Guaranteed Ashphalt (London) Ltd (In Receivership) v. Taylor Woodrow Construction Ltd [1998] APP.L.R. 06/05

JUDGMENT : His Honour Judge Thornton Q.C. In The High Court of Justice Official Referees' Business 5th June, 1998

1. Introduction

1. This application is made by Guaranteed Asphalt (London) Limited, *("Guaranteed"),* to remove an arbitrator, Mr. Christopher Dancaster, for misconduct pursuant to section 23(1) of the Arbitration Act 1950. Because the arbitration was commenced prior to 31 January 1997, which is the operative date for the coming into force of the Arbitration Act 1996, the application is made under the Arbitration Act 1950. Guaranteed is the claimant in an arbitration being brought against Taylor Woodrow Construction Limited, *("Taylor Woodrow")*. The arbitration arises out of a sub-contract entered into on 8 October 1990 and made between Taylor Woodrow, as main contractor, and Guaranteed, as sub-contractor, for asphalt tanking and roofing work carried out in connection with buildings being constructed for a new barracks at Windsor Barracks, Windsor, Berkshire.

2. The work contracted for consisted of large areas of general asphalt work at ground floor level, which would have involved three separate visits to the site. The sub-contract sum was £83,905.00 and the contract period was 40 weeks. The scope of the works was greatly extended. Instead of the general asphalt work contracted for, mastic asphalt bedding and backing was required. This had to be installed to finite tolerances for use as the backing to ceramic tiling in shower cubicles on several floors, mostly above ground floor level. The work took 91 weeks spread over 106 weeks. This greatly extended and varied sub-contract led to an extension of time of 58 weeks granted by Taylor Woodrow and to payment of £264,000.

3. Guaranteed has outstanding claims for further sums totalling nearly £200,000 and interest. These claims are based on the remeasurement and revaluation of the work. This revaluation is alleged to have been undertaken in accordance with the contract, using asphalt industry working rules. There is an alternative valuation put forward, based on what is described as a quantum meruit basis of valuation. Taylor Woodrow's principal defence is that Guaranteed waived any claim to extra payment arising from variations which are attributable to the lack of documentation at tender stage. Guaranteed's claims are alleged to be covered by this waiver. Guaranteed denies such a waiver and points to the lack of any contemporary written record of such an agreed waiver, even in Taylor Woodrow's own internal notes of the relevant meeting at which the waiver is said to be been discussed. Guaranteed's claims were initially submitted to Taylor Woodrow in Guaranteed's final account dated 7 July 1994. Subsequently, Guaranteed appointed Mr. J.R. Bates, a quantity surveyor and claims consultant in private practice, to pursue the claims for the outstanding sums. The claims were referred to arbitration by Guaranteed serving a notice on Taylor Woodrow, seeking the appointment of an arbitrator, dated 19 January 1995. Mr. Christopher Dancaster, FRICS, FCIArb, MBAF, was appointed by the Chartered Institute of Arbitrators on 4 April 1995. Mr. Dancaster is a Chartered Quantity Surveyor, construction contracts consultant and a Registered Arbitrator. Following discussions with the parties as to the terms of his appointment and the procedural rules to be used for the reference, he formally accepted his appointment on 2 July 1995.

4. Meanwhile, Guaranteed had got into financial difficulties. As Guaranteed sees the situation, these difficulties were largely because of cashflow problems associated with the Taylor Woodrow sub-contract caused by slow payments by Taylor Woodrow coupled with the non-payment of large sums due to it for the work carried out. Administrative Receivers were appointed by the company's debenture holder, National Westminster Bank, on 14 July 1993. A winding up order was subsequently made on 6 August 1993. The Administrative Receivers are two partners of the accountants BDO Stoy Hayward, Mr. R. Hocking and Mr. M. Cohen. The debt owed by Guarantee to National Westminster Bank is secured by a guarantee provided by Mr. N. Taylor, a director of Guaranteed. Since the Administrative Receivers were appointed before the winding up order was made, the debt constituted by the claims against Taylor Woodrow was one which they retained authority to pursue, since it was already charged to the bank. The Adminsistrative Receivers appointed Mr. Bates to act for them to pursue the claims in arbitration and it was Mr. Bates who signed the application for the appointment of an arbitrator. Since there is a shortfall in the assets being administered, the effective beneficiary of these claims, if recovery is achieved, is Mr. Taylor who will be relieved of liability under his guarantee to the extent of that recovery.

5. The arbitrator provided the parties with his terms and conditions which both parties assented to. Mr. Bates acted as Guaranteed's representative both in meetings held by the arbitrator and in conducting the reference on its behalf. Mr. Bates works largely from his home in Crowborough, East Sussex but the great majority of the letters written by him were written on the writing paper of Guaranteed Asphalt (London) Limited, using its address in London, SE14. This writing paper inaccurately describes the company as being in administrative receivership whereas it has, since 1993, been in liquidation. Thus, when referring to steps taken or correspondence sent in the arbitration by Guaranteed, I am referring to steps and correspondence emanating from its representative Mr. Bates, who is its agent and not one of its officers or employees. Taylor Woodrow was represented initially by Mr. J. Stewart and, from the latter part of 1996, by Mr. S. Foster. Both acted as litigators and, in meetings held by the arbitrator, as advocates on behalf of Taylor Woodrow. Whilst so acting, each was an assistant legal adviser within the Legal Department of Taylor Woodrow. Thus, Taylor Woodrow was represented throughout by one of its employed solicitors.

6. At the first preliminary meeting, the parties agreed to the arbitrator's suggestion that the reference should be conducted in accordance with the Arbitration Rules of the Chartered Institute of Arbitrators (1988 Edition), an agreement which was recorded in direction 4 of Order no 1, dated 2 June 1995. At that meeting, Taylor Woodrow intimated an intention of applying for security for costs from Guaranteed. The arbitrator gave directions for the application which he dealt with following written submissions. On 12 June 1995, he issued Order

no 2 requiring Guaranteed to provide £18,000.00 in respect of Taylor Woodrow's costs up to and including the reply and defence to counterclaim. The security was to be paid to the arbitrator and, in Order no 3, following written submissions concerning the nature of the security to be given, he ordered that the arbitration be stayed until such time as the security was given. The provision of security was ordered under Article 13.2 of the applicable Arbitration Rules which allows him to order any party to provide security in any manner as the Arbitrator thinks fit. I have doubts as to whether that provision allows the arbitrator to stay the arbitration until a security for costs order has been complied with but since the security was provided as ordered and the stay provision never took effect, this is immaterial. The security that was provided is being held by the arbitrator as stakeholder.

2. The Originating Motions

7. There were, originally, two originating motions issued by Guaranteed. They followed some months after the arbitrator had issued Order no 12 and then, subsequently, two interim awards whose cumulative effect had been to adjourn the hearing of the reference only one week before the appointed first day and to order Guaranteed to pay Taylor Woodrow's costs of and incidental to the adjournment. These were to be paid forthwith on an indemnity basis. The relevant costs were defined as being those wasted as a result of the adjournment and were to exclude any costs that would have been incurred in any event. These costs were to be taxed by him if not agreed and a stay of the arbitration was ordered until the taxed sums were paid in full. This order was initially made in Order no 12, dated 11 February 1997. The costs were taxed and Award no. 1, published on 20 May 1997, ordered that Guaranteed should pay a total of £8,261.88, inclusive of VAT, to Taylor Woodrow and a further £3,327.84 to him. The arbitrator's fees represented the fees incurred in dealing with matters which were rendered unnecessary by virtue of the adjournment and in preparing the Award and Order no 12. The arbitrator also directed that he would tax his fees for conducting the taxation and Taylor Woodrow's costs incurred in the taxation process and that the stay, originally ordered on 11 February 1997, would not be lifted until that second taxation had been completed and all sums resulting from the adjournment had been paid. He subsequently taxed these additional sums and published Award no 2, dated 28 July 1997. The first award was taken up by the parties but the second has not been, so the sums payable by virtue of Award no 2 are not known to the parties. Apart from £2,611.58 paid to the arbitrator by Guaranteed to enable it to take up Award no 1, the sums associated with the adjournment ascertained by the arbitrator have not been paid following these Awards. The arbitration remains stayed and the originating motions have followed.

8. The first originating motion, issued on 28 November 1997, sought to appeal various questions arising out of Award no 1. Guaranteed were dissatisfied with both the award of costs against it and with the quantification of those costs. Particular dissatisfaction was expressed with the fact that the arbitrator taxed the costs on an indemnity basis and that he included a significant sum within the sums awarded to Taylor Woodrow for its counsel's brief fee. This fee, in the sum that had been agreed following an agreed reduction to take account of the adjournment, had been allowed by the arbitrator's taxation. These and other complaints about the award were incorporated into the first originating motion. Leave to appeal was required and, given the lengthy delay in issuing the originating motion, an extension of time for issuing the notice of motion and for applying for leave to appeal were required. These applications and a cross-application to strike out the originating motion were heard by me on 13 February 1998. I dismissed the applications to extend time and this originating motion was, in consequence, dismissed with costs. This made it unnecessary to determine Taylor Woodrow's cross-application to strike out the originating motion.

9. The second originating motion sought an order under section 23(1) of the Arbitration Act 1950 to remove the arbitrator for misconduct and an alternative order under section 23(2) to remit Award no 1. There is a time limit for this second application and, since the originating motion had only been issued on 28 November 1997, leave to extend time was required. There is no time limit imposed on a removal application. At the hearing on 13 February 1998, counsel for Guaranteed, Miss Sarah Hannaford withdrew the remission application under section 23(2). I directed that the remaining application and Taylor Woodrow's cross-application to strike out the application as being vexatious should be heard together by me on 2 April 1998. On that occasion, it became clear that Guaranteed was seeking to widen its attack on the arbitrator with a further ground not yet pleaded. I adjourned the hearing, since time had in any event run out. At the resumed hearing, Guaranteed applied to amend the originating motion by adding this further ground. I ruled that I would give my ruling as to whether or not to allow the amendment in my judgment and, if I allowed the amendment to be made, I would also deal with the substantive ground.

10. The application makes a root and branch attack on the arbitrator's competence to conduct the reference and also alleges that the arbitrator has the appearance of being biased against Guaranteed. Removal is sought on both general grounds. In support of the application, Guaranteed relies on what are, on analysis, discrete complaints which are taken individually and cumulatively. These are concerned with the decision not to conduct a documents only arbitration, the decision to fix 17 February 1997 as the date of the first day of the hearing, the decision taken by the arbitrator at a meeting held on 31 January 1998 to confirm that date, the terms imposed on Guaranteed by the arbitrator when granting the adjournment, particularly the term imposing a stay on the reference until all sums he had ordered to be paid had been discharged in full, and the conduct of the arbitrator following Award no 1. With less force, complaint is also made about three further directions given by the arbitrator in January and February 1998. I will deal with each specific complaint in chronological order before dealing with the complaints in the round.

3. Procedural Matters

3.1 The Name and Identity of the Applicant

11. The originating motions and the arbitration are brought in the name of Guaranteed Asphalt (London) Limited (In administrative receivership). As I have recounted, the company is now in liquidation, the winding up order of the court and the appointment of the liquidator having occurred after the appointment of the Administrative Receivers who had been appointed under a power of appointment contained in the bank's debenture. According to Mr. Bates' letter dated 20 January 1997 to the Administrative Receivers, he appears to have been unaware that a winding up petition had been presented until being informed of that by Taylor Woodrow. The appropriate party in both the arbitration and both originating motions would appear to be *"Guaranteed Asphalt (London) Ltd,* (In liquidation).

12. The correct procedural position is set out in the Administrative Receivers' letter to Taylor Woodrow dated 21 January 1997. This states that: *"The right of action against your company is of course an asset of the company in receivership and is charged to the Bank under the terms of the mortgage debenture dated 13 April 1990. The said mortgage debenture appoints receivers as attorneys of the company with full power of substitution for the company in its name and on its behalf. This power of attorney is not revoked by liquidation and therefore we are able to proceed with the arbitration in the name of the company."*

13. This confirms that the arbitration and the originating motions are brought by the company in liquidation, albeit that the controlling parties are the Administrative Receivers of the mortgage and debenture. I was not made aware of any application to, or authorisation by, the Court for the arbitration or the originating motions to be commenced and carried on. No objection was taken by Taylor Woodrow to the apparent absence of these steps and I was informed by counsel for Guaranteed that neither the Insolvency Act, the relevant rules made pursuant to that Act nor the Rules of Court required an application to the Court or authorisation by the Court for permission to commence the arbitration since the administration of the company's assets, including the claims referred to arbitration, had preceded the winding up order. Since this motion is an incident of the arbitration, counsel also argued that no authorisation by the court was needed for it. I accepted these submissions.

3.2 The Position of the Arbitrator

14. The arbitrator is entitled to be a party to an originating motion seeking to remove him for misconduct even though he would usually decide not to participate in such proceedings. This is because the arbitrator's direct financial interest and professional reputation and professional integrity might be affected by such an application. The arbitrator was served with both the originating motion and the proposed amendment. He was served with the affidavits and their voluminous exhibits which have been filed in relation to the hearing of the originating motion, save that the paragraph in the first affidavie of Mr. Robert Jones,concerning the sealed offer, was deleted.

3.3 Without Prejudice Material

15. The principal affidavit sworn on behalf of Guaranteed referred to a without prejudice sealed offer that had been made by Taylor Woodrow at an early stage in the arbitration. The contents of this offer were summarised in a letter contained in the voluminous exhibit to that affidavit containing much inter-party correspondence as well as much of the parties' correspondence with the arbitrator. A second version of the affidavit, omitting the reference to this offer, was subsequently sworn and used at the hearing but the relevant letter remained in the exhibit to this amending affidavit.

16. In my view, given the nature of the application being made, Guaranteed is entitled to refer me to both the existence and the contents of the sealed offer. Ordinarily, both the arbitrator and the court may be informed of the existence of a sealed offer but not its terms. However, a court or arbitrator may be referred to the terms of a sealed offer in certain limited situations. I refer, particularly, to security for costs applications (see ***Parkinson (Sir Lindsay) & Co v Triplan Ltd.*** [1973] QB 609 and ***Simaan General Contracting Co. v Pilkington Glass Ltd.*** *[*1987] 1 WLR 516). Since a security for costs application is analogous to the application for a stay that the arbitrator was confronted with when making his costs order now being challenged by Guaranteed and since the terms of the sealed offer could, in the unusual circumstances of Taylor Woodrow's costs application, have been placed before the arbitrator when he was deciding whether or not to impose a stay, I have considered the terms of the letter which summarises Taylor Woodrow's sealed offer. I refer to why the arbitator could and should have had the terms of the sealed offer available to him when considering whether or not to impose a stay in more detail in paragraph 86 below.

4 Specific Complaints

4.1 The Type of Hearing

17. Guaranteed complains that the arbitrator originally ruled that the arbitration would be conducted as a documents only arbitration with no oral evidence or submissions. More than a year later he ruled that an oral hearing would be required, thereby causing much delay and additional cost to Guaranteed. This complaint is not borne out by the facts. It will be recalled that the parties accepted the arbitrator's suggestion that the arbitration should be conducted in accordance with the 1988 edition of the Arbitration Rules of the Chartered Institute of Arbitrators. Article 8.1 provides that each party has the right to be heard before the arbitrator, subject to the parties agreeing to a documents only arbitration. Guaranteed now suggests that, at the first meeting the arbitrator convened which was held on 22 May 1995, the arbitrator ruled that the arbitration would be conducted as a

documents only arbitration. This is not borne out by the terms of the directions issued after this meeting contained in Order no 1. This contains this direction:

"5.1 The conduct of this reference is to be reviewed on completion of Item 5 (service of a defence and counterclaim) either by correspondence or by a further meeting as may be considered appropriate at the time."

It would appear that Mr. Bates asked the arbitrator to rule that the arbitration would be a documents only arbitration and Taylor Woodrow's representative objected to this course. In the circumstances, the arbitrator declined to rule in favour of a documents only arbitration but left open the question of whether it should be transformed into a documents only arbitration until the close of pleadings since Taylor Woodrow might then have been prepared to change its position on this question. The arbitrator clearly had in mind the provisions of Article 5.1 of the Arbitration Rules which requires both parties' consent before the arbitration can be turned into a documents only one. The pleadings took some time to close and, in the meantime, in a letter dated 11 January 1996, Taylor Woodrow reiterated its objection to a documents only arbitration. When the arbitrator convened a further meeting on 22 May 1996, these objections were maintained and the arbitrator issued Order no 5, which contained a direction confirming that there would be a hearing in the arbitration.

18. Guaranteed argues that the arbitrator should have ruled in this way a year earlier, given the terms of Article 8.1 of the Arbitration Rules. However, the arbitrator did effectively rule in this way on that earlier occasion. The effect of his earlier direction was that the parties should plead their respective cases as if there would be a hearing but he would revisit the question of a documents only arbitration if both parties were prepared to accept such an arbitration in the light of the pleadings.

19. Guaranteed also argue that this suggested change of tack caused them additional expense because it had to replead its case. I do not accept that that was a consequence of Order no 1. Even if Guaranteed had pleaded its case originally on the basis of a documents only arbitration, despite the arbitrator's ruling which had the effect that the pleadings were to be prepared on a conventional basis, there was no need for Guaranteed to replead its case. Admittedly, a pleading for a documents only arbitration might have needed to be fuller than one for an arbitration in which there would be cross-examination. However, the fuller pleading could have been left to stand for an arbitration in which a hearing was to take place, even if a documents only arbitration had originally been envisaged by the pleader. It would only have been necessary to consider repleading the case if an oral hearing had originally been envisaged and, after the pleadings had closed, a documents only arbitration was decided upon by the parties.

4.2 Fixing the Date for the Hearing

20. Complaint is made that the arbitrator fixed 17 February 1997 for the date of the hearing and subsequently confirmed that date when it was obvious, or should have been obvious, that Guaranteed could not be ready for that date. The date was fixed by Order no 7, dated 14 October 1996. Guaranteed complained before me that this order was received *"out of the blue",* at a time when it was still preparing further particulars of the claim which had not yet been served. However, that complaint belies the previous procedural history of the reference. The arbitrator had, by Order no 5, dated 22 May 1996, fixed 23 September 1996 as the start of the hearing, albeit that that date was described in that Order as being provisional. However, Guaranteed then intimated the wish to amend its case and did so in a pleading served on 4 July 1996. Taylor Woodrow served an amended defence on 5 September 1996, having already intimated to the arbitrator that 23 September 1996 would not any longer be an appropriate date for the start of the hearing. It is clear that both parties and the arbitrator were proceeding, from early August onwards, on the basis that the September hearing dates would not be effective. When serving its amended defence, Taylor Woodrow suggested, in a covering letter, an amended timetable for the remaining stages of the reference, including a hearing in November 1996. It was in response to these developments that the arbitrator wrote to the parties on 14 October with the Order which set out a revised procedural timetable. Since Guaranteed had received a copy of Taylor Woodrow's earlier letter to the arbitrator, the arbitrator was within his rights to fix revised hearing dates without calling a further meeting. Furthermore, Guaranteed did not indicate that hearing dates in late February were premature once it had received the arbitrator's Order. This is hardly surprising. The parties could reasonably be expected to be ready for a hearing three months later, given the preparatory work that had already been undertaken in the eighteen months that the reference had been proceeding.

21. The absence of any complaint by Guaranteed, it is now argued, should not be held against it since Guaranteed was acting in the reference as the equivalent of a litigant in person. This was a surprising submission since Guaranteed was represented throughout by Mr. Bates who is a quantity surveyor and arbitration consultant of some experience. The principal affidavit sworn in support of this application was sworn by Mr. Robert Jones, Guaranteed's solicitor who had the conduct of Guaranteed's case in both motions. In it, Mr. Jones described Mr. Bates in these terms: *"Mr. Bates, who acted for [Guaranteed] in the underlying arbitration, is an experienced quantity surveyor with considerable experience of construction industry arbitrations."*

Thus, even if an arbitrator is required to conduct a reference differently when one of the parties is unrepresented from the way he conducts a reference when one of the parties is represented by a professional litigator, a proposition strenuously advanced by Miss Gough but not necessarily accepted by me, Guaranteed cannot take advantage of this doctrine. Guaranteed was represented throughout by a professional arbitration litigator and advocate whose lack of legal qualifications is irrelevant for this purpose. Mr. Bates cannot, at the same time, hold himself out as being sufficiently qualified and experienced to be allowed to represent Guaranteed in the

interlocutory stages of the reference and, at the same time, claim an indulgence on Guaranteed's behalf for any shortcomings in that representation which could not be claimed by Guaranteed if represented by somebody who is legally qualified.

22. In any case, the plain fact is that Mr. Bates and Guaranteed accepted, on receipt of the arbitrator's Order no 7, that 17 February 1997 was an appropriate date for the hearing to start. This was the only reasonable reaction that they could have had to that Order.

4.3 The Undertaking Given by Guaranteed's Counsel

23. Guaranteed complains that the arbitrator extracted an undertaking from its counsel at an interlocutory hearing held on 31 January 1997 whereas no undertaking was sought from Taylor Woodrow at the same meeting despite there being circumstances that suggested that Taylor Woodrow should have been subjected to a similar requirement.

24. Taylor Woodrow was seeking an undertaking from Guaranteed that Mr. Bates would not make direct contact with any of its personnel other that Mr. Foster. The circumstances giving rise to this application were that Mr. Bates, in early January 1997, contacted Taylor Woodrow's accounts department direct and asked for a copy of certain documents. The procedure of making direct contact with the accounts department for the purpose of obtaining copies of disclosed or disclosable documents was said by Mr. Bates to have become an acceptable procedure to Taylor Woodrow since it had been resorted to by him, with Taylor Woodrow's acquiescence and apparent approval, on previous occasions. However, Mr. Foster had since taken over the conduct of Taylor Woodrow's defence and the relationship between the parties' respective representatives had become acrimonious, which might explain why Taylor Woodrow was now insisting that the usual channel of communication between each party's representative in the arbitration should be re-established.

25. Taylor Woodrow aired its complaint with the arbitrator at the interlocutory hearing. Guaranteed was, on that occasion, represented by counsel who had been instructed under the Bar's direct professional access rules by Mr. Wren, at Mr. Bates request. Mr. Wren was a quantity surveyor who is often instructed by Mr. Bates to act as a professional witness for clients of Mr. Bates. The reason for instructing counsel to appear for Guaranteed on this occasion was because of the controversial nature of some of the applications it was known Taylor Woodrow would be making at this hearing.

26. According to Mr. Foster, he asked the arbitrator to extract an undertaking from Guaranteed not to approach any member of Taylor Woodrow except the relevant representative conducting this reference on its behalf. However, the arbitrator expressed the view that it would not be appropriate for him to get involved in such matters and that he had no power to deal with this situation in the way suggested. Notwithstanding that, counsel for Guaranteed then offered to provide a professional undertaking that no approach would be made to Taylor Woodrow except through its legal department. The arbitrator stated that he would have no power to deal with any breach of the undertaking but he would record it in correspondence. This undertaking was subsequently recorded in Order no 8, issued after the hearing, as follows:

"I record the following matters which were dealt with at the interlocutory hearing but upon which an Order is inappropriate:

In respect of the first application of [Taylor Woodrow] Mr. Anderson [counsel for Guaranteed] agreed to give his professional undertaking on behalf of [Guaranteed] that no approach would be made to [Taylor Woodrow] other than through [Taylor Woodrow's] legal department. Mr. Bates indicated his assent."

27. It is now suggested by Guaranteed that it had also applied for an order prohibiting Taylor Woodrow from making any direct approach to the Administrative Receivers or the directors and other personnel of Guaranteed. This followed a direct approach that had been made in a letter dated 10 January 1997 that had been written by Mr. Foster and which had been sent to Mr. N. Taylor in his capacity as a director of Guaranteed. The letter alleged that Mr. Taylor was a funder of Guaranteed's costs in the arbitration against Taylor Woodrow and had funded the £18,000 which was required to be provided as security for Taylor Woodrow's costs pursuant to the arbitrator's Order no 2. The letter indicated an intention to pursue any funder of the arbitration for any costs order made in Taylor Woodrow's favour. Mr. Foster had also written directly to the Administrative Receivers on 17 January 1997 indicating his view that they lacked the authority to start and continue the arbitration proceedings and indicating an intention of making them personally liable for Taylor Woodrow's wasted costs. However, Guaranteed made no formal application at the hearing on 31 January 1997. As with Taylor Woodrow's application, the arbitrator would have had no power to require an undertaking of the kind it is now suggested was being sought by Guaranteed to prevent such direct approaches being made by Mr. Foster.

28. Thus, the arbitrator did not act partially with regard to these somewhat petulant exchanges between the parties representatives. He correctly indicated that he had no power to require an undertaking in the circumstances explained to him, and declined to act at all, save to record, at Guaranteed's request, Guaranteed's counsel's undertaking which had been voluntarily proffered. Furthermore, he did not consider the merits of either Taylor Woodrow's misconceived application for an undertaking nor of any similar cross-application from Guaranteed, if, which seems doubtful, one was ever intimated.

4.4 The Stay Ordered on 21 January 1997

29. The arbitrator wrote to the parties on 21 January 1997 and ordered a stay of the arbitration until matters brought to his attention by a letter of Mr. Bates dated 20 January 1997 had been resolved. Mr. Bates' letter had

drawn the arbitrator's attention to Taylor Woodrow's suggestion to the Administrative Receivers that the arbitration was being pursued without authority and to Mr. Bates' subsequent suggestion to the Administrative Receivers that: *"Strictly by the letter of the law, Taylor Woodrow's assertions are correct in as much as you, as administrative receivers, should have sought permission from the Official Receiver prior to instigating or indeed defending any legal proceedings. ..."*

The letter and its contents came to the arbitrator as a bolt from the blue and his reaction, to impose a stay pending clarification of the situation, was a reasonable response. In fact, both parties continued to act as if the arbitration was validly constituted since both continued to make arrangements for a contested discovery application to be made to the arbitrator by Guaranteed. In consequence, the arbitrator lifted the stay by a letter dated 24 January 1997.

30. The arbitrator does not have a general power to order a stay of the arbitration. However, when a possible irregularity is drawn to his attention which, if made out, would have the effect that the arbitrator would have no jurisdiction to proceed with the reference, he must be within his rights to advise the parties that the reference will not proceed pending clarification of his jurisdiction. This is not to impose a stay in the conventional sense since a stay, if ordered, is a procedural order made by a tribunal, acting as part of its determination of a dispute within its jurisdiction, to ensure enforcement of an earlier order or so as to prevent further determination of that dispute. What the arbitrator was doing was to require his potential lack of jurisdiction, brought to his attention by Guaranteed, to be investigated before any further costs were incurred by anyone connected with the reference. The *"stay"* was only in force from 21 to 24 January 1997, was a reasonable response to an unexpected difficulty and did not interrupt preparations for either the further interlocutory hearing or the full hearing due to start on 17 February 1997. Had any difficulty been caused to Guaranteed by the *"stay"*, the time to raise this would have been at the meeting with the arbitrator held on 31 January but, instead, Guaranteed's counsel stated that Guaranteed would be ready for the hearings then due to start in only 17 days time.

4.5 The Interlocutory Hearing on 31 January 1997

31. I have already dealt with the complaint arising from this meeting concerned with the undertaking provided by Guaranteed's counsel. Complaint is also made that the arbitrator ordered Guaranteed to disclose certain correspondence and confirmed that the hearings would start on 17 February 1997.

4.5.1 Discovery

32. Taylor Woodrow had become somewhat exercised as to whether the Administrative Receivers retained authority to pursue the arbitration and as to who was funding Guaranteed's costs and expenses. This second concern arose because Guaranteed was insolvent and the security provided in 1996 had been paid by means of a personal cheque drawn by Mr. N. Taylor. There were three interlocking reasons for these enquiries. Firstly, if the Administrative Receivers had no authority to maintain the arbitration proceedings, that would constitute a complete defence to the claim and would render the arbitration nugatory. Secondly, Taylor Woodrow wanted to build up its potential application for any costs ordered to be paid to it to be paid by solvent parties who had been funding the arbitration. Thus, it wanted to find out who was providing that funding. Thirdly, Taylor Woodrow was seeking to put pressure on Guaranteed and those controlling the arbitration to settle the arbitration. Taylor Woodrow had made a substantial sealed offer by a letter dated 28 March 1996 and appeared concerned to seek to persuade those with a controlling interest in Guaranteed's conduct of the arbitration to accept a settlement at a level appropriate to that offer now that the hearings were looming.

33. In pursuit of these purposes, Taylor Woodrow had sought from Guaranteed, in correspondence with Mr. Bates, disclosure of correspondence passing between *"the claimant"* and BDO Hayward, the accountants providing the Administrative Receivers. It appeared that the reference to *"the claimant"* in Taylor Woodrow's request for specific discovery in that correspondence was a reference to the company, the directors of the company and to Mr. Bates, all of whom were potential recipients of any such correspondence, had there been any. Some of this correspondence might be relevant and disclosable in relation to the question of the Administrative Receivers' authority to pursue the arbitration at all. I am using the term "disclosable" in its technical sense in which it refers to documents which are relevant. These documents must be disclosed, even if privileged, and the grounds upon which privilege is claimed must be identified. If privilege is claimed, the documents may not be inspected or copied unless the claim for privilege is dropped or a further order requiring inspection facilities to be granted is made by the arbitrator.

34. The question of seeking costs orders directly from those funding Guaranteed's case was not one giving rise to a current issue in the arbitration and documents whose contents were only relevant to that issue would not be disclosable. This was because the issue of who was funding Guaranteed's proceedings would only arise once an order for costs had been made against Guaranteed and would then only arise if the arbitrator was directly involved in an application that these funders should pay the costs order already made. Moreover, even if relevant to a current issue in the arbitration, the contents of communications between the Administrative Receivers and Guaranteed could, but not necessarily would, be covered by litigation privilege if the addressee or sender was Mr. Bates. If the correspondence consisted of the giving of instructions in connection with, or the communication of information about, the arbitration, Mr. Bates' role was as Guaranteed's representative pursuing its case in the arbitration. This role is obviously equivalent to that of a litigation solicitor and the law now recognises, for limited purposes, a litigation privilege in communications between a client and its representative in legal proceedings whether the representative be legally qualified or not.

35. Thus, Taylor Woodrow's application needed to be considered with some care by both Guaranteed and the arbitrator who was entitled to expect help from its representative on the difficult issues raised by the application. At the hearing on 31 January 1997, the arbitrator does not appear to have been addressed by Guaranteed's then counsel, the late Mr. Anthony Anderson, on the difference between documents concerned with the Administrative Receivers' authority and those concerned with the funding of the arbitration proceedings nor as to the ambit of litigation privilege. This is particularly surprising given that Taylor Woodrow had put forward two questionable submissions in correspondence before the hearing and at the hearing, namely that the possible future application for costs against the Administrative Receivers was a current issue in the arbitration and that litigation privilege only attached to communications to and from those who are legally qualified.

36. Notwithstanding the somewhat confused basis of Guaranteed's objection to the application, the arbitrator proceeded cautiously. Initially, he made this order following the hearing:
"7 [Guaranteed] shall provide to [Taylor Woodrow] copies of all relevant correspondence passing between [Guaranteed] and Messrs. BDO Stoy Hayward. If the answer to this Order is that there are no such documents, [Guaranteed] is to swear an affidavit to that effect."

37. Taylor Woodrow challenged this order in a letter dated 3 February 1997. This letter sought an amendment to the order because: *"It is our contention that BDO Stoy Hayward are the claimant and as such the order should be phrased as being relevant documents in the possession of BDO Stoy Hayward."*

This amendment widened the ambit of the application since it covered not just correspondence with *"the claimant"* but was now being extended to cover all documents in BDO Stoy Hayward's possession. The arbitrator, faced with the initial questionable application, Guaranteed's somewhat confused response and Taylor Woodrow's subsequent change of tack, clarified his intentions in a letter dated 5 February 1997 as follows: *"With regard to the clarification sought on point 7 of my Order no 8 I am not prepared to require Messrs BDO Stoy Hayward to give the requested discovery on the basis of the submissions made to date. I am prepared to make an Order on this point upon receipt of written submissions. My Order no 9 attached deals with the procedure for obtaining that Order."*

The attached Order no 9 required a written application to be made by 6 February 1997 and for a response from Guaranteed by 7 February 1997. Taylor Woodrow confirmed that the discovery was sought because of the documents' relevance to the issue as to who had authority to pursue the arbitration and as to the identity of Guaranteed's funding sources. Taylor Woodrow sent a submission in a letter of 6 February 1997 but no response was ever sent by Guaranteed since, by 6 February, it was caught up in applying for an adjournment of the hearing.

38. It follows that the arbitrator was dealing with a difficult and somewhat confused application and with the equally confused objections to it in a careful and pragmatic way. No ruling adverse to Guaranteed had been made by the time that this originating motion was launched and the matter remains for resolution.

4.5.2 Confirming the Hearing Dates

39. At the hearing on 31 January 1997, the arbitrator considered whether the hearing should proceed on 17 February 1997. This consideration occurred following his consideration of Guaranteed's application for further discovery from Taylor Woodrow, namely documents relating to Taylor Woodrow's applications to the main contract quantity surveyors, Northcroft Neighbour and Nicholson, *("Northcorft")*, for interim payments and to the interim payments received by Taylor Woodrow. This request had been refused and Guaranteed pursued an application for these documents on 31 January 1997, which the arbitrator allowed by ordering Taylor Woodrow to provide most of the documents being sought. Guaranteed had intimated to the arbitrator in a letter dated 27 January 1997, that, even if the arbitrator ruled in its favour and ordered that these documents should be disclosed, the hearing could proceed on 17 February 1997, albeit that Guaranteed might need additional hearing days to deal with what were described as *"the resultant inferences"* to be drawn from these additional documents.

40. At the meeting, Taylor Woodrow indicated a wish to amend its defence. I was not informed what, if anything was said to the arbitrator by way of explanation as to what the subject-matter of the proposed amendments might be. The arbitrator, in the absence of any draft of the proposed amendments, ordered that Taylor Woodrow's application should be delayed until the draft amendments were made available. He then considered the future conduct of the reference and the appropriateness of maintaining the hearing dates starting on 17 February 1997 on the basis of the existing pleadings. Although Guaranteed now complains that the arbitrator continued to press towards a February 1997 hearing despite the intimation of an amendment application, there can be no reasonable criticism of the arbitrator dealing with the reference on the basis of the existing pleadings when no proposed amendment had been made available to him.

41. The arbitrator then gave directions on outstanding procedural and administrative matters with the intention of starting the hearing as planned. In this he was encouraged by counsel for Guaranteed and no immediate adverse comment was made by Guaranteed. This was not surprising given the many complaints previously made by Guaranteed that Taylor Woodrow appeared to be dragging its feet and jeopardising the hearing date. By way of example, Guaranteed had written to the arbitrator on 27 January 1997 in these terms: *"... we are indeed desirous of continuing with the hearing on 17 February, ... From the outset of the proceedings, [Taylor Woodrow] has not had the stomach for a fight, choosing to use every means at its disposal to postpone matters ...".*

42. It follows that the arbitrator cannot be faulted in ruling that the hearing dates should be maintained. Guaranteed obviously wanted to keep them and the only reason it put forward as potentially affecting those dates was what was described, in a letter from Guaranteed to the arbitrator dated 27 January in the regrettably unrestrained language frequently adopted by Mr. Bates, as *"[Taylor Woodrow's] recently escalated campaign of dirty tricks"*. In the context of the correspondence, this was a reference to the possibility that late disclosure of the valuation documents, ordered to be produced at the meeting on 31 January 1997, might delay the experts' quantum reports and might also belatedly throw up documents whose contents might necessitate lengthier cross-examination than could be accommodated in the time set aside.

4.6 Unless Order - 5 February 1997

43. Complaint is made that the arbitrator made an unless order on 5 February 1997 with regard to Guaranteed's witness statements. The history of this aspect of the arbitration involves a consideration of the chronology concerning these statements. When the arbitration hearing was refixed by the arbitrator on 14 October 1997 by Order no 7, he directed that witness statements should be exchanged on or before 18 November 1996. On 12 November 1996, Taylor Woodrow wrote to Guaranteed and asked for an agreement to amend this and other dates because it had not had sufficient time to prepare the witness statements, largely because of delay caused by preparing further and better particulars of its defence and with making contact with witnesses no longer working for Taylor Woodrow. Mr. Bates agreed to a revised date of 10 January 1997. Neither party was ready on that date and, at the interlocutory hearing on 31 January 1997, the arbitrator reviewed the whole of the remaining timetable. He directed that witness statements would be exchanged on 5 February 1997. No suggestion was made that Guaranteed could not meet that date when it was proposed by the arbitrator at the meeting.

44. On 4 February 1997, Guaranteed wrote to the arbitrator suggesting that the hearing, which was to be confined to cross-examination, could take up to ten days. This was a reply to the arbitrator's letter of 2 February seeking confirmation from the parties that 5 days would suffice for the hearing since he had only allocated that period for the hearing and did not want the hearing to be adjourned part heard. The letter suggested that 5 days would be sufficient since the arbitrator envisaged that the limited examination-in-chief and any cross-examination for each of the ten witnesses would not occupy more than half a day per witness. The following day, on 5 February 1997, Guaranteed wrote again stating that each witness would take a day in being examined and cross-examined, that the hearing should be set for ten days and that, in the light of these observations, *"we no longer consider it appropriate to exchange witness statements at this juncture"*. In a second letter of 5 February 1997, this withholding of the service of witness statements was said to be on the advice of counsel.

45. Taylor Woodrow contacted the arbitrator and sought an order that Guaranteed should be debarred from adducing witnesses of fact or, alternatively, that the hearing should be adjourned with Guaranteed paying the costs of and incidental to that adjournment on an indemnity basis.

46. This was the background to the arbitrator making his Order no 9, dated 5 February 1997 that provided that unless the witness statements were exchanged by Guaranteed by 9.00 AM on 6 February 1997, the hearing would be adjourned and the costs would be paid for by Guaranteed on an indemnity basis. Not surprisingly, Guaranteed complied and exchanged its witness statements within the requirements of the order.

47. Guaranteed's complaint about this order is hard to divine. The conclusion I draw from the chronology I have set out is that the arbitrator found himself with a party who was seeking unilaterally to alter the procedural timetable he had carefully structured, with that party's assistance, only a few days before. Guaranteed was seeking to take this step, not because the witness statements were said to be incomplete but because Guaranteed considered that Taylor Woodrow had defaulted in its discovery obligations and because the hearing might take longer than the allotted time. The default as to discovery could not have affected the preparation of Guaranteed's factual statements and since the arbitrator was the master of how long would be allowed for cross-examination and had ruled that the appropriate time would be half a day per witness, it was not for Guaranteed to hold up its witness statements on the grounds that one day per witness would be required. The arbitrator was entitled to take the view that Guaranteed was seeking to use the non-service of witness statements, which it appeared had already been finalised, as a means of securing an adjournment for other, unacceptable, reasons. Thus, no objection can be raised to his order that either the statements be served forthwith or there be an adjournment at Guaranteed's expense.

3.6 Refusal of an Adjournment on 8 February 1997

48. Guaranteed applied for an adjournment of the hearing by a letter of 7 February 1997. This was sought in a remarkable letter which imperiously informed the arbitrator: *"Notwithstanding Mr. Foster's pleading for the hearing to continue on the 17th, we shall not be ready for the reasons stated and therefore your deliberation will obviously be as to the allocation of costs."*

    The ostensible reason put forward for Guaranteed's non-readiness was the continuing absence of the documents concerned with Taylor Woodrow's applications for payment and with interim payments. These documents were undoubtedly relevant and their disclosure had been ordered on 31 January 1997. However, Taylor Woodrow had indicated that they were no longer in its possession. It is true that this was done in a somewhat off hand manner, namely in a letter on 4 February 1997 which merely stated that: *"We have conducted a thorough search of our archives to locate the documents required by clause 3 of the said order [dated 2 February 1997]. We would report that no documents within the ambit of clause 3 have been located."*

49. This was a serious omission since the documents were highly relevant. The terms of Taylor Woodrow's applications for payment for Guaranteed's asphalt work, and what had been paid by the employer specifically for asphalt work, would have a direct bearing on the valuation of Guaranteed's work. The documents evidencing these matters had direct relevance to the efficacy of the defence that nothing more was due to Guaranteed, who was the only asphalt sub-contractor. This relevance was particularly pertinent since there was evidence that Taylor Woodrow had applied for payment for a total of £345,000 for asphalt work but was contending in the arbitration that Guaranteed was only entitled to a total payment of £264,000, the total sum already paid. The letter of 4 February was an unsatisfactory way of replying to the arbitrator's order for specific discovery since Taylor Woodrow had been ordered to disclose these documents and was therefore required to explain in detail what had happened to them if they were no longer available. The normal practice would be for the explanation to be given in an affidavit sworn by a director with personal knowledge of the facts. Instead, the writer of the letter appeared to think that the indication given to the arbitrator at the meeting that the documents should not be disclosed because they were not available was a sufficient reason not to provide a full explanation as to why they were not available despite the arbitrator's subsequent order for specific discovery.

50. The arbitrator obviously appreciated the significance of these documents and the significance of Taylor Woodrow's initial refusal to disclose them followed by the somewhat dismissive explanation for not disclosing them once he had ordered their disclosure. He also appreciated that Guaranteed might have to apply to the High Court for a subpoena duces tecum, directed to Northcroft, the quantity surveyors responsible for the main contract valuations with whom Taylor Woodrow had corresponded, whose files might be expected to contain copies of at least some of the missing documents. He therefore made this order in response to the adjournment application, by Order no 10, dated 8 February 1997:

> *"2. ... any additional matters that have to be dealt with as a result of the additional discovery required by my Order no 8 are to be the subject of supplementary statements and reports and cross-examination as a result of those supplementary statements and reports is to occur at a reconvened hearing at a date to be set once the additional discovery is complete. This reconvened hearing is to be limited to matters arising in respect of the further discovery only."*

51. This order would accommodate any specific discovery application to be made by Guaranteed for orders directed to Taylor Woodrow and for any appropriate application to the High Court for discovery from third parties. It also removed the stated need for an adjournment since the hearing in February would have been concerned with all issues save for those arising out of a consideration of the critical Northcroft documents if and when they were received. The sole need for an adjournment had been stated by Guaranteed to be related to the absence of these documents.

52. This manner of dealing with the application was one fully within the range of reasonable procedural responses open to the arbitrator and, in the circumstances, was wholly reasonable. It balanced the need to avoid wasting costs by a late adjournment of the whole hearing with the need for fairness to Guaranteed faced with the unexpected and late realisation that Taylor Woodrow were not to disclose highly material documents.

5 The Adjournment and Costs Orders

5.1 Guaranteed to Pay Taylor Woodrow's Costs In Any Event

53. The prelude to the arbitrator's order adjourning the hearings was Guaranteed's letter dated 10 February 1997. This reads, in part, as follows:

> *"1. As stated in our recent letter [dated 7 February 1997 seeking an adjournment which led to the arbitrator's Order for Directions no 10 refusing the application but ordering that evidence and cross-examination arising out of the documents he had ordered Taylor Woodrow to disclose should be heard on a later occasion], we are not in a position to be ready for the 17th. We do not have the resources of [Taylor Woodrow] and quite simply do not have sufficient time to brief counsel and prepare the bundles and fix a venue. As for the experts reports, at the time of writing, Mr. Wren [Guaranteed's expert quantity surveyor] has not completed his report and is in court all day today. Moreover he informs us that as matters stand neither experts reports are liable to be of any significance whatsoever. Apparently [Taylor Woodrow's] expert is not in possession of a considerable amount of documentation and, notwithstanding that we have indicated to Mr. Wren that would not go ahead on the 17th, he also wishes to see the outcome of our request for specific discovery before concluding.*
>
> *2. As it would appear that you will now be minded to find against us, with regard to costs, we must repeat our request that disbursement be set aside at least until conclusion of the matter of discover."*

54. The following matters need to be appreciated in putting this letter in context:

1. Mr. Bates' reference to the arbitrator being already minded to find against Guaranteed on the question of costs is a reference to the arbitrator's previous order, made on 5 February 1997, that if Guaranteed failed to serve its witness statements by the following day, the hearing would be adjourned and Guaranteed would pay the costs of the adjournment on an indemnity basis. However, the witness statements were served as ordered, the adjournment did not take effect and nothing contained in the Order, nor drawn to my attention, indicates that the arbitrator had given any indication of how he would deal with the costs occasioned by an adjournment arising from this or any other application.
2. The date for the exchange of witness statements had been refixed at the hearing on 31 January for Noon on 12 February 1997 and Guaranteed was ordered, at the same time, to produce an index of the documents for the hearing bundle to Taylor Woodrow by Noon on 10 February 1997.

3. The application for specific discovery referred to was one that had not yet been made to the arbitrator. Guaranteed, following Taylor Woodrow's intimation that the documents that it had been ordered to disclose could not be found, had indicated to Taylor Woodrow that it required an affidavit from Taylor Woodrow's auditor as to the whereabouts of the documents and also wanted copies of such of the documents as were in Northcroft's possession to be copied and provided by that firm. The arbitrator had indicated in a fax to the parties dated 9 February 1997 that he had not received any application for an order requiring an affidavit from the auditors and that he had no power to require discovery from Northcroft. The arbitrator had learnt of these requirements of Guaranteed, which it had only addressed to Taylor Woodrow, from being sent copies of the relevant inter-party correspondence by Guaranteed.
4. The arbitrator had invited Taylor Woodrow to fix the venue in a letter to the parties dated 7 January 1997. However, he had asked the parties to agree amongst themselves who should make the arrangements and, given that Mr. Bates stated, in the letter seeking an adjournment, that he had not had time to do this, I infer that the parties had agreed that Guaranteed should make the arrangements. This was certainly the arbitrator's understanding since he had reminded the parties on 2 February 1997, in his letter enclosing Order no 8, that Guaranteed was arranging an appropriate hearing venue in central London. This statement was not contradicted by Guaranteed in subsequent correspondence.
5. The arbitrator had also directed Guaranteed to prepare a list of issues for determination which should be notified to Taylor Woodrow in advance of the hearing, that arrangements should be made for the experts to produce a joint open report setting out the matters upon which they both agreed and disagreed, that Guaranteed should prepare the hearing bundle, that drawings, documents, figures and photographs should be agreed as far as possible and that each party should inform the other, before the hearing, of the nature of their representation at the hearing. In context, this last requirement was to be complied with sufficiently before the hearing to enable the opposing party to arrange similar representation itself if it was so minded.

55. Overriding these factors was the fact that Guaranteed had not raised with the arbitrator at the hearing on 31 January 1997 its resource difficulties, nor its other difficulties concerned with preparing hearing documentation, finalising its expert's report or finding a venue. Equally, these difficulties were not raised as part of its adjournment application made on 7 February 1997. Moreover, the desirability of postponing the hearing until the Nothcroft Neighbour documentation was available had been considered and rejected by the arbitrator when issuing Order no 10, on 8 February 1997. There had been no suggestion by Guaranteed that the hearing should not take place until this documentation was available until Guaranteed's letter to the arbitrator dated 6 February 1997.

56. This application was responded to by Taylor Woodrow in a letter dated 10 February 1997. The letter set out reasons why the application should be refused. The letter then continued:

"Should you be minded to grant an adjournment then we would request the following order as to costs:

'That the costs of and incidental to the adjournment be paid by [Guaranteed] in any event, forthwith on an indemnity basis, such costs to be taxed if not agreed AND that this arbitration be stayed until such time as such costs so taxed or agreed have been paid in full.

We note that [Guaranteed] concedes that they will in all probability have costs awarded against them. In respect of the specific order we require we would like to make the following points:

1. *As we previously stated in our letter of 6th February, we have previously requested that [Guaranteed] confirm whether they wished to proceed with the hearing on the 17th February. [Guaranteed] has allowed [Taylor Woodrow] to incur costs on the basis of the hearing proceeding when, it their argument is to be accepted, they must have known that they were not in a position to proceed.*
2. *[Guaranteed] breached three of the time limits imposed by Order 8 being in relation to witness statements, experts reports and the bundle index. On no occasion did [Guaranteed] give [Taylor Woodrow] prior notice that they would not be able to meet these deadlines and it was left to [Taylor Woodrow] to ascertain that the documents would not be available. As a result, any opportunity to mitigate costs which might have been occurred had earlier notification been forthcoming was lost.*
3. *At the hearing of the 31st January, no indication was given by [Guaranteed] that they might not be in a position to proceed on the 17th February, a timetable was set and the parties were required to adhere to it. [Taylor Woodrow] made clear at the meeting that the timetable gave very little margin to either party yet [Guaranteed] still did not voice concerns about their ability to be ready for the hearing.*

57. The letter also asserted that Taylor Woodrow was ready for the hearing, by which was meant that its expert's report was ready for exchange, its index of documents was ready and it would have no problem ensuring that counsel would be instructed on its behalf who would be ready to start cross-examining Guaranteed's witnesses on 17 February 1997.

58. Having considered these matters, the arbitrator sent out Order no 11, dated 11 February 1997 which adjourned the hearing and gave directions as to how submissions as to costs should be prepared and served. In his covering letter, the arbitrator stated that the procedure dictated by the Order was intended to apply to Taylor Woodrow's application for a stay of the arbitration and that, because the stay and the matters relating to it were of importance, he should make a reasoned award. The parties' comments as to this proposal were also invited.

59. The arbitrator considered the parties' submissions sent as a result of this order and, in Order no 12, dated 11 March 1997, directed that the costs of and incidental to the adjournment should be paid by Guaranteed forthwith on an indemnity basis, that such costs should be taxed if not agreed, that such costs should exclude any costs that would have been incurred in any event and that the reference should be stayed until such time as such costs so taxed or agreed were paid in full.

60. The submissions lodged by Guaranteed are lengthy but do not address, to any extent, the principal reasons put forward by Taylor Woodrow in its previous letter from which I have already quoted, as to why the costs order it sought should be made. In summary, Taylor Woodrow had focused on Guaranteed's conduct at and following the critical procedural review meeting held on 31 January 1997. Its argument can be interpolated as follows:

1. Guaranteed could and should have drawn to the arbitrator's attention at that hearing that it could not be ready for the hearing on 17 February because of resource difficulties and the unreadiness of its witness statements and expert's report and all other matters causing delay. The cause of these difficulties was immaterial. The arbitrator was holding an arbitration management meeting at which each party owed a duty to the arbitrator and the opposing party to explain frankly and candidly whether it could be ready. Even if the inability to be ready was wholly the fault of Taylor Woodrow, Guaranteed should have explained that difficulty and asked for the hearing to be adjourned. It was, or should have been, evident to Mr. Bates at that meeting that Guaranteed would not be ready. Had this been explained to the arbitrator then, the hearing would have been adjourned at that meeting and the costs subsequently incurred would have largely been avoided.
2. The matters of which Guaranteed complained, including difficulties caused by any late or non-disclosure of relevant documents by Taylor Woodrow, were all apparent on 31 January 1997. Nothing had happened since 31 January that could be said to have transformed the situation from that which existed on 31 January 1997.

61. Guaranteed's submissions recite its complaints about Taylor Woodrow's conduct prior to 31 January but do not explain why it did not explain to the arbitrator on 31 January that it could not be ready for a hearing on 17 February because of the delays it had suffered as a result of that conduct nor why it did not refer to all the preparation difficulties it was then experiencing. A difficulty may have been that Guaranteed was represented at the meeting by counsel instructed by, and appearing with, Mr. Wren, althogh Mr. Bates was also present. However, this is surmise on my part, Guaranteed did not itself provide an explanation. The submissions do not explain why the witness statements were delayed by the matters complained of, why the expert's report, on all matters other than those covered by the undisclosed documents, had not been finalised, what the practical effect of lack of funds had been on the preparations being made for the hearing, why the trial bundles had not been prepared in January and why no venue had been arranged.

62. The arbitrator then issued Order no 12, dated 11 February 1997 which provided: *"The costs of and incidental to the adjournment shall be paid by [Guaranteed] forthwith on an indemnity basis, such costs to be taxed if not agreed. These costs shall be those wasted as a result of the adjournment and shall exclude any costs that would have been incurred in any event."*

63. The arbitrator did not give reasons for making this costs order, the reasons in the subsequent Award being solely concerned with the quantification exercise that that order necessitated. However, in the light of the factors that I have referred to, he was clearly entitled to conclude that the cause of the adjournment was Guaranteed's failure, on 31 January, to explain its lack of readiness and its allowing the arbitrator to confirm the February hearing dates. This was coupled with Guaranteed's failure to put forward subsequently any sustainable reason justifying its assertion that the need to adjourn was caused by Taylor Woodrow's conduct. Moreover, Guaranteed did not seek to explain why it had not drawn attention to its lack of readiness on 31 January, nor why it had not explained the full extent of these difficulties when seeking an adjournment in its letter of 7 February.

64. In those circumstances, there is no basis for impugning the arbitrator's decision that Guaranteed should pay Taylor Woodrow's costs of and incidental to the adjournment in any event. It was well within the ambit of what could be regarded as reasonable for the arbitrator to conclude that the hearing should have been adjourned on 31 January, that the failure to adjourn it then was attributable to Guaranteed and that the costs incurred since then should be paid by Guaranteed in any event.

5.2 Costs on an Indemnity Basis

65. Guaranteed argued that it was wrong in principle to order that the costs should be paid on an indemnity basis. Guaranteed's arguments as to costs proceeded on the basis that the arbitrator was required to apply the same principles concerned with taxing costs as would be applied by a judge of the High Court applying the principles enshrined in Order 62 of the Rules of the Supreme Court. Thus, it was argued, the principles associated with the award of indemnity costs by the High Court applied to an arbitration. However, by the terms of the Article in the arbitration rules applicable to this arbitration, the arbitrator has the power to order in his award that:
"16.2 ... all or a part of the legal or other costs of one party shall be paid by the other party."

66. In applying this rule, the arbitrator is entitled to follow whatever procedure he regards as appropriate, subject to the overriding requirements of fairness and natural justice. In ruling that he would award indemnity costs, the arbitrator was clearly doing no more than indicating that he would apply an approach to the evidence adduced as to the costs incurred by Taylor Woodrow which would be analogous to the approach adopted by the High

Court when taxing costs on an indemnity basis. In other words, he would place the onus on Guaranteed to show that any item of costs was unreasonable in amount or unreasonably incurred rather than resolving any doubt in favour of Guaranteed. However, the arbitrator is not confined to adopting this standard to the situations where the High Court would order indemnity costs.

67. Thus, so long as the decision to adopt this standard of proof was not perverse, the arbitrator's use of it cannot be faulted. In fact, on the view of Guaranteed's conduct he had formed, such an approach is eminently sustainable. Given that Taylor Woodrow had incurred considerable costs in a short period of time due to Guaranteed's clear disregard of its duty to the arbitrator when given the opportunity, on 31 January 1997 to agree to an adjournment of the hearing, the arbitrator cannot be criticised for deciding to adopt an approach to taxation which enabled any doubts to be resolved in Taylor Woodrow's favour. Given that the costs being taxed were those incurred in a narrow window of time between the end of January and mid-February, the difference between the two approaches would, in any event, have been small or even non-existent.

5.3 Immediate Taxation

68. The arbitrator clearly decided that the relevant costs should be ascertained and paid forthwith. With hindsight, given the protracted process that that taxation involved, it might have been preferable for the arbitrator to assess a sum at that stage, order that sum to be paid on account and then leave taxation to a later stage. However, the arbitrator cannot be faulted in deciding on an interim taxation. The power to order and conduct such a taxation is available to the High Court and is used in similar circumstances. An immediate taxation of costs is a concomitant, in many cases, of an immediate costs order in both High Court proceedings and in arbitration references.

5.4 Interim Award

69. The arbitrator is criticised for deciding to publish the result of his taxation in an interim award. It is unusual to publish an interlocutory costs order in an interim award, as the arbitrator himself recognised. However, there is no procedural irregularity in doing so. There are two consequences of such a decision which make the decision both understandable and readily supportable.

70. Firstly, the arbitrator was able to proceed to an immediate taxation. Article 16.2 only allows the arbitrator to tax a party's costs as follows: *"The Arbitrator has power to order in his award that all or a part of the legal or other costs of one party shall be paid by the other party. The Arbitrator also has power to tax those costs ...".*

Thus, unless the arbitrator published his costs order as an award, he could not have taxed the costs at that stage.

71. Secondly, the costs order could only be summarily and speedily enforced by the High Court if it was contained in an award. An award can be registered as a judgment and enforced without further ado, a costs order which was not an award could only be enforced following an action and court judgment. There is a marginal procedural and costs advantage in enforcing an award as a judgment compared with bringing an action on a costs order and then enforcing it.

72. There was another reason in the mind of the arbitrator. He was aware that the only means of challenging his decision for legal error was by an appeal under section 1 of the Arbitration Act 1979. He clearly felt that this route should be made available to Guaranteed. Admittedly, the chances of obtaining leave to appeal an interim costs award would be very slim. However, the arbitrator obviously felt that Guaranteed should have the opportunity to seek to challenge his decision for legal error if so minded.

73. It follows that no criticism can be levelled at the arbitrator for deciding to publish his decision as an award.

5.5 Immediate Payment and Stay

5.5.1 General

74. This part of the order gives rise to two separate considerations: did the arbitrator have the power to order a stay and, if so, should he have exercised that power?

75. The arbitrator's requirement that the costs payment should be immediate is no more than an indication that the costs flowing from the order should not be set off against subsequent costs orders and that, in the normal course, the costs should be paid as soon as possible. This part of the arbitrator's order was a reasonable corollary of the parts of the costs order I have already dealt with.

76. As to a stay, the arbitrator appears to have decided that the order to stay the proceedings was a necessary concomitant of the order for immediate payment. This is not so. The order for immediate payment could have been enforced as a judgment, it would then have been for the court to decide whether to stay execution pending the outcome of the arbitration. Moreover, it is unusual for a court to order a stay even if it makes an immediate costs order.

77. The stay was imposed so as to ensure that the sum ordered was paid. However, the effect of a stay, given that Guaranteed was insolvent, might have been that the arbitration would be stifled. The arbitrator might have concluded that it should be. If asked: *"do you intend the arbitration to come to an end if Guaranteed cannot pay and no alternative source of funding is available?"* he might have said: *"yes"*. However, such a decision should have involved the arbitrator in considering whether that would be a likely outcome of his order and, if it would have been, to consider whether so draconian a step was warranted and whether it met the justice and fairness of the case in circumstances in which, amongst other factors, Taylor Woodrow had made a substantial sealed offer. Thus,

the arbitrator needed to consider his jurisdiction carefully and then, if he concluded that he had jurisdiction, should have considered whether it should be exercised in a context where such an exercise could stifle the whole arbitration. This is particularly so given that costs orders are not intended to punish parties but are intended merely to provide compensation on such terms and in such circumstances as meet the justice of a particular case.

5.5.2 Jurisdiction

78. The arbitrator does not have a general power to order a stay of the arbitration. His duty is to resolve disputes that have been referred to him. This duty, which arises in the pre-1996 Arbitration Act law from an implied term of his appointment, is reinforced by the Arbitration Rules adopted for this reference. Article 5.1 provides: *"In the absence of procedural rules agreed by the parties or contained herein, the Arbitrator shall have the widest discretion allowed by law to ensure the just, expeditious, economical and final determination of the dispute."*

An arbitration which has been stayed is not subject to any final determination let alone an expeditious determination. Thus, if there is a power to order a stay, it must be found in the rules.

79. Mr. Rowlands, counsel for Taylor Woodrow, argued that the order was akin to a security for costs order and that Article 13.2, which deals with the arbitrator's powers to order security for costs includes the power to order security by way of deposit, bank guarantee or in any other manner as he sees fit. Thus, either because *"any other manner"* includes the imposition of a stay or because there is an implied power to order a stay arising as a necessary adjunct to these powers, the arbitrator had power to order a stay in this case.

80. I have doubts as to whether, even when ordering security, the arbitrator would have the power to impose a stay pending compliance with the order, in cases where this Article governs the procedure. The "any other manner" appears to relate to the method of providing the security and not to what is to happen if the ordered security is not provided. The suggested implied power, arising by analogy with court proceedings, does not appear to be a necessary adjunct to Article 13. However, I need not decide that difficult point since the Order was not a security for costs order, although its effect was closely analogous to one. The Order might have led to an application by Taylor Woodrow for further security, but that point was never reached.

81. What the arbitrator was ordering was, in effect, that the reference should not continue unless and until his interim costs award had been discharged. The rules provide him with no such power and, therefore, he had no power to order a stay.

5.5.3 Fairness in Making the Order

82. There is a further matter of concern about this order. It was made following a submission by Taylor Woodrow that since Guaranteed would be unable to pay the costs ordered against it, there should be a stay of the arbitration. Taylor Woodrow's submissions contained the following passage:

"Application for stay

... [Taylor Woodrow] has no assurances that any costs orders it obtains will be met by [Guaranteed], other than the security already ordered which is in respect of costs only up to close of pleadings. [Guaranteed] is an impecunious litigant and in the absence of confirmation from the funders of the action that they will be responsible for costs awarded against [Guaranteed], there is a presumption that such costs will not be met, In these circumstances it is unreasonable for [Guaranteed] to require [Taylor Woodrow] to incur additional liabilities when costs awarded against [Guaranteed] have not been paid."

83. That submission should have either have been considered in the light of certain material facts potentially relevant to the application or, if these facts were not drawn to the arbitrator's attention, this should have been as a result of a conscious decision by Guaranteed (and not just Mr. Bates) to refrain from referring to them. The facts to which I refer are these:

1. The terms of the original sealed offer.
2. The fact that Taylor Woodrow had elected not to apply for further security despite Order no 6, dated 13 June 1996, which required Taylor Woodrow to make its further application for security for its costs within 7 days of the service of the amended statement of case (which was served on 4 July 1996). This absence of a second application might have been connected with the fact that the sealed offer had, by then, already been made. It followed that Taylor Woodrow had been prepared to go to the end of the arbitration with no more than the £18,000 security provided, by the terms of the relevant Order, for the period up to the service of the reply.
3. The extent to which Guaranteed would be, or might be, unable to make payment of the relevant sums from its own, or other people's, resources.
4. The witness statements that had by then been served.

84. These facts and statements were potentially relevant to a consideration of whether to order a stay because, in exercising the appropriate discretion, the arbitrator should have balanced the potential stifling of the claim against the strength of Guaranteed's case and these facts were highly relevant to that difficult exercise.

85. It was also necessary for the arbitrator to consider whether the security Taylor Woodrow already had was sufficient for the relatively small costs order in contemplation. This security was in the form of the sum already provided coupled with the minimum sum likely to be awarded to Guaranteed from which Taylor Woodrow's entitlement to costs could be deducted. To put the matter another way, the arbitrator ought to have been able to weigh up the seriousness of Guaranteed's default and the size of the financial consequences of the default

against the possible loss to Guarantee of a claim which had attracted a substantial sealed offer and for which Taylor Woodrow had both substantial security and a possible further means of recovering the costs by way of a set off.

86. The circumstances of this case are similar to an application for security for costs where a payment into court or a sealed offer has been made. It is clear, on the authority of the ***Lindsay Parkinson*** case, referred to in paragraph 16 above, that a sealed offer may be considered by a tribunal in determining an application for security for costs since its terms are relevant in a consideration as to whether to order security. This is because security should not be ordered if to do so would stifle the claim, particularly when the claim is a strong one as evidenced by a substantial sealed offer. It is also similar to those cases where a court decides to temper a payment order it might otherwise have made because the underlying claim would be stifled. Such cases include ***Yorke Motors v Edwards*** [1982] 1 WLR 444. If Taylor Woodrow decided to seek to have the arbitration stayed until the sums ordered to be paid had been paid by Guaranteed, it had to accept the concomitant that the arbitrator could consider all material relevant to the question of whether this might cause a good claim to be stifled.

87. The evidence shows that Mr. Bates never considered these points and never brought them to the attention of the arbitrator. It is unfortunate that Taylor Woodrow raised its argument in favour of a stay, for the first time, in a submission which was the last in the chain of submissions ordered to be provided. This made it harder for Guaranteed to raise and rely on the argument that the claim should not be stifled, given the terms of the sealed offer, the strength of Guaranteed's case revealed by the witness statements and the level of security available to Taylor Woodrow.

88. The arbitrator cannot be criticised for what happened. Taylor Woodrow applied for a stay without, apparently, addressing the question of whether the arbitrator had power to order one and Guaranteed never argued that there was no jurisdiction to impose one. Indeed, the first time that this argument was raised was in the proposed amendment to the originating motion served between the first and second hearing days of the motion. This draft amendment followed a suggestion from me, made on the first day of the hearing, that the arbitrator might not have had jurisdiction to order a stay. Equally, Guaranteed did not put before the arbitrator the terms of the sealed offer or the arguments I have summarised concerning the potential stifling of its claim. The fact that the arbitrator never considered the contents of that offer, or the stifling arguments, when ordering a stay was not referred to in any of Guaranteed's grounds of application set out in the originating motion. It follows that the arbitrator never had a proper opportunity to consider whether it was appropriate to make a potentially stifling order for the payment of Taylor Woodrow's costs and Guaranteed has yet to place before the court a draft of a properly pleaded reliance on this shortcoming in the arbitrator's decision-making process.

5.6 Arbitrator Rendered Functus Officio by the Order

89. Guaranteed argued that the arbitrator had rendered himself incapable of taxing the costs arising out of the adjournment since he had imposed a stay of the arbitration. Therefore, the taxation exercise could not be carried out. In the circumstances, the arbitrator had misconducted the reference on that ground alone, since it would not have been possible for him to lift the stay he had imposed since he could not tax the relevant costs, a necessary precondition to the stay being lifted.

90. There are two short answers to this submission. Firstly, the natural construction of the Order is that the arbitration would be stayed save for the taxation process, which was to continue notwithstanding the stay of other steps in the reference. Secondly, even if the Order did stay everything including the taxation process, the arbitrator could vary his own stay order and reinstate the power to tax the relevant costs. A procedural order is not like an award. It is not final in the sense that it cannot be revisited and it does not create any issue estoppel. Thus, on the basis that the whole arbitration, including the taxation proceedings, had been stayed, the ensuing Order no 13, dealing with the taxation procedure to be followed, amounted to a variation of that Order.

6 The Two Awards

6.1 Award no 1

91. Following the making of Order no 11, the arbitrator conducted a taxation, including an oral hearing. The arbitrator also ruled, in correspondence, that the costs of Order no 12, which included both his fees incurred in dealing with and drafting that Order and Taylor Woodrow's costs associated with that Order, came within the definition of *"costs of and incidental to the adjournment"*. The arbitrator then published Award no 1 which included the costs of Taylor Woodrow incidental to the adjournment and the arbitrator's costs of drafting the award and of dealing with Order no 12. The costs of drafting the award were paid by Guaranteed since the arbitrator required these to be paid before the award could be taken up. It was made clear to the parties by the arbitrator, in a letter dated 6 June 1997, that the stay applied to the arbitrator's cancellation fee for the hearing in February as well. This fee had not been covered by the Award but could be said to have been covered by the terms of the stay imposed by Order no 12. The part of Award no 1 concerned with the stay was in the following terms: *"I find that the parties' costs of this taxation and for my fees and charges for this taxation and Order no 12 are costs incidental to the adjournment of the hearing. By reason of this I DIRECT THAT the stay of this arbitration will not be lifted until the liability and quantum of these matters is resolved and payment made."*

92. This wording shows that the terms of the Award are only concerned with the quantum of costs to be paid as a result of the adjournment. The stay itself was not imposed by the Award but by the terms of Order no 12. All that

the Award does is to give a procedural direction in connection with the stay. The Award does not, itself, impose or reimpose the stay.

93. The Award gives detailed reasons for the items of costs found to be payable and for the quantification of those items. Guaranteed's principal complaint about this Award is that it includes Taylor Woodrow's counsel's reduced brief fee although, it was argued, this was not incurred or, if it was, was not properly incurred. These allegations and several others were sought to be made the subject of the appeal but I never considered whether leave to appeal should be granted since I refused Guaranteed's application to extend the time for issuing both the originating motion and the application for leave to appeal.

94. The complaints made about the taxation process are not ones which may be incorporated into a misconduct application since they are all to the effect that the arbitrator erred in law or made perverse findings of fact. In so far as either type of complaint can be made in an application to the court for judicial intervention into the arbitral process, the only appropriate procedure is an appeal on a question of law. Thus, these complaints were not considered by me.

6.2 Offer to Provide Security

95. Guaranteed now complains that the arbitrator did not accept its offer to provide the amount required to be paid by Award no 1 by paying it into a secure fund, pending the determination of the originating motions, thereby allowing the stay to be lifted. This offer was not made sufficiently seriously to require the arbitrator to consider it further. Guaranteed was challenging the costs order made against it because this had stifled the arbitration. If Guaranteed was able to meet the costs order and was solely concerned with challenging the Award, it could have provided the sum required by paying it to the arbitrator and asking him to hold it as stakeholder. In fact, the suggested course of action formed part of a stream of vituperative letters written by Mr. Bates on Guaranteed's behalf which arose because he seemed unable, despite his professional standing as a claims consultant and professional litigator, to accept the arbitrator's rulings and Awards as to costs. This reaction of Mr. Bates was studiously overlooked by the arbitrator. Rather than the arbitrator being potentially biased against Mr. Bates, the converse impression is conveyed by some of Mr. Bates' letters.

6.3 Award no 2

96. The complaint about this award is that it might have been made without jurisdiction. The Award quantifies the costs associated with the taxation process. Neither party asked for this exercise to be rendered as an award and neither party appears to be prepared to pick up the award. Thus, it will not take effect as an Award. The complaint about it is, therefore, groundless.

7 General Complaints

97. Underlying these specific complaints is a general complaint by Guaranteed that the arbitrator has shown, by his correspondence and his decisions, that he no longer has an open mind so far as Guaranteed's case is concerned. He is, or appears to be, biased. Moreover, the voluminous correspondence generated by the taxation of costs shows, it is argued, that he is incapable of conducting the reference in a professional manner.

98. I find these complaints to be groundless. The conduct of the arbitration has proved to be very difficult but the arbitrator has maintained a professional approach throughout. The real difficulty has been that Mr. Bates has, throughout, corresponded at enormous length with Taylor Woodrow and the arbitrator, in the latter case, principally by copying almost every letter sent to Taylor Woodrow. In the correspondence, Mr. Bates frequently descended into vulgar abuse of Taylor Woodrow's representatives and frequently resorted to language of an unprofessional kind in making complaints about them. Throughout, the arbitrator has exercised commendable restraint in neither responding to this intemperate language nor in appearing to allow it to influence his judgment.

99. The other difficulty in conducting the reference that the arbitrator has had to contend with has been the attitude adopted by Taylor Woodrow which has generated needless acrimony between the parties' representatives. This was achieved by various actions. The principal cause of friction was when Taylor Woodrow sought, by direct approaches to the perceived funders of the arbitration, to drive a wedge between Mr. Bates and them. A further source of friction occurred when its representatives seemed to take undue umbrage at Guaranteed having obtained, by apparently innocuous means, highly material disclosable documents. Taylor Woodrow also, initially, declined to disclose other highly material documents, referred to by the parties as the Northcroft documents, on the erroneous grounds that they were commercially confidential and, when ordered to disclose them, merely stated that they were unavailable. The resulting acrimony should have been avoided by both sides' representatives.

100. However, these difficulties do not appear to have influenced the arbitrator nor to have led to the appearance of partiality in favour of, or against, either party or their respective representatives.

8 The Amendment Application

101. I can deal with Guaranteed's application to amend shortly. The proposed amendment is as follows: *"The arbitrator misconducted himself by ordering both in directions order no 12 and his award no 1 dated 20 May 1997 that the Arbitration would be stayed pending payment by the Applicant of the Respondent's costs of the adjournment (including his own fees and expenses) when he had no jurisdiction to do so. ... The Arbitrator's stay of the arbitration ... was ... in excess of jurisdiction."*

102. This application was made one year, almost to the day, after the publication of Award no 1. As I have shown, the stay order was in fact imposed by Order no 12, issued over 15 months before this amendment was formulated.

No complaint had been made previously that the Order was one the arbitrator had no power to make. Furthermore, it is doomed to fail since, although the making of the Order could be described as procedural mishap, it is not misconduct since it was made at the express request of one party without the other party objecting. Thus, the arbitrator can hardly be faulted for making the Order. Finally, it is still open to Guaranteed to apply to the arbitrator to lift the stay, even if the sums provided for in the Order are not paid. If the arbitrator declines to do so, Guaranteed could, if it wished and if it was appropriate to do so, make another misconduct application. It would, however, be better employed discussing with Taylor Woodrow and the arbitrator how the reference can be speedily brought to a conclusion. I, therefore, refuse the application for leave to amend the originating motion.

9. Conclusion

103. The consequences of this judgment are as follows:

1. Guaranteed's application to amend the originating motion is refused.
2. Taylor Woodrow's summons is dismissed with no order as to costs.
3. The originating motion is dismissed with costs, to be taxed if not agreed.
4. Any application by Taylor Woodrow for costs to be paid by parties other than the claimant is adjourned generally, liberty to apply.

Miss Karen Gough of Counsel appeared for the Applicant whose solicitors were Robert M Jones & Co., 32 Claremont Road, Bishopston, Bristol, BS7 8DH (Ref: RMJ/1ct/Guaran.Taylor W)

Mr. Marc Rowlands of Counsel appeared for the Respondent whose solicitor was Simon Foster, Legal Department, Taylor Woodrow Construction Ltd., 345 Ruislip Road, Southall, Middlesex, UB1 2QX (Ref: SF/JL/00022)