JUDGMENT : The Hon. Mr Justice Langley. Commercial Court. 6th December 2001

THE APPLICATIONS

1. There are two applications before the Court which arise out of an Arbitration Award made by the Umpire (Mr Alan Burbidge) in respect of disputes arising under a voyage charterparty on an amended Gencon form dated 16 July 1999.

2. The first application is made by the Owners seeking declarations under Sections 67 and/or 68 of the Arbitration Act 1996 that the "*Correction to Final Award*" published on 5 June 2001 be declared to be of no effect insofar as it purported to alter the award of costs made in the Final Award itself dated 26 March 2001.

3. The second application is made by the Charterers and is contingent on the Owners' application succeeding. It seeks remission of the Final Award to Mr Burbidge pursuant to section 68 of the 1996 Act for him to reconsider the question of costs and, if necessary, an extension of time to make that application.

4. The circumstances in which these applications come to be made are ones which I think, in agreement with Mr Nolan for the Charterers, have more to do with technicality than justice. The just outcome is in my judgment commonsense and the route to achieving it, especially with the sums involved, of no real importance. But I am told that the issues are of general significance.

THE ARBITRATION

5. In the arbitration the Owners claimed demurrage at both discharge ports. The claim for $132,562.43 demurrage at Conakry succeeded but only in a sum of $61,606.45 (about three times the amount admitted by the Charterers). The claim for $185,243.53 demurrage at Banjul failed on the basis that the delay was caused by the wrongful exercise of a supposed lien by the Owners.

6. The Charterers had made various payments such that whilst the Owners total claims on the balance of account amounted to $261,768.37, the Charterers denied liability and contended that they were due $34,592.27. The arbitration was conducted by the exchange of written submissions and documents.

7. In his Reasons for his Final Award, Mr Burbidge set out (Paragraph 37) the final account resulting from his findings on the demurrage claims. The result as shown was a balance due to the Owners of $35,330.85 which he awarded to them. But included in that balance was a sum of $21,858.33 for loadport demurrage. That was an error because the parties had agreed a figure of only $860.

8. The Final Award also awarded interest on the balance and (paragraph 39) as to Costs recorded: *"Costs follow the event, as usual. As requested I reserved my jurisdiction to assess costs, if not agreed"*

9. The Charterers were also ordered to pay the costs of the Award.

10. On publication of the Final Award the "error" in the final account was pointed out by the Charterers and accepted by the Owners. The parties then proceeded to debate in correspondence and make written submissions to Mr Burbidge about both his jurisdiction to re-consider and the merits of amending not only the amount of the Final Award but also the award of costs contained in it.

11. Mr Burbidge considered these submissions and published his "Correction to Final Award" dated 5 June. He found that the Owners' claim succeeded to the extent of $15,119.96 only (that is a reduction of over $20,000); that interest should be paid on that sum; and further, as to costs, that: *"the Charterers shall bear and pay their own costs and one-half of the Owners' costs of this reference ... and ... the cost of this my Final Award ...."*

12. Thus Mr Burbidge varied his original costs award but only to the extent of requiring the Charterers to pay half not the whole of the Owners' costs. Otherwise the costs were all to be paid by the Charterers.

13. Mr Burbidge's reasons for this decision are set out fully in his *"Correction"*. I would indeed respectfully pay tribute to the clarity of what is there recorded. The same submissions have been repeated in this court on the question of jurisdiction. Mr Burbidge dealt with those submissions in paragraphs 13 and 14 as follows:

   "I have no experience of any comparable situation, neither could I find guidance in any of the works on arbitration (the extract from Russell on Arbitration to which I was referred certainly contained no such guidance) as to how an arbitrator should proceed in these circumstances. The kernel of the matter is that a clerical or arithmetical error has been made, which all agree can be corrected by an Amending Award, but had that error not been made my decision as to costs may have been different. There is no question that an arbitrator has, in principle, no entitlement to review a decision. However, when the arbitrator's decision on a particular point, in this case liability for costs, is based on an admitted mistake, then surely as a matter of common sense the arbitrator must have power to review his decision in the light of that mistake. This is no more or less than ensuring that justice is done, and the real issue here is that my determination of liability for costs was based on a perceived fact (the amount of money awarded to the Owners) which turned out to be incorrect.

   From several points of view I think that it is right and proper for me to assume jurisdiction to review this matter. In the first place, the parties contracted to refer disputes to arbitration, which has been described as expressing the preference to be judged by their peers rather than in the Courts. In this case a purely arithmetical error by the Umpire has led to a conclusion as to liability for costs which might have been different had the true figures been known at the time, and I think that the parties' decision to refer disputes to arbitration can logically be extended to include this dispute. Secondly, the principles of equity and natural justice demand that where a mistake has been made upon which other decisions may have relied, the correction of that mistake should be accompanied by the opportunity to review

the other decisions in case they should also be corrected. I have already commented that the books on arbitration are of no assistance, but there is a degree of support for my position in the fairly recent change in the law providing that a payment made under a mistake is now recoverable. The present case is not identical, since the mistake was made by the Umpire and not one of the parties, but it seems to me that the principle of rectification of such a mistake or of the consequences arising directly from it is clear. Finally of course I accept that the tribunal, in this case the Umpire, becomes functus officio when the Award is made and published, but specific provision is made both in the Arbitration Act 1996 and the L.M.A.A. Terms (1997) for any mistake or error to be rectified, and it seems to me that any concomitant decision made on the basis of that error should fairly be open to review. Accordingly I decided that I had jurisdiction to re-examine this issue."

14. Mr Burbidge then addressed the question of what order for costs was appropriate on correction of the amount of the Award. He did so in paragraphs 15 to 20 of his "Correction" which I also think merit quotation in full:

"15. Costs.

In my Award of the 26th March 2001 I awarded the Owners their costs, on the basis that costs follow the event as usual. In reaching this conclusion I was influenced by the number of issues, their complexity, the number and volume of exchanges generated, the sums claimed, the amount of my time occupied on each, and the respective results. Of the 7 issues identified 4 were decided in the Owners' favour, but they were all of minor importance in terms of the sums at stake, the volume of exchanges and the space devoted in the Reasons to the Award - 1 paragraph each. The 5th issue, that of whether delay at Conakry due to dredging activity in the port should count as laytime, was determined in the Owners' favour but took little time to decide and occupied only 3 paragraphs of Reasons. That leaves the two major issues, namely deductions from laytime on account of rain time at Conakry and the time lost owing to the Owners' purported exercise of a lien at Banjul.

16. *The issue of rain time at Banjul was so contentious and so conflictingly documented that (as I explained in the Reasons) I had to work my way through a total of 7 different documents comprising statements of facts, the Master's own weather report and a report from the local meteorological station in a vain attempt to find a reasonable degree of congruity. Finally I decided that the only practical solution was to draw up my own version of the Statement of Facts and timesheet for the "Gannet", utilising the more credible of the facts contained in the other documents. This took 12 paragraphs of the Reasons, and an inordinate amount of my time. In support of their claim the Owners adduced the Master's own version of bad weather, said to be extracted from the ship's log although not supported by log extracts or photocopies of the actual log. I described this as being flawed, not to be relied upon, and (importantly) failing to be confined to weather conditions at the discharging berth. They also adduced what was said to be a report from the local Meteorological Station. This document conflicted with the Master's report, appeared to be unreliable, and was seriously challenged by the Charterers as to the authenticity of the supposed author and his signature. As a result I regarded this report with serious misgivings. Statements of Facts for 4 other vessels were adduced in evidence, one by the Owners to support their case and 3 by the Charterers to support that drawn up by the port agents for the "Gannet". From what I have recounted above, and as the Owners were awarded only US $61,606.45 instead of the US $132,562.43 they claimed (the Charterers conceded US $21,858.33) I think that it can be reasonably concluded that the Owners were primarily the main losers on this issue.*

17. *The matter of the lien at Banjul occupied 7 paragraphs in the Reasons. The Owners claimed US $185,243.53 demurrage, but the result in a nutshell is that I decided that their purported exercise of a lien on the cargo at Banjul was unlawful, which had the effect that, to the extent of any demurrage resulting therefrom, the Charterers had a counterclaim extinguishing that claim. Therefore the Owners failed entirely on this issue.*

18. *After finalising the Reasons for the Award, and noting that the Final Account had a balance of US $35,330.85 in favour of the Owners, I took the view that this amount was sufficiently significant for me to follow the usual procedure that costs follow the event. Now however the situation is that the Owners should correctly have been awarded only US $15,119.96. The question I have to ask myself is whether, had I known at the time that this was the correct figure, I would have considered that in the exercise of my discretion and in order to reflect the relative success or failure of both parties the costs should be awarded differently. I am bound to say that, having now put myself mentally back in that position, and with the changed facts, I would have come to a different conclusion. I would have awarded against the Charterers the cost of the Award and 50% of the Owners' costs of the reference, and that is my conclusion for this Correction to Award.*

19. *For the Owners it was argued that the CPR was not applicable to arbitration. However the fundamental principle is that arbitrators are masters of their own procedure. I do not think that the Arbitration Act 1996 was intended to be a "specific" code. I think that it would be wrong, on a specific point, to take a different view from that adopted by the Act (save where express terms like the L.M.A.A. Terms so provide) but if there are areas not covered by the 1996 Act then I believe that one is perfectly entitled to look to the CPR for some guidance. After all, the CPR represents what is taken to be current thinking on litigation generally. Feeling that the situation in which I find myself is incorrect as a matter of principle, my object in this Award is to try to achieve the correct result, in other words taking a common-sense view on what is essentially a common-sense matter.*

20. *As I understand the situation the relevance of the CPR is that it firmly endorses the view that there should be some apportionment of costs on a wider basis than was assumed to be appropriate in the past, notwithstanding that the arbitrators have always had reasonable discretion. In arriving at my conclusion I have had regard to the principle stated in the CPR and guidance as to what constitutes best practice in the field today, as well as exercising*

reasonably that discretion as stated in Section 61(2) of the Arbitration Act 1996, and emphasised in the Commentary (2nd edition) by Harris Planterose and Teck."

THE UMPIRE'S JURISDICTION

15. Section 57 of the 1996 Act provides:

"(1) The parties are free to agree on the powers of the tribunal to correct an award or make an additional award.

(2) If or to the extent that there is no such agreement, the following provisions apply.

(3) The tribunal may on its own initiative or on the application of a party:

(a) correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission ...."

16. There is no substantive difference between Section 57(3)(a) and Section 17 of the Arbitration Act 1950.

17. The parties did agree on the powers of the tribunal to correct an award by agreeing that the arbitration was to be conducted under the L.M.A.A. Terms (1997). Rule 26(A) of the L.M.A.A. Terms provided that:

"In addition to the powers set out in Section 57 of the Act, the tribunal shall have the following powers to correct an award or to make an additional award:

(i) The tribunal may on its own initiative or on the application of a party correct any accidental mistake omission or error of calculation in its award .... "

18. The parties are agreed that there is no relevant authority on the construction of Section 57(3)(a) of the 1996 Act. I have been referred to a number of decisions on the former and present slip rules in the RSC and CPR and to ***The Montan*** [1985] 1 WLR 625 in which the judgments consider section 17 of the 1950 Act. The starting point has of course to be the words used in section 57(3)(a). It is also in my judgment important to keep in mind that one of the objectives of the 1996 Act was to limit the rights of parties to arbitration agreements to resort to the courts and so to ensure greater autonomy for their chosen tribunal.

19. Although Mr Ashcroft, for the Owners, submitted that the error in the amount of the Award was a "*clerical mistake*" and not "*an accidental slip or omission*" and Mr Burbidge himself described it as *"a clerical error",* I do not agree. Mr Burbidge wrote what he intended to write but he was mistaken in the substance of what he wrote. Even if that could be described as a "*clerical mistake"* it was, I think, in common parlance, an accidental slip or at least also an accidental slip. It was a slip because it was wrong. It was accidental because he did not mean to use the wrong figure and he misread some manuscript amendments made in the laytime calculations submitted by the Charterers (paragraph 7 of the Correction to Final Award).

20. As is apparent from the passages I have quoted from the *"Correction"* Mr Burbidge considered that there were two errors arising from this slip which required to be corrected. First, correction of the amount of the Award itself and second correction of the award of costs. The second was a consequence of and ancillary to the first.

21. In my judgment the wording of Section 57(3)(a) is wide enough to encapture both corrections. The costs error was an error "arising from" the "accidental slip" in the amount of the Award and as such there was power to correct it.

22. I would add that I think it would be most unfortunate if there was no power in an arbitrator to address ancillary costs orders which might have been decided otherwise had a mistake within section 57 not been made. To take an extreme case, the amount of an Award might be reduced from £1m to £1 under the slip rule. If such a power did not exist the only available route to correct a costs award would be the contingent alternative route followed by the Charterers here, namely to make their own application under section 68 of the 1996 Act. Not only, however, does Mr Ashcroft submit that such a course is not or may not be available in principle or because of time limits which apply to such applications, but even if successful it is a potentially expensive route to achieving nothing if the arbitrator has not expressed his view on the merits of changing his order. Much better, it might be thought, to go to the arbitrator first.

23. It was the submission of Mr Nolan that in any event Mr Burbidge had jurisdiction to correct the costs award pursuant to Rule 26(A) of the L.M.A.A. Terms. Mr Ashcroft submitted the Rule was no different in effect from the Act. Again, I think it is a question of applying the words used to the context. As I read the "*Correction"* and as Mr Nolan submitted, Mr Burbidge was accepting that he made a mistake in the award of costs because he made it on the mistaken assumption that the Owners had succeeded to an extent significantly greater than in fact they had. In my judgment that is properly described as an "*accidental mistake*" within the meaning of Rule 26(A). Although Mr Ashcroft questioned whether Mr Burbidge had really had in mind the various matters which he referred to in addressing costs in his "*Correction*" I see no reason to doubt what he says.

24. I do not think anything in the authorities cited to me is contrary to the conclusions I have expressed. The authorities draw distinctions between errors affecting the expression of the tribunal's thought (which can be corrected) and errors in the tribunal's thought process (which cannot) and to not permitting corrections to reflect "*second thoughts*". I do not think such distinctions are material in the present context. Granted an error in the amount of the Award was properly corrected, I do not think these principles preclude the tribunal from addressing the question whether the corrected figure may reveal other errors. If an error properly falls to be corrected, how it is to be corrected and its consequences is always likely to involve some new consideration.

25. I should add that Mr Ashcroft, wisely in my judgment, did not pursue the objection based on Section 57(5) of the 1996 Act that the "Correction" was not published within 28 days of the application to make it. Nor did he seek to

sustain the submission in the circumstances of this case that if the proper route for the Charterers was to proceed by way of section 68 then they were out of time to do so and should not be granted an extension of time.

SECTION 68

26. Although it does not arise I will express my views briefly on whether or not, had the only route available to the Charterers been to proceed by way of an application for an order for remission to Mr Burbidge pursuant to section 68, they could have done so.

27. Mr Nolan relied on "serious irregularity" as defined in section 68(2)(a) and (i), which read as follows:

"(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant -

(a) failure by the tribunal to comply with section 33 (general duty of tribunal);

(i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal ...."

28. The thrust of Mr Ashcroft's submission was that in the absence of any evidence as to the amount of 50% of the Owners' costs of the arbitration there was no evidence on which the court could conclude that any irregularity as to the costs award had caused or would cause substantial injustice to the Charterers. I do not agree. Any party aware that the chosen tribunal would (or might well) have made a different and more favourable order than it did had the tribunal itself not made a mistake would, I think, have a justified sense of real injustice if it were not able to seek to have the order corrected unless, in the case of a sum of money, the amount could fairly be described as insignificant in the context. In the context of an Award of $15, 000, and even recognising that the arbitration was dealt with on paper, commonsense suggests that 50% of the Owners' costs will be a significant amount.

29. Mr Ashcroft also submitted that neither subsection 2(a) or 2(i) was applicable. Again I do not agree. Albeit inadvertent, if Mr Burbidge was not able to re-address the question of costs in the light of the correction of his mistake in the amount of the Award I think it would involve a failure in the duty of fairness to the Charterers. Whether that be right or wrong, however, I think Mr Burbidge has admitted that there was an irregularity in his original award of costs.

30. Finally Mr Ashcroft also submitted that the Charterers had themselves to blame because they (like the Owners) failed to make any submissions on costs prior to the original Award or to ask Mr Burbidge to reserve the question for further argument. For that reason, he submitted, section 68 did not apply as it was not intended as a palliative for such failures, and he referred to the undoubted principle that section 68 was only intended to apply in exceptional cases. I do not think this affects the matter. I suspect neither party focussed on costs for the perhaps understandable reason that there were a number of possible outcomes to the arbitration which would be likely to impact upon the discretion as to costs. But I do not see why that failure, if it is correct to describe it as such, should preclude the Charterers from asserting a substantial injustice has resulted as a consequence of a wholly and understandably unforeseen mistake in the amount of the Award.

CONCLUSION

31. Had it been necessary to decide the Charterers' application I would have granted the Charterers the order they sought. As it is, and as I stated at the conclusion of the argument, the Owners' application will be dismissed with costs. Those costs were summarily assessed in an amount of £6500.