JUDGMENT : HIS HONOUR JUDGE RICHARD SEYMOUR Q.C.. TCC. 1st November 2000

Introduction

1. This is an application on behalf of Miller Construction Ltd. (*"Miller"*) for the setting aside of an interim arbitration award (*"the Award"*) dated 31 March 2000 made by Mr. John Phillips (*"the Arbitrator"*) in favour of Mr. James Moore, trading as "James Moore Earthmoving", in the sum of £739,693.95, and for the removal of the Arbitrator for misconduct. As an alternative to the application for the removal of the Arbitrator, Miller seeks an order that the Award be remitted to the Arbitrator for his reconsideration. As a further alternative, Miller seeks permission to appeal from the Arbitrator's determination of two points of law and, of course, a determination in its favour of those points of law.

2. The claims made in the arbitration arose out of the involvement of Mr. Moore as a sub-contractor to Miller in connection with earthmoving works required as a part of the work of constructing the A590 Dalton in Furness Bypass *("the Main Contract Works")* in the North of England. It appears that Miller was employed by the Department of Transport to undertake the Main Contract Works under the terms of a contract in the Standard Form of Civil Engineering Contract, 5th edition, *("the ICE Form").*

Mr. Moore's Sub-Contract

3. The second recital to the Award rehearsed the position concerning Mr. Moore's contractual arrangements with Miller as follows:- *"The contract between James Moore Earthmoving, the Claimant and Miller Construction Limited, the Respondent included the Federation of Civil Engineering Contractor's form of sub contract revised in September 1984, intended for use in conjunction with the I.C.E. Conditions of Contract with minor amendments, together with a letter of 25th October 1991 stating* "Our price for the total earthworks package is based upon a "Back to Back" arrangement with the Main Contractor on a subcontract FCEC blue form" *and a minute of a meeting dated 23rd January 1992. Clause 18 of the FCEC form of sub contract provides for any dispute to be referred to the Arbitration and final decision of a person to be agreed by the Parties, or failing such agreement appointed upon the application of either of the Parties by the President for the time being of the Institution of Civil Engineers."*

4. The standard form of sub-contract referred to in the second recital to the Award included, as clause 10 (2) the following:- *"Subject to the Sub-Contractor's complying with this sub-clause, the Contractor shall take all reasonable steps to secure from the Employer such contractual benefits, if any, as may be claimable in accordance with the Main Contract on account of any adverse physical conditions or artificial obstructions or any other circumstances that may affect the execution of the Sub-Contract Works and the Sub-Contractor shall in sufficient time afford the Contractor all information and assistance that may be requisite to enable the Contractor to claim such benefits. On receiving any such contractual benefits from the Employer (including any extension of time) the Contractor shall in turn pass on to the Sub-Contractor such proportion thereof as may in all the circumstances be fair and reasonable. Save as aforesaid the Contractor shall have no liability to the Sub-Contractor in respect of any condition, obstruction or circumstance that may affect the execution of the Sub-Contract Works and the Sub-Contractor shall be deemed to have satisfied himself as to the correctness and sufficiency of the Price to cover the provision and doing by him of all things necessary for the performance of his obligations under the Sub-Contract. Provided always that nothing in this Clause shall prevent the Sub-Contractor claiming for delays in the execution of the Sub-Contract Works solely by the act or default of the Main Contractor on the ground only that the Main Contractor has no remedy against the Employer for such delay."*

5. The references in the second recital to the Award to the letter dated 25 October 1991 and to a "Back to Back" arrangement are important in the context of the argument addressed to me by Mr. John Marrin Q.C., who appeared on behalf of Miller, as to how I should interpret the Award. In essence, Mr. Marrin submitted that, where there appeared in the Award any reference to a "Back to Back" arrangement, such was to be understood as a reference to the terms of the letter dated 25 October 1991.

Mr. Moore's Claims

6. In essence, the matters about which Mr. Moore made claims in the arbitration were principally delays and disruption to his earthmoving works from a variety of causes. A particular matter of complaint

was alleged unforeseen adverse physical conditions and obstructions encountered in excavations. In respect of the latter Mr. Moore claimed a sum of £538,994.61, calculated by reference to his alleged costs incurred as a result of encountering such conditions and obstructions.

7. Mr. Moore also claimed to be entitled, amongst other reasons in reliance upon clause 10 (2) of his sub-contract, to a share of sums paid to Miller by its client in respect of delays and disruption to the Main Contract Works and calculated by what was called *"the Entitlement method"*. Appendix 3.8 to the Re-Re-Amended Points of Claim in the reference was entitled *"Evaluation of Reimbursement by Entitlement Route"*. That appendix included what was called *"Engineer's Claims Evaluation"*. The narrative in the appendix extracted from that evaluation an amount of £371,471.98, described as *"Plant and resources standing"*, and also an amount of £406,800.00, being an apportioned part of a sum of £1,855,765.91, described as *"Extension of Time"*. The total of those items is £778,271.98.

The procedure at the hearing

8. Because of the fact that the primary relief sought on behalf of Miller was the setting aside of the Award and the removal of the Arbitrator, in relation to which evidence going beyond the terms of the Award itself was admissible, and because of the fact that the application for permission to appeal had been made at the same time and in the same claim form as the applications for the setting aside of the Award and the removal of the Arbitrator, the procedure which was followed at the hearing before me was somewhat unusual. In the ordinary way, on an application for permission to appeal under *Arbitration Act 1979 s. 1(3)(b)* the decision whether to grant permission is taken by the judge in his private room, without hearing any argument, based only upon a consideration of the award itself and the claim form- see ***Foleys Ltd. v City & East London Family & Community Services*** [1997] CILL 1283; ***Antaios Compania Naviera S.A. v Salen Rederierna A.B.*** [1985] A.C. 191. In the present case the course adopted, with my agreement, was that Counsel for Miller, Mr. John Marrin Q.C., who appeared with Mrs. Kate Gordon, opened his case in relation to the applications for the setting aside of the Award and the removal of the Arbitrator, and the alternative of remission of the Award to the Arbitrator, and then proceeded to argue the appeal on the questions of law as if permission to appeal had been granted. Although that procedure exposed me to the risk of neglecting to consider, as properly I ought, whether in fact the case was a proper one in which to grant permission to appeal, I have warned myself against that risk. I considered that, in the circumstances of this case, and given that the procedure adopted also had the effect that Mr. Michael Bowsher, who appeared, with Mr. Martino Giaquinto, as Counsel on behalf of Mr. Moore, in a sense had the opportunity, which, in the ordinary way, he would not have had, of making submissions as to why it was not appropriate for me to grant permission to Miller to appeal, while in fact making submissions on the merits of the appeal, I was prepared to proceed in the way which I have described. However, I desire to make it crystal clear that I consider it to be wrong in principle to join applications for the setting aside of an arbitration award or for the removal of an arbitrator with an application for permission to appeal. In my view, if it is desired to make application for permission to appeal, such should be made separately from any other application in relation to which there is a right to be heard or a right to rely upon material going beyond the arbitration award and the claim form.

The Award

9. The Award followed a hearing which occupied substantially the whole of the month of September 1999. Originally that hearing was intended as the hearing of all of the issues in the reference. However, it soon became apparent that the time available would prove insufficient for all of the matters in contention between the parties to be dealt with, and it was agreed by Miller and Mr. Moore that the hearing in September should be confined to a consideration of the following seven issues:-

"1 Did the Claimant encounter adverse physical conditions and/or obstructions which could not have been foreseen as pleaded in Annex 2 of the Re re amended Points of Claim?

"2 In respect of which if any of these conditions or obstructions is the Claimant entitled to recover sums pursuant to clause 10(2) of the Sub-Contract except insofar as identified by Engineer and paid for by him?

"3 Was the Claimant's performance of its Sub-Contract affected by

i. *delay and disruption due to the late, insufficient or inappropriate provision of sites for tipping for which the Claimant was not contractually responsible as pleaded in Annex 3 of the Re re amended Points of Claim?*
ii. *adverse physical conditions and/or obstructions as identified in 1 above as pleaded in Annex 3 of the Re re amended Points of Claim;*
iii. *or other matters for which it was not contractually responsible as set out in Annex 3 of the Re re amended Points of Claim?*

"4 Is the Claimant entitled to recover sums calculated on the "entitlement" *basis set out in Appendix 3.8 of the Re re amended Points of Claim pursuant to the Sub-Contract or otherwise?*

"5 If so, what sum is the Claimant entitled to recover on this basis?

"6 What sum, if any, is the Claimant entitled to recover on the alternative basis of calculation in respect of delay and disruption (Winter working + Prolongation (Annex 4)?

"7 Is the Claimant entitled to recover from the Respondent the sums paid by it as rates in respect of site establishment and tipping areas required for performance of the Sub-Contract?"

That the Arbitrator understood what the Award was intended to address appears from paragraph 7.1 of the Award, where he wrote: *"The Parties have expressed their wish that I make an Interim Award in the following terms given to me on the first day of the Hearing in Birmingham 1st September 1999".*

10. The grounds upon which Miller seeks to rely in support of the applications for the setting aside of the Award and the removal of the Arbitrator are, in essence, that:
    i. the Arbitrator decided to deal with the question of quantum in relation to the second of the issues which I have set out above *("Issue 2")* without affording Miller an opportunity of making submissions on that question;
    ii. having decided to deal with the question of quantum, the Arbitrator determined it on a basis which had not been pleaded;
    iii. the Arbitrator found in favour of Mr. Moore in relation to the fourth of the issues set out above *("Issue 4")* not on the basis pleaded, namely that there was a right to a share of the monies paid to Miller under an express agreement to that effect or under clause 10 (2) of the form of sub-contract to which I have referred or on some sort of restitutionary basis, but in reliance upon the "Back to Back" arrangement mentioned in the letter dated 25th October 1991 to which the Arbitrator referred in the second recital to the Award;
    iv. the Arbitrator failed to decide two of the issues which he ought to have decided, namely those set out, respectively, at the paragraphs from the list quoted above numbered 6 and 7 (respectively *"Issue 6"* and *"Issue 7"*), without affording Miller the opportunity of being heard as to whether it was appropriate for him not to decide issues which the parties had agreed he should decide;
    v. the Arbitrator failed to inform the parties during the hearing that he was having difficulty in hearing the proceedings, especially anything said by Mrs. Gordon, who appeared as Counsel for Miller;
    vi. the Arbitrator, in the Award, cited legal decisions in such a manner as to show that he had no, or no sufficient, understanding of the principles which they, respectively, laid down.

    In the event, the fifth of these grounds was, rightly, in my judgment, but faintly pursued, while the sixth rather became subsumed, again, in my judgment, rightly, in the issues raised by the application for permission to appeal on questions of law.

11. The proper conduct of the arbitral process depends, in my judgment, critically upon whoever is appointed as an arbitrator giving each of the parties to the reference before him an opportunity to be heard on any matter which the arbitrator is called upon to decide. The point was emphasised by Lord Denning MR in ***Modern Engineering (Bristol) Ltd. v C. Miskin & Son Ltd.*****[**1981] 1 Lloyd's Rep 135 at p. 138:- *"This does seem to me a most serious matter. The Judge put this test to himself in his judgment: Are the circumstances such as to demonstrate that the arbitrator is not a fit and proper person to conduct the arbitration proceedings? I do not think that was the right test. I would ask whether his conduct was such as to destroy the confidence of the parties, or either of them, in his ability to come to a fair and just conclusion.*

"The question is whether the way he conducted himself in the case was such that the parties can no longer have confidence in him. It seems to me that if this arbitrator is allowed to continue with this arbitration one at least of the parties will have no confidence in him. He will feel that the issue has been pre-judged against him. It is most undesirable that either party should go away from a Judge or an arbitrator saying, "I have not had a fair hearing".

"I know the inconveniences to which the removal of the arbitrator may give rise – the delay, the extra expense, and the like. But it seems to me that it is far more important that this Court should see that arbitrations are properly conducted so that the arbitrator can have the confidence of those who appear before him. Arbitration is now one of the most important spheres of activity in the system of administering justice in this land. The Courts, I feel, must show an example and see that arbitrations are properly conducted so as to earn and deserve the confidence of those who appear before them. I am afraid that the conduct of this arbitrator was such as to lose that confidence – at least of one of the parties."

Thus, if I were persuaded that the Arbitrator in this case had failed to give one of the parties the opportunity to be heard on some matter before him for determination in the Award, or if I were persuaded that he had decided, in the Award, some matter which was not before him for determination at that stage, I should have to consider most carefully, in the light of other authorities more recent than ***Modern Engineering (Bristol) Ltd. v C. Miskin & Son Ltd.***, as well as in the light of that decision itself, what was the appropriate course to take.

12. In a section of the Award which immediately preceded that in which the Arbitrator turned to consider the seven issues to which I have referred the Arbitrator had set out "CONSIDERATION OF POINTS OF LAW". I should quote what the Arbitrator said about those points of law because the argument of Mr. Bowsher on behalf of Mr. Moore as to the proper interpretation of the Award depends upon that consideration.

"6.1 FIRSTLY The Respondent pleaded that payment on an entitlement basis is not a contractural [sic] *benefit File A2. p.5, claimable in accordance with the main contract within the meaning of Clause 10(2) (of the FCEC sub contract)*

"I find from the evidence the entitlement payment is based upon the resources used in carrying out the works which comprised the contract albeit during notional time. I find that these payments are a benefit derived from the execution of the main contract and that in accordance with FCEC Subcontract Clause 10(2) the Contractor shall take all resonable [sic] *steps to secure from the Employer such contractural* [sic] *benefits, if any, as may be claimable in accordance with the main contract on account of adverse physical conditions or artifical* [sic] *obstructions or any other circumstances which may affect the execution of the subcontract works and the Subcontractor shall in sufficient time afford the Contractor all information and assistance that may be requisite to enable the Contractor to claim such benefits. On receiving such contractural* [sic] *benefits from the Employer (including any extension of time) the Contractor shall in turn pass on to the Subcontractor such proportion thereof as may, in all the circumstances, be fair and reasonable. etc.*

*"**B.S.C. v Cleveland Bridge and Engineering. Constantine Line v Imperial Smelting and BP Explorations (Libya) v Hunt** considered.*

"SECONDLY

*6.2 The question of notice of claims and the clause of the subcontract under which they are made has been raised in response to J Moore's claims. In particular **Mooney v Henry Boot Construction Ltd 80 BLR p 66.** has been quoted in support of the Respondents reply to these claims.*

"I consider the question of notice within the time and in the form necessary to comply with the requirements of Clauses 6,7 and 10 of the sub contract has been waived by the application of the entitlement method of paying for variation of the works, clause 12 claims and disruption and delay on the main contract, on a notional rather than a factual basis, this view takes into account the sub contract special provision that J Moore and Miller would act "Back to Back" *in recovering sums due under the contract, confirmed by the outcome of the meeting between Messrs. J Moore and R Wilson which I find took place in May 1992 at which it was agreed the Parties would proceed together on claims and that J Moore would receive fair treatment, I do not however accept it was agreed*

at this meeting J Moore was promised payment on the entitlement method. It is acknowledge [sic] *the site was unusually open with free exchange of information and co-operation to complete the works on the due date.*

"6.3 As a result of this Miller prepared claims based on J Moore's resources to obtain entitlement payments for the Main Contract variations, clause 12 claims and disruption and delay, due to both parties. These claims were largely prepared by Mr.I Hearne Miller's assistant project manager, acknowledged as particularly interested in earthworks, to obtain payments from the Employer under the entitlement method, or should it be withdrawn by the Engineer a private shadow collection of data for the basis of traditional claims.

"6.4 I find J Moore could reasonably rely on these arrangements to relieve him of the need to give notices and details formally to Miller in accordance with the strict terms of the sub contract set out above, to obtain his fair and reasonable proportion of the entitlement payments.

"THIRDLY

6.5 On the question of the Best Endeavours Programme and it's effect upon the timing and efficiency of J Moore's work. I find the Best Endeavours Programme was an internal concept of Miller to achieve the Employers desired completion date and that this target was achieved by Miller's site short term programmes which caused disruption to J Moore, I find, Mr O' Neil's evidence that these short term programmes were not instructions, unconvincing particularly as Clause7 (2) of the sub contract binds the sub contractor to comply with the main contractors instructions."

The *"entitlement method"* referred to in the passage quoted was, in essence, a method of compensation agreed between Miller and the Engineer appointed under the terms of the contract between Miller and its client which was intended as a means of recompensing Miller for the delays and disruptive effect of various events which occurred during the course of the Main Contract Works.

Issue 2 and Issue 4

13. Having answered the first issue in the affirmative, the Arbitrator turned to consider Issue 2:

"2.1 In respect of which if any of these conditions or obstructions is the Claimant entitled to recover sums pursuant to clause 10 (2) of the Sub-Contract except in so far as identified by the Engineer and paid for by him?

"2.2 The Engineer certified the direct costs of meeting the unforseen [sic] *conditions or obstructions under Clause 12 of the main contract as follows:*

	£
Additional Rock Quantities	*20,066.95*
Unforseen [sic] *conditions in rock cuttings*	*25,000.00*
Rock encountered in spoil heap cut	*9,896.02*
Stiffer clay matrix and larger and more numerous boulders in Broughton Road cut	*90,198.00*
	£ 145,160.97

"2.3 This sum includes ££9896.02, spoil heap cut, which the Respondent admits should have been paid to J Moore. In addition a proportion of the entitlement payment is due for disruption and delay associated with this work. Noted from Mr Rodger's evidence and Mr Forrest calculation of a period of 5 weeks entitlement.

"2.4 J Moore alleges Miller did not pursue his claims for unforseen [sic] *adverse physical contions* [sic] *with due dilligence* [sic], *particularly for those encountered in June and October 1992 which Miller claimed late, resulting in rejection on this ground by the Engineer. J Moore states Miller had little incentive to make Clause 12 claims as it was concentrating on entitlement, confirmed by Mr Notman's evidence. On the subject of disruption and delay both, Mr Sleightholm and Mr Mycock acknowledged the sub contractor is entitled to payment for his substantiated claims.*

"2.5 Taking account of the precedents ***Mooney v Henry Boot Construction Ltd., Wharfe Properties and another v Eric Cumine Associates, British Steel Co v Cleveland Bridge and William Lacey v Davis*** *and the evidence adduced before me:*

"2.6 I find the alleged breach of contract arising from Millers failure to present claims in which a portion was due to J Moore cannot be sustained. Claims were submitted to the Engineer for consideration, albeit the claim for work in 1992 was submitted late and rejected by the Engineer on that ground rather than consideration of it's [sic] *merits, leaving the potential result unknown. Under the terms of the sub contract Clause 10 (2) the sub contractor's payment for unforseen* [sic] *adverse physical conditions or artificial obstructions (including any extension of time) is only due to be paid by the main contractor if it is a contractural* [sic] *benefit payable by the employer. The Employer is bound to comply with the terms of Clause 12 of the main contract and the Engineer's decisions thereon which limits the sums to be paid to the sub contractor under the sub contract Clause 10 (2), to those certified by the Engineer on this Issue No.2.*

"2.7 I find the sums awarded by the Engineer's certification of the Clause 12 claims to Miller and to be paid by Miller to J Moore are limited to the direct costs plus a portion of the entitlement identified by the Engineer and assessed by Mr Forrest at 5 weeks, which I consider fair and reasonably due to J Moore

	£
Direct costs less already paid	*9,896.02*
5 x one 45th of the notional entitlement (appendix 3.8) of £778.271.98	*86,092.03*
Total	*£ 97,988.05 "*

14. What, on its face, a determination of Issue 2 required, in my judgment, was the making of a decision as to which of the conditions or obstructions listed in answer to Issue 1 were such as to entitle Mr Moore to additional payment. It did not require the making of any decision as to any amount of money to which Mr Moore might be entitled. The main plank of Mr. Marrin's attack upon the Arbitrator's award on Issue 2 rested on this very point. He submitted that the Arbitrator should not have considered the question of quantum in relation to Issue 2 at all. However, he went further and submitted that, not only had the Arbitrator considered a matter which he should never have considered, but, in the Award, the Arbitrator had assessed a sum under Issue 2 on a basis which had not been pleaded or contended for on behalf of Mr. Moore, namely by reference to the *"Entitlement method"*. The pleaded case on behalf of Mr. Moore, Mr. Marrin submitted, put the claim in relation to Issue 2 as one for recovery of costs actually incurred. Mr. Bowsher, while accepting that it was not to be expected that the Arbitrator would award any amount of money as part of his determination of Issue 2, submitted that, when the Award was properly construed, all that the Arbitrator had done in relation to Issue 2 was to award an amount of money, £9,896.02, which was not in dispute, and that the sum of £86,092.03 which it might appear, at first sight, he had awarded in respect of Issue 2 he had actually awarded in relation to Issue 5. Mr. Bowsher submitted that in the Arbitrator's preliminary *"CONSIDERATION OF POINTS OF LAW"* the Arbitrator was considering the question of Mr. Moore's entitlement to share under clause 10 (2) of his sub-contract in the sum calculated by reference to *"the Entitlement method"* which had been paid to Miller. He further submitted that the Arbitrator's determinations in respect of Issue 2, Issue 4 and Issue 5 followed on from that preliminary consideration. The result, Mr. Bowsher submitted, was that, far from Miller having been disadvantaged by the Arbitrator having decided the question of quantum in respect of Issue 2 without Miller having had an opportunity to make submissions about quantum, if anyone was disadvantaged, it was Mr. Moore, who had had a claim for £538,994.61 in effect determined against him without him having an opportunity to present his alternative case in relation to that claim. It was implicit in that submission that Mr. Moore was not complaining about such having happened.

15. About the sum of £9,896.02 included in the calculation of the figure of £97,988.05 referred to by the Arbitrator in the context of Issue 2 the closing submissions of Mrs. Gordon, on behalf of Miller at the hearing of September 1999, said:- *"The engineer accepted that rock was not foreseeable at all in Spoil Heap Cut and therefore certified a net sum of £9,896.02. By oversight, this sum has not been paid to the Claimant and it is admitted that it should have been paid"*.

That is all that was said on the subject of the £9,896.02 in the closing submissions. Although Mr. Marrin sought to suggest in his submissions to me that the apparent acceptance of a liability to pay

£9,896.02 should be viewed as, in effect, an acceptance that that element, subject to any other adjustments which were appropriate, was due, not an admission that it was immediately due, I see no reason to regard the statement in Mrs. Gordon's closing submissions as so qualified.

16. The Arbitrator's findings concerning Issue 4 were as follows:-

"4.1 Is the Claimant entitled to recover sums calculated on the "entitlement" *basis set out in Appendix 3.8 of the Re re amended Points of Claim pursuant to the Sub-Contract or otherwise*

"4.2 This question arises from arrangements made at a meeting or series of meetings of the 6th May 1992 when an acknowledged shortage of tipping space and variation of the works at Hagg Gill were likely to delay the works, and likely to lead to claims for disruption and delay. Prior to this meeting, in mid April 1992 the Engineer had indicated to Miller that he proposed to deal with matters which normally led to traditional claims in a novel way which he described as the "entitlement method" *as defined in Appendix C.*

"4.3 The sub contract included an arrangement requiring the Parties to act "Back to Back" *which I take to mean on matters of costs recovery from the Employer via the Engineer the Parties would look after each others interests. This situation was discussed at the 6th May 1992 meeting or meetings. The differences in the site administration resources of Miller compared to J Moore made this approach desirable as Miller would need to incorporate J Moore's costs in representations to the Engineer, although not following the traditional operation of the sub contract in relation to the main contract where notices and detailed claims are passed from the Sub Contractor to the main Contractor for submission to the Engineer. A Mr Hearne, Miller's assistant projects manager was responsible for the assembly of the necessary data for both Parties.*

"4.4 Miller was doubtful whether the Engineer and Employer would persist with the novel entitlement method, consequently as a safeguard it prepared shadow private traditional claims using information collected from J Moore acknowledged by Mr Mycock. J Moore received interim payments in response to their submissions, excluding disruption and delay costs which were covered by the Entitlement method.

"4.5 Miller's Counsel Mrs Gordon avered [sic] *the lack of pressure from J Moore suggested it did not expect to receive money from the Entitlement route. However J Moore was not party to the entitlement cost recovery meetings. The Entitlement payments to Miller certified by the Engineer are set out in the Claimants pleadings p.250. It is clear from the evidence adduced J Moore incurred additional costs to the measured work recovery, due to disruption and delay and that his resources involved have been used to assess the Entitlement payments to Miller for variation of the works and unforseen* [sic] *physical conditions.*

"4.6 I am satisfied the meeting between Messrs J Moore and R Wilson took placed [sic] *during which, although the form of and the details of the Entitlement method were unknown, Miller agreed an arrangement to give notices and prepare details of costsof disruption and delay of voth Parties on the* "Back to Back" *contractural* [sic] *basis. I do not accept Mrs Gordon's averment that J Moore's delay in persuing* [sic] *payments for disruption and delay is justification for saying he did not expect payment, for on civil engineering work this payment is usually delayed by protracted negotiations with the Engineer. Miller admits J Moore is entitled to it's proven disruption and delay costs.*

"Taking into account the precedents. ***Mooney v Henry Boot Construction Ltd. Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd. BSC v Cleveland Bridge and Engineering Co. Ltd. BP Exploration Co. (Libia) Ltd v Hunt William Lacy v Davis Way v Latilla Mid Glamorgan v J Devonald Williams and Partner Costain v Zanex Text*** "**The Law of Restitution**" ***Wharf Properties Ltd v Eric Cumine Associates London Borough of Merton v Leach and Crosby v Portland U.D.C.***

The documents presented, the evidence adduced and the matters set out above.

I find the answer to the question raised as Issue 4 is "Yes"

17. The Arbitrator's findings about Issue 5 were:

"5.2 I find the sums the Claimant Sub Contractor J Moore is entitled to recover on the Entitlement basis are most accurately and reasonably proven by the Engineers dispassionate assessment of the Sub Contractor's costs set out in Appendix 3.8 of the Entitlement recovery schedule Page 272 of the Claimant's Pleadings. Having awarded 5 weeks of this entitlement to the Sub Contractor under Issue 2. I

find he is entitled to the 40.2 weeks sums set out in Appendix 3.8 Entitlement Recovery Schedule. Page 272 of the Hearing bundle in the sum of:- 40.2 *x £778,271.98 =£692,179.94 45.2*

18. Having been served with the claim form in these proceedings, the Arbitrator decided to make some comments on the allegations in the Particulars of Claim. Those comments included:-

"9.(a) Issue 5 which requires a Quantum Award is connected with Issue 2. For clarity it is sensible to separate the sums identified by the Engineer to the separate issues rather than deal with moneys related to two issues under Issue 5.

"9.(b) Issue 2 wording refers to sums identified by the Engineer related to Clause 10.2 events, the sum awarded was that identified by the Engineer to this issue. No prohibition on the Award of Quantum is present in the issue wording."

19. While it can fairly be said that a degree of confusion has, perhaps, been introduced by the decision of the Arbitrator to divide his consideration of what was actually Issue 5 between Issue 5 and Issue 2, it is, I think, tolerably clear upon an objective reading of the Award as a whole that that is in fact what he did. I do not think that any serious criticism can properly be made of the Arbitrator's decision to award Mr. Moore a sum, £9,896.02, which it does not appear was in dispute. Rather paradoxically, it seems that Miller has, if anything, benefited from how the Arbitrator has chosen to proceed in relation to Issue 2, for it would seem that what he has done is, in effect, to treat any sum otherwise due in respect of Issue 2 as subsumed, apart from the £9,896.02, within the amount to which, in his opinion, Mr. Moore was entitled in relation to the *"Entitlement"* claim.

20. So far as Issue 4 is concerned, it is, in my judgment, tolerably clear that the submissions of Mr. Bowsher as to the correct interpretation of the Award in relation to Issue 4 are well-founded. What I think the Arbitrator has done is, in the section of the Award entitled *"CONSIDERATION OF POINTS OF LAW"*, to determine that Mr. Moore was entitled to a share of the monies paid to Miller which had been calculated by *"the Entitlement method"* under clause 10 (2) of his sub-contract. Whether he was correct in doing that is a matter to which I need to return in the context of the applications for permission to appeal on questions of law, but I am satisfied that that is in fact what the Arbitrator did. I think that, as Mr. Bowsher submitted, the focus of the Arbitrator's attention in his consideration of Issue 4 was whether the entitlement which, by this point in the Award, the Arbitrator had held *prima facie* to exist, was affected by the failure to give the notices for which clause 10 (2) provided. Consequently, in my judgment, the challenge to the determination on Issue 4 on the basis that the Arbitrator's decision was based upon an analysis which had not been pleaded fails.

21. Notwithstanding that, for the reasons which I have given, in relation to Issue 2, at least, Miller does not appear to have lost as a result of what the Arbitrator has done, Mr. Marrin submitted that, because of the test established by the decisions to which I must now refer, Miller can rely upon conduct of the Arbitrator to the prejudice of Mr. Moore in support of the application for him to be removed as arbitrator. Whereas in ***Modern Engineering (Bristol) Ltd. v C. Miskin & Son Ltd.,*** the relevant passage from the judgment of Lord Denning MR in which I have cited above, it might appear that the emphasis was placed upon the views of the parties to the arbitration as to whether they could or would have confidence in the arbitrator to resolve the differences between them fairly, later authorities have made clear that the test of whether an arbitrator should be removed for misconduct is objective. In ***The Elissar*** [1984] 2 Lloyd's Rep 84 Ackner LJ at p.89, having referred to the decision in ***Modern Engineering (Bristol) Ltd. v C. Miskin & Son Ltd.,*** formulated an objective test, based upon the reaction of the *"reasonable person"*. He said that the test was:- "Do there exist grounds from which a reasonable person would think that there was a real likelihood that (the arbitrator] could not, or would not, fairly determine the [relevant issue or issues] on the basis of the evidence and arguments to be adduced before him?"

Later he said:- *"The reasonable person does not have to establish that his confidence has been wholly destroyed: it is enough that there is a real likelihood that the issue which is left to be determined would not be fairly determined if remitted to the arbitrator."*

Ackner LJ had previously indicated that, in his view, the outcome in *Modern Engineering (Bristol) Ltd v C. Miskin & Son Ltd* would have been the same whether an objective or a subjective test had been adopted, saying:- *"In my judgment Lord Denning,MR, was not applying his mind as to whether the test was an objective or a subjective one, understandably, in that case, because whether one applies a subjective test or one which is based upon an objective approach, the reaction of a reasonable person, the result in that case would have been the same. Therefore I do not view that case as being a decision which deals the point at issue."*

In ***Lovell Partnerships (Northern) Ltd. v A W Construction plc*** (1996) 81 BLR 83 at p.99 Mance J, as he then was, said, in the context of whether, in a case in which the question arose what remedy was appropriate if an arbitrator had misconducted himself or the proceedings, that the test to be applied was:- *"…whether a reasonable person would no longer have confidence in the present arbitrator's ability to come to a fair and balanced conclusion on the issues if remitted ".*

22. In the light of the authorities to which I have been referred, it is plain, in my judgment, that Mr. Marrin's submission that Miller can rely upon misconduct on the part of the Arbitrator which may not in fact have caused Miller prejudice is well-founded. Although this might, at first sight, seem a surprising conclusion, in my view it follows logically from the adoption of an objective test. The present arbitration, subject to the question which I must consider of whether to remove the Arbitrator, is continuing. Just because this time the victim of irregularity, if such there was, was Mr. Moore, does not necessarily mean that both parties are not exposed to the risk of misconduct in the future. While, in my judgment, the criticisms levelled at the findings in the Award in relation to Issue 2 on behalf of Miller are substantially based upon a misreading of what the Arbitrator in fact held, what the examination of the Award in that context has revealed quite clearly is that the Arbitrator has, in substance, dismissed without a hearing Mr. Moore's claim for a payment in respect of unforeseen adverse physical conditions and obstructions encountered in excavations calculated on a costs basis. That, it seems to me, is a serious matter amounting to misconduct. I must, therefore, consider whether it is a matter so serious that only removal is appropriate, or whether, as in the case of ***The Elissar***, it would be enough simply to remit the Award to the Arbitrator. As I have already indicated, in my view the right and expectation of a fair hearing in relation to each matter which an arbitrator has to determine is fundamental to the arbitral process. Ackner LJ recognised in *The Elissar* that the outcome in ***Modern Engineering (Bristol) Ltd v C. Miskin & Son Ltd*** would have been the same, whether a subjective or an objective test had been adopted. I have come to the firm opinion that, objectively, a reasonable person would think that there is a real likelihood that the Arbitrator could not come to a fair and balanced conclusion if Issue 2 were remitted to him for reconsideration as to quantum, he having eliminated from consideration a possible basis of evaluation without being addressed on the matter. I have also formed the clear view that a reasonable person would think that the Arbitrator could not, indeed, come to a fair and balanced conclusion in relation to any of the remaining issues in the arbitration, he having already demonstrated that he is unable to recognise the vital need for parties to be afforded an opportunity to be heard before he reached any decision on any controversial issue.

Issue 6 and Issue7

23. In his submissions to the effect that the appropriate course was that the Arbitrator should be removed Mr. Marrin did not confine himself to reliance upon how the Arbitrator had dealt with Issue 2. He submitted that I should consider all of the matters about which Miller made complaint in coming to a conclusion as to what was the appropriate relief, in the event that I was satisfied, as I am, that the Arbitrator had misconducted himself or the proceedings. In my judgment, that submission of Mr. Marrin also was well-founded in principle, although, in my view, the way in which the Arbitrator decided an arguable approach to quantum against Mr. Moore without a hearing is in itself so serious that the only sensible course is removal.

24. In relation to Issue 6 the Arbitrator found in the Award as follows:-

"6.2 Due to the difficulty and potential delay in obtaining the attendance of the Quantum Experts at a meeting with me to explain the convoluted nature on the quantum evidence on this Issue. I find I am unable to answer the question raised in this Issue

"6.3 I find from the precedent ***Shore and Horwitz Construction Co. Ltd and Franks of Canada and the text Keating on Building Contracts P.230.*** *The following matters need to be considered:-*

a. Mr J Moore's evidence that scrapers and their motive power plant would in a normal winter, stand unused and non earning part of the time.

b. I find Mr Notmans view that the plant rates used in calculating plant standing should be the sub contract inter company rates adjusted to allow for unused consumables, to be the most reasonable and convincing of the various plant rates considered.

c. Allowance shall be made for the costs which would have been recoverable for the use of plant taken as standing which would have been used if the original Clause 14 programme timing had been followed."

The Arbitrator thus made some, rather limited, findings, but in substance he deferred consideration of Issue 6. Mr Marrin submits that the Arbitrator did so, notwithstanding that the parties had expected him to resolve Issue 6 finally, he having heard all the evidence which the parties wished to put before him and having heard full argument, without giving the parties an opportunity to address him as to whether it was appropriate not finally to decide Issue 6 at that point.

25. In relation to Issue 7 what the Arbitrator said in the Award was:-

"7.2 I find from consideration of the precedent ***South West Aluminium Co. Ltd v Assessment Committee for the North Assessment Area.*** *The tips obtained specifically for disposal of material excavated for the works if subject to business rates are, in my view, the responsibility of the Employer or failing him the Main Contractor. Business rates due on quarries from which J Moore extracted rock for the works and the subsequent void filling, are the responsibility of the Sub Contractor who negotiated the use of the quarries with the owner for his own purposes. On the question of business rates for the Sub Contractors temporary buildings, I consider he is responsible for these rates including those on the buildings which the Main Contractor provided under the terms of the memorandum of 23 January 1992, for a tenant subject to a special agreement otherwise, is normally liable for such rates. Providing the demand for these rates and clear evidence of the areas or structures to which they specifically apply are provided, the sums paid for the tips obtained specifically for disposal of material excavated from the works are due to be paid by Miller to J Moore".*

The substance of Mr. Marrin's complaint in relation to Issue 7 is similar to that of his complaint in relation to Issue 6, namely that the parties had been expecting the Arbitrator to decide the issue on the evidence and argument which he had already heard and it was wrong of him not to do so without giving the parties the chance to make submissions.

26. If the only matters before the Court were the complaints in respect of Issue 6 and Issue 7 it would have seemed to me less obvious that the Arbitrator had been guilty of misconduct. While an important aspect of the orderly conduct of a reference to arbitration is, no doubt, that it should be clear to the parties at what point or points in the proceedings they, respectively, should deploy their cases, and fairness, in my judgment, requires that an issue in relation to which the parties have deployed their respective cases should not be re-opened without the parties having an opportunity, at least, to address the arbitrator as to the course proposed, I should take some persuading that merely not to decide an issue now, as opposed to at some later point in the proceedings, amounted to misconduct. In this regard I have found helpful the observations of H. H. Judge Diamond Q.C. in the unreported case of ***Miller Civil Engineering Ltd v National Rivers Authority*** as to the freedom allowed to an arbitrator in the performance of his functions, to which Mr. Bowsher drew my attention, especially the comments at pages 23 and 24 of the transcript with which I was provided. Further, even if I had been persuaded that it was misconduct not to decide at this point in the proceedings Issue 6 or Issue 7, I doubt that that, on its own, would have led me to remove the Arbitrator. A more obvious course would have been simply to remit the Award to the Arbitrator for him to decide Issue 6 and Issue 7.

However, in the light of my conclusion as to the consequences of how the Arbitrator dealt with Issue 2, this is all academic.

The applications for permission to appeal

27. In the circumstances it is not strictly necessary for me to consider the applications for permission to appeal. However, as it may be of some assistance to the parties in the resolution of the differences between them for me to indicate what I would have done, had it been necessary for me to consider the applications for permission to appeal, that is what I propose to do.

28. There were two points of law in relation to which application was pursued for permission to appeal. These were the survivors of a rather greater number of points foreshadowed in the Points of Claim. The two points pursued were respectively described as *"Ground 2"* and *"Ground 4"*. These grounds were formulated respectively as follows:- *"If and insofar as the basis of the Award on Issue 4 was that the Defendant was entitled to recover on the Entitlement basis under 10 (2) of the sub Contract, the Arbitrator erred in law in finding that entitlement receipts by the Claimant were contractual benefits claimable under the Main Contract on account of any adverse physical conditions or artificial obstructions or any other circumstance that may affect the execution of the sub-contract works"* and *"The arbitrator erred in law in that he found (paragraph 7.2) that sums paid by the Defendant as rates on tips obtained specifically for disposal of material excavated from the works are due to be paid by the Claimant to the Defendant"*

The first of these grounds involved the submission that, on a proper understanding of the Award, what the Arbitrator had done was to hold that Mr. Moore was entitled to recover from Miller under clause 10 (2) of its sub-contract, the terms of which I have quoted above, a proportion of the sums paid to Miller on the *"Entitlement"* basis, notwithstanding that it appeared on the face of the Award that the sums so paid included monies paid in respect of what, under the Main Contract, were variations. It was submitted by Mr. Marrin that, in so finding, the Arbitrator had disregarded, or misunderstood, the effect of the decision of the Court of Appeal in ***Mooney v Henry Boot Construction Ltd*** (1996) 80 BLR 66 that clause 10 (2) of the form of sub-contract with which I am here concerned only entitled a sub-contractor to benefits obtained by the main contractor under clause 12 (3) of the ICE Form, and only then if those benefits were not the result of an instruction or variation. The second of the grounds depended upon the submission that the Arbitrator had disregarded, or misunderstood, the effect of the decision in ***South Wales Aluminium Co. Ltd. v Assessment Committee for the Neath Assessment Area*** [1943] 2 All ER 587, to which the Arbitrator himself referred in paragraph 7.2 of the Award, which I have quoted above, in reaching his conclusion that tips and quarries were *"structures"* for the purposes of clause 26 of the ICE Form.

29. If it had been necessary to consider whether to grant permission to appeal in relation to either of the grounds to which I have referred in the preceding paragraph I should have granted permission in respect of the first, *"Ground 2"*, but not in respect of the other. In accordance with established practice I say no more about the ground upon which I should not have granted permission to appeal.

The appeal on Ground 2

30. It is, I think, plain from a number of passages in the Award that the sum which was paid to Miller under the main contract on the so-called *"**Entitlement**"* basis included sums in respect of variations, so that if Mr. Moore was to have any entitlement to a share of those monies it had to be on some basis other than under clause 10 (2) of his sub-contract. In the Award variations under the main contract were referred to in paragraphs 3.3,3.6 and under Issue 3 (iii). In the result, therefore, if I had not set aside the Award and removed the Arbitrator, I should have allowed the appeal in relation to *"Ground 2"* and remitted the Award to the Arbitrator for his reconsideration in accordance with my finding that Mr. Moore is not entitled to a share of the sums paid to Miller on the *"Entitlement"* basis.

John Marrin Q.C. and Kate Gordon for the claimants (Dundas and Wilson, Solicitors)
Michael Bowsher and Martino Giaquinto for the defendant (Wragge & Co., Solicitors)