been unreasonable pay all the costs of that hearing on the footing of an indemnity. In other words, I am trying to encourage you to agree things.

If neither of you have been unreasonable then the costs will just be costs in the summary assessment. I hope that will not be necessary.

Do you have any other application?

MR. HINCHCLIFFE: *No. There was an application about a speedy trial, but seeing as my learned friend and I have agreed directions, I think that is a bit of a storm in a teacup now. It is water under the bridge.*

MR. PUMFREY J : *I thought I said clearly there was going to be a speedy trial.*

MR. HINCHCLIFFE: *You said there was going to be one. The question was whether my Lord actually already ordered one and whether, therefore, the trial should have been fixed in the interim –*

MR. PUMFREY J : *Did I not say you could go off and get a date?*

MR. HINCHCLIFFE: *No.*

MR. PUMFREY J : *When is the last date? You have agreed a timetable?*

MR. HINCHCLIFFE: *Yes.*

MR. PUMFREY J : *When is the last date on the timetable.*

MR. HINCHCLIFFE: *We have agreed that the trial should come on before the 31st October.*

MR. PUMFREY J : *Before?*

MR. HINCHCLIFFE: *Yes.*

MR. PUMFREY J : *If possible.*

MR. HINCHCLIFFE: *Yes, if possible.*

MR. PUMFREY J : *When you draw the order could you leave out the date -- first open date after the 1st October for this trial, on the footing that it is expedited.*

MR. HINCHCLIFFE: *Can I hand up the directions we have agreed, then we can just run through them so that we know.*

MR. PUMFREY J : *Let me have a look at it, please. (Handed). To say "to come on no later than the 31st October" is overdoing it, because I do not know what the lists look like.*

MR. HINCHCLIFFE: *The first available date after the 1st October.*

MR. PUMFREY J : *What I will do is say to come on as a speedy trial, not before the 1st October. When do the times actually run out?*

MR. HINCHCLIFFE: *What we have agreed is disclosure on 6th August; evidence, 3rd September, and then trial whenever. So if the trial comes on round about the beginning of October it will probably deal with it.*

MR. PUMFREY J : *4th September, did you say?*

MR. HINCHCLIFFE: *For evidence, yes.*

MR. PUMFREY J : *I could say not before the 14th September, could I not?*

MR. HINCHCLIFFE: *That would make it quite tight between evidence and trial.*

MR. PUMFREY J : *Not before the 21st September. How about that?*

MR. HINCHCLIFFE: *May I take instructions?*

MR. PUMFREY J : *Yes. I was told that there was some desire to trade in these jurisdictions, which was being stymied at the moment.*

MR. HINCHCLIFFE: *Yes. We really ought to get this on and resolve this as soon as possible.*

MR. PUMFREY J : *Right. Not before the 21st September. That is what I consider to be a speedy trial. If there is any problem fixing, you will have to make an application to fix, one or other of you, but I hope you will be able to fix in the usual way. You have permission to apply to fix straight away. Does this order dispense with allocation questionnaires and everything else?*

MR. ENGELMAN: *They have been filed.*

MR. PUMFREY J : *They have already been filed. I suppose I should say in a trial window beginning not earlier than the 21st September. As a speedy trial in a window commencing not earlier than the 21st September.*

MR. HINCHCLIFFE: *I should just say, in paragraph 9 which is before you, there is an erroneous reference to an "assigned Judge".*

MR. PUMFREY J : *That comes out. I did see a draft order with a mention of models in it.*

MR. HINCHCLIFFE: *That has gone.*

MR. PUMFREY J : *Anything else?*

MR. HINCHCLIFFE: *I believe that is it.*

Mr. T. Hinchcliffe (instructed by Messrs Bristows) for the Applicant/Defendants.
Mr. M. Engelman (instructed by Messrs Jensen & Son) for the Respondent/Claimants.