**JUDGMENT : Mr. Justice Jackson:** TCC. 10th August 2005.

1. This judgment is in seven parts, namely: part 1, introduction; part 2, the facts; part 3, the present proceedings; part 4, the law; part 5, extension of time; part 6, leave to appeal and part 7, conclusion.

**Part 1 - Introduction**

2. This is an application for leave to appeal against an arbitrator's award and also (if necessary) an application for extension of time in which to seek leave to appeal. The claimant in the arbitration and the defendant in these proceedings is Guardian ECL Limited. I should refer to this party as "Guardian". The respondent in the arbitration and the claimant in the present proceedings is Surefire Systems Limited. I shall refer to this party as "Surefire". The only other party to whom I should refer at this stage is Shirayama Shokusan Company Limited, to whom I shall refer as "Shirayama". Shirayama is now the owner of the County Hall in London.

3. These remarks are a sufficient introduction for present purposes. I must now turn to the facts.

**Part 2 – The Facts**

4. In 1996, Shirayama engaged Surefire as a trade contractor to design and install a fire and voice alarm system in the County Hall building in London. Surefire engaged Guardian as subcontractor to carry out the work of installing the cables. The subcontract incorporated the conditions of the trade contact made between Shirayama and Surefire. Guardian carried out the subcontract works between September 1996 and March 1997.

5. Surefire and Guardian were unable to agree the amount which was due to Guardian on its final account. After prolonged and desultory negotiations, Guardian commenced arbitration in accordance with the arbitration clause which was incorporated into the subcontract. In that arbitration, Guardian claimed: (a) £268,628 in respect of extra and varied work and (b) £372,243 in respect of loss and expense resulting from delay and disruption.

6. Mr Michael Milne who is both a quantity surveyor and a barrister, was appointed as arbitrator. The arbitrator dealt with the issues between the parties (other than costs) in three awards. The principal award, in which most matters were resolved, was the third award dated 19th April 2005. The hearing leading up to that award lasted for eight days. The following witnesses were called on behalf of Guardian: Mr Michael Jackson, a self employed electrician who had carried out some of the work; Mr John Crawley, chairman of Guardian's holding company; Mr Edward Felstead, the quantity surveyor who was acting for Guardian during the course of the works and Mr Peter Riley, a self employed surveying consultant who dealt with the loss and expense claim. The witnesses for Surefire were Mr David Simmonds, the managing director of Surefire, who was not directly involved in the work; Mr Alan Neenan, Surefire's sales director and Mr John Lindsay, Surefire's supervisor at the material time. Mr Lindsay was the person who scrutinised and signed certain day work sheets. After the conclusion of the hearing, each party delivered lengthy written submissions to the arbitrator.

7. In his third award, the arbitrator found as follows: (1) Guardian was entitled to additional payment of £70,589 in respect of variations; (2) Guardian was entitled to interest on this sum of £32,397 and (3) Guardian's claim for loss and expense was flawed and should be dismissed. On the basis of these findings, the arbitrator awarded £102,986 to Guardian.

8. On 2nd May 2005, the arbitrator issued a clarification of his award in the light of correspondence sent to him.

9. Surefire was aggrieved by the arbitrator's award. Accordingly, Surefire commenced the present proceedings in order to challenge that award.

**Part 3 – The Present Proceedings**

10. By a claim form issued on 23rd May 2005, Surefire applied for leave to appeal against the arbitrator's third award, pursuant to section 69 of the Arbitration Act 1996. Surefire also applied for an extension of time for seeking leave to appeal, if such extension was necessary. The grounds of appeal set out in the claim form are as follows:

*"(1) the arbitrator has failed to take into account and apply Surefire's condition on the order form, that applications for the cost of variations should be accompanied by day work sheets. This has led to decisions based on pure speculation in the total absence of any evidence, as to the number of hours actually employed on the claimed variations (item 1/4 and 3/24; item 1/17; item 1/28; item 2/8);*

*(2) the arbitrator failed to take into account the evidence provided at the hearing as to what was involved in the variations for which Guardian had claimed, wrongly determining questions (a) either in the absence of any evidence at all (item 2/8; item 3/20) or (b) on the basis of what the parties discussed and did on Guardian's applications for interim payments (item 1/7; item 1/14; item 3/24; item 1/17; item 1/28);*

*(3) the arbitrator failed to take into account Surefire's own contractual conditions relating to payments on account and wrongfully concluded that the terms relating to payments on account were governed by terms relating to Surefire's contract with its client Shitayama who owned the site (all items)."*

11. The evidence in support of Surefire's claim consists of a witness statement by Mr Roderick O'Driscoll. Mr O'Driscoll is a partner in Gullands who are Surefire's solicitors. Mr O'Driscoll is the advocate who represented Surefire at the arbitration. In his witness statement, Mr O'Driscoll limited Surefire's proposed appeal to the following variations:

*"(1) item 1/7, increase in cable size;*
*(2) items 1/4 and 3/24, the aquarium;*
*(3) item 1/16, stair cores C to F;*
*(4) item 1/17, stair cores A, B, G, H, J;*
*(5) item 1/28, sprinklers;*
*(6) item 2/8 fire core alarm;*
*(7) items 3/20 to 3/23, labour."*

12. I shall refer to these seven matters as "the disputed decisions of the arbitrator". The total sum which the arbitrator awarded in respect of these disputed decisions was £55,174 plus interest. On pages 9 to 20 of his statement, Mr O'Driscoll sets out detailed arguments about each of the seven disputed decisions of the arbitrator. In support of his arguments, Mr O'Driscoll has annexed to his witness statement (a) some extracts from the witness statement of Mr Felstead in the arbitration; (b) some day work sheets; (c) some diary notes and (d) some notes of the oral evidence given at the arbitration.

13. In response to Surefire's application, Guardian has served two witness statements of Mr David Kilvington. Mr Kilvington is a partner in the Hawkswell Kilvington Partnership, who are Guardian's solicitors. In his first statement, Mr Kilvington opposes the grant of an extension of time. In his second statement, Mr Kilvington opposes the grant of leave to appeal. Mr Kilvington annexes to his second statement various documents relating to the subcontract works and to the arbitration. In the course of his second statement, Mr Kilvington deals in some detail with each of the disputed decisions of the arbitrator.

14. It appeared to me, on considering the papers in this matter, that Surefire's applications gave rise to certain issues of principle. Accordingly, pursuant to paragraph 12.6 of the Part 60 Practice Direction, I directed that the applications for (a) an extension of time and (b) leave to appeal should be listed for oral hearing. That hearing is taking place today.

15. In opening the case for Surefire, Mr Simon Brown QC (who did not appear in the arbitration) departed from the formulation which appears in the claim form. Mr Brown advanced two separate grounds of appeal, namely: (1) The arbitrator failed to have regard to the burden of proof which was on Guardian. He awarded sums to Guardian in respect of which (as can be seen from the award) there was no supporting evidence. (2) The arbitrator disregarded clause 10 of the subcontract. He awarded sums to which Guardian were not entitled, since Guardian had failed to comply with the mechanism contained in clause 10.

16. On behalf of guardian, Mr Adam Constable (who has acted both in the arbitration and in these proceedings) submits that leave to appeal should not be granted. He submits that Surefire has not identified any question of law which the arbitrator was asked to determine, or in respect of which the arbitrator even arguably fell into error.

**Part 4 – The Law**

17. Section 69 of the Arbitration Act 1996 provides:

*"(1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings. An agreement to dispense with the reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section.*

*(2) An appeal shall not be brought under this section except:*
*(a) with the agreement of all the other parties to the proceedings or*
*(b) with the leave of the court.*
*The right to appeal is also subject to the restrictions in section 70(2) and (3).*

*(3) Leave to appeal shall be given only if the court is satisfied*
*(a) that the determination of the question will substantially affect the rights of one or more of the parties;*
*(b) that the question is one which the tribunal was asked to determine;*
*(c) that on the basis of the findings of fact in the award -*
*(i) the decision of the tribunal on the question is obviously wrong or*
*(ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and*
*(d) that despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.*

*(4) An application for leave to appeal under this section shall identify the question of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted."*

18. Section 70 of the Arbitration Act 1996 provides:

*"(2) An application or appeal may not be brought if the applicant or appellant has not first exhausted -*
*(a) any available arbitral process of appeal or review, and*
*(b) any available recourse under section 57 (correction of award or additional award).*
*(3) Any application or appeal must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process."*

19. Section 79 of the Arbitration Act 1996 provides:

*"(1) Unless the parties otherwise agree, the court may by order extend any time limit agreed by them in relation to any matter relating to arbitral proceedings or specified in any provision of this Part having effect in default of such agreement...*
*(3) The court shall not exercise its power to extend a time limit unless it is satisfied*
*(a) that any available recourse to the tribunal, or to any arbitral or other institution, or person vested by the parties with power in that regard, has first been exhausted and*
*(b) that a substantial injustice would otherwise be done."*

*20.* Section 80(5) of the Arbitration Act 1996 provides: *"Where any provision of this Part requires an application or appeal to be made to the court within a specified time, the rules of court relating to the reckoning of periods, the extending or abridging of periods and the consequences of not taking a step within the period prescribed by the rules apply in relation to that requirement."*

21. In ***Demco Investments & Commercial SA & Ors v SE Banken Forsakring Holding Aktiebolag*** *[2005] EWHC 1398 (Comm)*, at paragraph 36, Mr Justice Cooke stated that the legislative intent of section 69(3) of the Act was to prevent parties seeking to dress up questions of fact as questions of law. I agree with that analysis. Any party seeking leave to appeal under section 69 must take, as his starting point, the arbitrator's findings of fact. He must then identify the question of law arising from those facts, upon which the arbitrator fell into error. The prospective appellant must demonstrate that the question of law was one which the arbitrator was asked to determine. The prospective appellant must also surmount one or other of the two high hurdles which section 69(3) (c) erects.

22. It follows from this analysis that the evidence which is admissible on an application for leave to appeal is strictly limited. Such evidence will generally comprise (a) the award itself and (b) any

evidence relevant to the issue whether the identified question of law is of general public importance. In some cases, it may also be necessary to look at the pleadings, or written submissions in the arbitration, in order to ascertain what were the questions which the arbitrator was asked to determine.

23. I turn now to the matter of extension of time. In *Aoot Kalmneft v Glencore International AG*, Commercial Court (27th July 2001), Mr Justice Coleman considered the proper approach of the court to applications for extension of the 28 day time limit imposed by section 70(3) of the 1996 Act. He noted that the court has a discretionary power to extend time under section 80(5) of the 1996 Act and under rule 3.1(2) of the Civil Procedure Rules. Mr Justice Coleman then said this:

*"(50) In determining the relative weight that should be attached to the discretionary criteria, the starting point must be to take into account the fact that the 1996 Act is founded on a philosophy which differs in important respects from that of the CPR.*

*(51) Thus, the twin principles of party autonomy and finality of awards, which pervade the Act, tend to restrict the supervisory role of the court and to minimise the occasion for the court's intervention in the conduct of arbitrations…"*

24. In paragraph (59) Mr Justice Coleman listed seven relevant considerations in relation to applications for extension of time. These are:

*"(1) the length of the delay;*

*(2) whether, in permitting the time limit to expire and the subsequent delay to occur, the party was acting reasonably in all the circumstances;*

*(3) whether the respondent to the application or the arbitrator caused or contributed to the delay;*

*(4) whether the respondent to the application would, by reason of the delay, suffer irremediable prejudice in addition to the mere loss of time if the application were permitted to proceed;*

*(5) whether the arbitration has continued during the period of delay and, if so, what impact on the progress of the arbitration or the costs incurred in respect of the determination of the application by the court might now have;*

*(6) the strength of the application;*

*(7) whether, in the broadest sense, it would be unfair to the applicant for him to be denied the opportunity of having the application determined."*

25. I accept the analysis of Mr Justice Coleman.

26. These then are the principles which I must apply in determining Surefire's applications.

**Part 5 – Extension of Time**

27. In my view, the arbitrator's clarification issued on 2nd May 2005 constitutes "an arbitral process of… review" for the purposes of section 70(3) of the Act. Accordingly, no extension of time is necessary.

28. I should add that if an extension of time were necessary, I would not be prepared to grant it. Mr O'Driscoll's statement contains no explanation for the (assumed) delay. The application for leave to appeal is, on its face, a weak one. Following the approach of Mr Justice Coleman in ***Aoot Kalmneft***, this is not a case in which it is appropriate to grant any extension of time. These comments are, however, *obiter*. My decision is that the proceedings were commenced in time.

**Part 6 – Leave to Appeal**

*29.* The first ground of appeal set out in the claim form is directed at those variations which were not supported by day work sheets. Surefire's order to Guardian dated 5th August 1996 (the subcontract order) contained the following passage: *"Please note that payment for any additional works will only be made when accompanied with an instruction and day work sheets authorised by our site manager."*

*30.* The arbitrator dealt with this matter in paragraph 9 of his award, as follows: *"On a few occasions, Guardian did submit day work sheets but not time sheets. Where it did, the day work sheets were signed by Surefire 'for record purposes only'. I accept Mr Felstead's evidence that Surefire did not generally ask him for day work sheets and did not use their non-provision as a specific reason for disputing the value of variations."*

31. The effect of the note on the order form quoted above was not an issue argued by either party in the arbitration. Both the parties in the arbitration proceeded on the basis that the contractual provisions governing payment for variations were those set out in clause 12 of the conditions of the trade

contract. In those circumstances, it is unsurprising that the arbitrator dealt with the note on the order form quite briefly in his award. It is clear that if the effect of the note had been raised as an issue, then the arbitrator would have held that compliance with this note had been waived.

32. In my view, the first ground of appeal set out in the claim form is quite hopeless. This ground does not identify any question of law upon which the arbitrator even arguably fell into error. This ground does not satisfy section 69(1), or section 69(3)(b), or section 69(3)(c), or section 69(3)(d), or section 69(4) of the Arbitration Act 1996. Very wisely, Mr Brown did not pursue ground one in his oral submissions this morning.

33. I turn now to the second ground of appeal set out in the claim form. As formulated, this ground is hopeless. It does not satisfy any of the requirements set out in section 69 of the Arbitration Act 1996. This ground of appeal has, however, been reformulated and burnished by Mr Brown in his oral submissions, as summarised in part 3 above. That is the formulation upon which I must focus. In relation to this ground, it should be noted that the arbitrator directed himself correctly concerning the burden of proof. In paragraph 15(1) of his award, the arbitrator said this: *"I accept that Guardian bears the burden of proof in establishing first, that a variation under the contract has occurred and second, what is its entitlement to extra payment."*

34. Nevertheless, Mr Brown argues, the arbitrator did not proceed thereafter in accordance with his own correct direction of law. Mr Brown relies upon the decision of the House of Lords in ***Rhesa Shipping Co SA v Edmunds*** *[1985] 1 WLR 948*. In that case, the House of Lords held that where there was no satisfactory evidence on a particular point, the party bearing the burden of proof should fail in respect of that point. See the speech of Lord Brandon at pages 955 to 956. It should be noted that Lord Fraser, Lord Diplock, Lord Roskill and Lord Templeman all expressed agreement with Lord Brandon's speech.

35. I accept, of course, the propositions of law established in ***Rhesa Shipping***. I do not accept, however, that those propositions are applicable to the present case. In respect of some issues, the arbitrator notes that there is a paucity of evidence. However, the arbitrator goes on to identify some evidence in respect of each variation. The arbitrator had the benefit of not only the contemporaneous documents, but also the oral evidence of Mr Felstead and Mr Lindsay.

36. It is not the function of this court to review an arbitrator's assessment of the factual evidence. However, in fairness to the arbitrator in this case, I must say that I can see nothing remotely surprising in the arbitrator's assessment of the evidence in relation to each of the disputed decisions. Accordingly, the second proposed ground of appeal must be rejected.

37. I turn now to the third ground of appeal set out in the claim form. This ground was developed this morning by Mr Brown in the manner summarised in Part 3 above. In my judgment, this ground of appeal is fatally flawed. At the hearing before the arbitrator, no submissions were developed by either party as to the meaning or effect of clause 10 of the conditions which were printed on the back of the subcontract order. On the contrary, both the parties proceeded on the basis that the relevant contractual provisions were those contained in clause 12 of the trade contract. The arbitrator sets out the provisions of clause 12 of the trade contract on pages 9 to 11 of his award. Unsurprisingly, the arbitrator makes no reference whatsoever to clause 10 of the subcontract conditions.

38. It follows from the foregoing that this final proposed ground of appeal does not involve "a question of law arising out of the award". Furthermore, the question which is raised by this ground is not one which the arbitrator was asked to determine.

39. Indeed, there is no admissible evidence before this court as to what clause 10 provided. As a matter of indulgence to Surefire, I have looked at paragraph 15 of Mr O'Driscoll's statement, which sets out clause 10 in full. It can be seen that if Surefire had raised clause 10 in the arbitration, Guardian would have had a number of possible arguments available in response. Those considerations are, however, of no relevance to the present application.

40. The third proposed ground of appeal must be rejected, because it does not satisfy the requirements of section 69(1), or section 69(3)(b), or section 69(3)(c), or section 69(3)(d) or section 69(4) of the Arbitration Act 1996.

41. In the result therefore, Surefire fails in each of its three proposed grounds of appeal.

**Part 7 – Conclusion**

42. For the reasons set out in part 6 above, Surefire fails in its application for leave to appeal. I have dealt with this case at much greater length than is usual, for two reasons. First, the arguments of counsel on both sides have been excellent. They have neatly and concisely exposed the issues. Secondly, this case illustrates three propositions, which need to be emphasised and which need to be understood, both by the construction industry and by the profession. These are:

    (1) Where the parties enter into an arbitration agreement, their rights thereafter to challenge the arbitrator's award are strictly limited by the Arbitration Act 1996.

    (2) No application for leave to appeal will be granted unless the prospective appellant can surmount the substantial hurdles set up by section 69 of the Act.

    (3) Where an application for leave to appeal is made, the court should not be burdened with vast tracts of inadmissible evidence, nor should the court be burdened with many pages of intricate argument about the factual issues which the arbitrator has decided. The preparation of such material is a waste of time, effort and costs.

43. The philosophy underlying the Arbitration Act 1996 has been expounded many times, most recently by Mr Justice Cooke in *Demco Investments*. I will not repeat that exposition. There are good commercial reasons for parties in the construction industry to choose arbitration. The parties obtain a resolution (almost always a final resolution) of their disputes by a suitably qualified individual of their own choosing. There is, however, a price to be paid. The parties cannot have their cake and eat it. The parties cannot refer their factual or technical disputes first to an arbitrator and then to a judge of the Technology and Construction Court.

44. I make these remarks because, at least in some quarters, there seems to be a widespread misunderstanding about the role of the court in relation to construction arbitrations. I hope that this judgment will help to alleviate that misunderstanding.

45. Returning to the issues in this case, Surefire's claim fails and these proceedings must be dismissed.

Mr. Simon Brown QC (instructed by Gullands, Kent) for the Claimant
Mr. Adam Constable (instructed by Hawkswell Kilvington, West Yorkshire) for the Defendant