Ronly Holdings Ltd. v JSC Zestafoni G Nikoladze Ferroalloy Plant [2004] APP.L.R. 06/22

Judgment : Mr Justice Gross: Commercial Court. 22nd June 2004

INTRODUCTION

1. This is an application by the Claimant ("Ronly") for relief under ss. 67 and/or 68 and/or 69 of the Arbitration Act 1996 ("the Act"), following an award by Mr. Ian Kinnell QC dated 19th December, 2003 ("the award" and "the arbitrator" respectively), whereby he ordered the Defendant ("Zestafoni") to pay to Ronly, forthwith, US$10,088,834.57 plus interest thereon.

2. The gravamen of Ronly's complaint is that the arbitrator, having held that a sum of US$16,083,772.40 was "outstanding" under the underlying agreement forming the subject-matter of the arbitration, directed that a "capital" sum of only US$10,088,834.57 should be "immediately payable" by Zestafoni to Ronly. The effect of the relief sought by Ronly would be to increase the sum immediately payable by the shortfall between the sum outstanding and the sum immediately payable, namely, US$5,994,937.83 ("the shortfall amount").

3. There is also before the Court a very subsidiary application by Ronly, in effect to correct the award. No more need be said of that application until the end of the judgment.

4. Returning to the principal application, the nature of Ronly's claims for relief appears from its Claim Form dated 20th February, 2004, which included the following:

" 1. A declaration pursuant to the Arbitration Act 1996 Section 67 ….that the arbitrator… had no jurisdiction to take into account as he did in paragraphs 50 and 52 of his Award credits due from the Claimant to other companies who were not parties to the arbitration…under contracts which had not been referred to him, or under other contracts with the Respondent in circumstances where the Respondent had expressly declined to extend the jurisdiction of the arbitrator to include matters arising under such other contracts.

2. Further or alternatively an order i) that the Award be set aside insofar as Mr. Kinnell refused to direct that the full amount found by him to be due under the contract referred to him be paid immediately by the Respondent to the Claimant and ii) that the Award be remitted to Mr. Kinnell and that he be directed to find that all the sums outstanding under the Ferroalloy Production Agreement as found by him are immediately payable to the Claimant by the Respondent together with interest on those sums.

3. Further or alternatively the Claimant seeks an order pursuant to …Section 68(2)(b) that such parts of paragraphs 50 and 52 of the Award in which Mr. Kinnell seeks to limit the "directory part of" his Award be set aside and that those parts of the Award be remitted to him for reconsideration with the direction that he has no power to take into account any matters not arising under the Ferroalloy Production Agreement.

4. Further or alternatively, and only in so far as maybe necessary, the Claimant seeks permission to appeal to the Court pursuant to … Section 69 on the following question of law arising out of the award:-

Whether or not the interest of justice entitled the arbitrator to take into account, when considering his Award, sums which may be due either under contracts between the Claimant and third parties or between the Claimants and the Respondents in circumstances where the Respondents had expressly stated that they did not agree that the arbitrator should have jurisdiction…"

5. Insofar as relevant, ss. 67-68 of the Act provide as follows:

"67(1) A party to arbitral proceedings may …apply to the court-

(b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction…

(3) On an application under this section … the court may by order-

(a) confirm the award,

(b) vary the award, or

(c) set aside the award in whole or in part.

68.(1) A party to arbitral proceedings may …apply to the court challenging an award … on the ground of serious irregularity affecting the tribunal, the proceedings or the award…

(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-

(b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);…

(d) failure by the tribunal to deal with all the issues that were put to it;

(3) If there is shown to be serious irregularity …, the court may-

(a) remit the award to the tribunal, in whole or in part, for reconsideration,

(b) set the award aside in whole or in part, or

(c) declare the award to be of no effect, in whole or in part.

The court shall not exercise its power to set aside or to declare an award to be of no effect …. Unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration."

6. It is unnecessary to set out the well-known provisions of s.69 of the Act providing for leave to appeal to the Court on a question of law arising out of the proceedings; leave is of course not to be granted unless (*inter alia*) the decision of the tribunal is obviously wrong or, where the question is one of general public importance, the decision of the tribunal is at least open to serious doubt.

7. For completeness, I record but need not recount that there has been a dispute as to whether the arbitrator had jurisdiction at all, a matter determined adversely to Zestafoni by Colman J. on the 16th February, 2004 (in, I am told, [2004] EWHC 245 (Comm.)). I further record that Zestafoni wishes to reserve the question as to whether the award was within the jurisdiction which was held to exist by Colman J.; nothing about this suggested reservation impacts upon the matters which must now be decided.

THE HISTORY

8. The history of this matter has a distinct "Alice in Wonderland" air.

9. The arbitrator was appointed to determine disputes arising under a Ferro-Alloy Production Agreement ("the agreement"). As the arbitrator observed, the agreement's essential purpose was for the supply to the Zestafoni alloy plant of electricity and raw materials and for the supply by the plant of ferro-alloys; in somewhat simplified terms, Ronly was to supply the electricity and raw materials and Zestafoni agreed to produce and supply ferro-alloys to Ronly.

10. In the original (unamended) Points of Claim in the arbitration, Ronly claimed a balance of US$15,081,242.13 as due and payable under the agreement and in respect of cash advances made. The Points of Claim then gave credit for balances due from Ronly (1) under the "Seymour Contracts" (see below) and (2) under other contracts with Zestafoni. The relevant paragraphs in the Points of Claim read as follows:

*" **The Seymour Contracts***

11. Between about October 1998 and about May 2000 various contracts were concluded between Seymour Limited, an offshore company acting as agents for the Respondent and Fapet International Chemical Trading Inc, acting as agents for the Claimant.

12. Pursuant to the Seymour Contracts, the Claimant made cash advances to the Respondent in return for shipments of ferro-alloys by the Respondent. In the case of the Seymour shipments the cash advances made by the Claimant amounted to less than the value of the ferro-alloys delivered by Seymour. On a final reconciliation of the amounts due under the Seymour contracts the balance of moneys due to Seymour was as follows ….

Total due to Respondent US$3,528,858.19

16. It was agreed between Seymour and the Respondent, and the Claimant and Fapet that the amount due to Seymour of US$3,528,858.19 would be used as a set off against payment of the outstanding amounts due under the Agreement of 30 September 1997 and in respect of the cash advances made by the Claimant to the Respondent…..

The Zestafoni contracts

17. Between about February 1998 and about December 2001 the Claimant and Fapet concluded further contracts with the Respondent pursuant to which they supplied raw materials and electricity and made cash advances to the Respondent, in return for the supply of ferro-alloys by the Respondent.

18. On a final reconciliation of the amounts due under the Zestafoni contracts there was a balance due to the Respondent in the amount of US$2,466,079.64….

19. It was agreed between the Respondent on the one side and the Claimant and Fapet on the other that the US$2,466,079.64 due under these further contracts would be used as a set off against payment of the outstanding amounts due under the Agreement of 30 September 1997 and in respect of the cash advances made by the Claimant to the Respondent… "

Accordingly, the total of the sums for which, as matters then stood, credit would be given by Ronly, amounted to the shortfall amount, i.e., US$5,994,937.83.

11. It is not unfair to observe that the various Responses which Zestafoni provided to the Points of Claim are somewhat opaque; on any view, however, it does not appear that Zestafoni agreed or admitted the facts contained in the paragraphs of the Points of Claim set out above. Further and on any view, it is plain that Zestafoni denied that the arbitrator had jurisdiction to deal with any matters other than disputes arising under the (Ferro-Alloy Production) agreement.

12. By this stage, at least for the time being (if now no longer), well-known English solicitors, Norton Rose, had come to represent Zestafoni, itself a Georgian company. On the 13th February, 2003, Ince & Co., solicitors for Ronly, wrote to Norton Rose in what might be thought very fair and plain terms. The Ince & Co letter said this:

" …Whether the set-off contracts should form part of the arbitration proceedings:

Zestafoni state that the set-off contracts should not form part of the arbitration proceedings. The consequence of this stance is that the amount of the claim against them will increase to US$15,787,107.95 excluding interest…"

13. Nothing daunted, as I have been told without objection, Zestafoni, represented by Norton Rose, maintained its stance at a hearing before the arbitrator on the 6th March, 2003; the reference was to deal with and only with the agreement; all other contracts were excluded from the arbitration. Subsequently, Norton Rose produced Points of Defence, dated 31st March, 2003, which emphasised Zestafoni's position that the arbitrator had no jurisdiction (whatsoever) to determine the disputes which had been referred to him. Following an order by the arbitrator, Norton Rose then produced "*Further Points of Defence*", dated 23rd April, 2003. So far as here relevant, these Further Points of Defence, said this:

*" **Cash Contracts; Zestafoni and Seymour Contracts***

3. Regarding the "cash contracts" and "set offs" including the "Zestafoni and Seymour contracts" (together "the Cash Contracts"), it was proposed at the hearing on 6 March that they be excluded from the jurisdiction of this Tribunal. The Claimants reserved the right at the hearing to re-introduce these contracts in the reference, but have not exercised this right. In any event and without prejudice to our contention that the Cash Contracts as described and as pleaded by the Claimants are beyond the jurisdiction of this Tribunal, …we set out our brief further submissions on the Seymour contracts ….

Set-off

8. The following submissions are expressly without prejudice to the Respondent's position that this Tribunal has no jurisdiction to determine any dispute under the Cash Contracts… as they do not fall under the Agreement.

9. Referring to the "Seymour contracts", for example, in our submission these are contracts between Zestafoni and Seymour pursuant to which Zestafoni supplied ferro-alloy to Seymour and were due to receive payment direct from Seymour. These contracts were separate from the Agreement (between different parties and with their own dispute resolution mechanism). To the extent that there is any dispute under the Seymour contracts this is to be resolved between the parties to the Seymour contracts under such contracts' own dispute resolution mechanism, not by this Tribunal.

10. Further, we attach … a Payment Agreement between Zestafoni and Seymour pursuant to which Seymour agree to make payment to Ronly in satisfaction of Seymour's obligations to Zestafoni. In accordance with the Payment Agreement, payment was made to Ronly with the effect that Zestafoni's indebtedness to Ronly under the Agreement was reduced by a further US$6,928,168.

11. It appears that Ronly have failed to take into account receipt of such payments from Seymour. It follows that Ronly's calculations in the Points of Claim are incorrect. We reserve the right to particularise this further in witness evidence."

Plainly, there was no admission in this pleading of the matters which I have set out from the Ronly Points of Claim. Both the nature of the Seymour contracts and the calculations were very much in dispute. It was further clear that Zestafoni would object to the arbitrator making any determination in respect of such contracts; they had, as Norton Rose said in terms, their own dispute resolution mechanism.

14. Against this background, Ronly now abandoned its attempt to resolve the entire position between itself, Zestafoni, Fapet and Seymour, encapsulated in the original Points of Claim. Extensive amendments were made to the Ronly pleadings in the arbitration. So far as the Points of Claim were concerned, these were amended to delete all reference to the Seymour and (other) Zestafoni contracts. As a result, the proposed credits were deleted and the amount claimed was accordingly increased by the shortfall amount of US$5,994,937.83.

15. At the substantive hearing before the arbitrator in July 2003, Ronly obtained permission for these amendments; no terms were imposed. On the pleaded cases before the arbitrator, there was, therefore, neither any agreement nor any issue as to credits to be given by Ronly – or, if it be said that the Norton Rose Further Points of Defence raised some such issue - at least no issue which could be explored, still less determined, without reference to contracts other than the agreement.

THE AWARD

16. I come next to the key passages in the award. It is ultimately simplest to set them out at some length:

"*45. …*[the original Points of Claim]*…raised matters outside the scope of this Award, but, among other things, also indicated the Claimants' willingness to give credit against their overall claim because of substantial sums from which they had been able to benefit under agreements and arrangements outside the scope of the Ferroalloy Production Agreement.*

46. The Claimants were content for all these matters to be dealt with within the reference….but, on any view, this would have involved an extension of my jurisdiction beyond the terms of my initial appointment, and that … could be achieved only by agreement between the parties.

47. By the time of the …[6th March] hearing…the Respondents had, however, decided that they were not prepared to extend my jurisdiction to any extent beyond what had been agreed (which, of course, they in any event disputed). Whether the Respondents or their then representatives anticipated this or not I do not know, but the Claimants sought in due course to take advantage of the Respondents' decision by amending their claim, removing from it those credits that they had previously been prepared to allow in the Respondents' favour…

48. At the hearing…Counsel for the Claimants argued that, having made their choice to exclude from my consideration everything which did not fall strictly within the ambit of the Ferroalloy Production Agreement, the Respondents could not complain if the Claimants now sought strictly to enforce their entitlement under that agreement. Although they did not resile from their position that I had no jurisdiction to look into matters falling to any extent outside the scope of the Ferroalloy Production Agreement, the Respondents….argued that, in making any monetary award in the Claimants' favour, I should not overlook the sums in respect of which the Claimants had been previously prepared to give credit. While it remained the case, the Respondents said, that it was not open to me to investigate the contracts or arrangements that had led to this result, the Respondents were not at this stage in a position similar to a party seeking to set off some claims as yet to be determined. So far as concerned the position between the Claimants and the Respondents, this should be treated as would have been the case had payment of the sums in question actually been made by the latter to the former.

49. I have to say that I found the issue a novel and troublesome one. Counsel for the Claimants took a robust, and seemingly entirely logical approach. Having declined to extend my jurisdiction to cover those matters that had given rise to the credits which the Claimants had previously been prepared to allow, the Respondents could scarcely now object if the benefits that they might otherwise have enjoyed were now to be withdrawn from them. I should…make a monetary award entirely without reference to anything other than the position under the Ferroalloy Production Agreement. But, with respect to him, the Claimants' Counsel….offered no very compelling reason why, in the interests of justice, I should not be able to make a distinction between what I might determine to be the position merely by reference to the Ferroalloy Production Agreement and what I might direct should forthwith be paid by the Respondents to the Claimants.

50. Although I have some sympathy for the Claimants' position, the conclusion that I have reached is that it is open to me, and right that I should make the distinction to which I have referred in the preceding paragraph. It was entirely understandable for the Claimants to say that it was the Respondents' own choice that led them to being deprived of a benefit they might otherwise have enjoyed, but they – the Respondents – were not obliged to agree to any modification of the agreement to arbitrate, and they cannot…be properly penalised for not having done so. An illustrative (if not very close) analogy to the present situation may be seen in a case in which an admission had been made, which may not be withdrawn without leave. Where justice demands, the admission may be allowed to be withdrawn, but not otherwise. For example, where the admission has been obtained by improper means such as misrepresentation, one would expect it to be allowed to be withdrawn. In the present case there is no such suggestion, nor has there even been a suggestion that the Claimant have themselves had second thoughts as to what, looking at the broader picture, it was appropriate to allow as a credit to the Respondents. …my jurisdiction is constrained by the terms of the …Agreement, and by the terms of my appointment, and, accordingly, I can make no determination binding upon the parties concerning the sums in respect of which the Claimants were previously prepared to give credit. So far as the directory part of my Award is concerned, however, I propose to take those sums into account, leaving it to the parties to resolve by other means any outstanding differences that may remain concerning the contracts and arrangements from which they were derived.

51. …I can now summarise the sums outstanding under the ….Agreement …. [Total] US$16,083,772.40

52. According to their (unamended) Points of Claim, the Claimants had been willing to give credit for the total sum of US$5,994,937.83. I shall therefore direct that the capital sum immediately payable to the Claimants by the Respondents amounts to US$10,088,834.57."

17. What might be termed the formal parts of the award included the following:

*"5. **I ORDER AND DIRECT** that, by reference to the sums stated in sub-paragraphs 1 to 4, above, amounting in total to US$16,083,772.40, the Respondents shall forthwith pay to the Claimants the sum of US$10,088,834.57.*

9. This Award is final as to the matters determined in the preceding sub-paragraphs, but is otherwise interim in the reference. For the avoidance of doubt, I have made no determination as to the true accounting position between the Claimants and the Respondents in relation to the contracts or arrangements referred to in paragraphs 45 to 52 above …."

18. For my part, I have much sympathy with the arbitrator in the position in which he found himself, as recounted in the award. Moreover, if I may say so, his good intentions in seeking to promote an overall commercial settlement, are at once apparent. The question remains, however, as to whether his approach is sustainable. To that I must return, having first summarised the rival cases.

THE RIVAL CASES IN OUTLINE

19. For Ronly, Mr. Gruder QC submitted that the arbitrator's approach was unsustainable. There had been no study of any contracts other than the agreement; they had been treated as outwith the arbitrator's jurisdiction. There had been no agreement as to the credits due to Zestafoni. Insofar as Ronly had represented in the (original) Points of Claim that it was willing to give credit, that representation had not been relied upon by Zestafoni and had gone with the amendment. More generally, at least unless the credits constituted a "transaction" set-off, the arbitrator had no jurisdiction to take them into account, arising, as they did under other contracts outside his jurisdiction; see: ***Aectra Refining v Exmar*** [1994] 1 WLR 1634; ***Glencore v Agros*** [1999] 2 Lloyd's Rep. 410. There was, however, no need to decide if the credits did constitute a transaction set-off, as the arbitrator had made no binding determination in that regard. While the arbitrator's approach might have been a good idea if all concerned were reasonable, in practice he had left Ronly exposed; as Mr. Gruder put it, what would happen if Seymour (for example) commenced proceedings against Ronly to recover monies due under other contracts? Ronly could find itself facing a shortfall under the agreement and exposed to Seymour's claims under the other contracts. Finally, in leaving Ronly to collect "*by other means*" sums due to it under the agreement, the arbitrator had failed to deal with the issues before him. In the circumstances, Ronly was entitled to succeed in its application, whether under s.67 or s. 68 of the Act, or, but only if need be, under s.69.

20. For Zestafoni, Mr. McClure submitted that the hearing before the arbitrator had proceeded on the basis that there was no dispute as to the fact that the credits put forward in the unamended Points of Claim were due to Zestafoni. There had been no suggestion that the concession was untrue. The balance in favour of Zestafoni was to be treated as akin to a payment already made by Zestafoni to Ronly. There was no need to decide whether the credits gave rise to a transaction set off, because the parties had gone beyond that; they had agreed that there was a balance due to Zestafoni. Essentially, Zestafoni relied on the reasoning set out in the arbitrator's award.

The arbitrator had not been in error but, if there was an error, it did not go to his jurisdiction. At most, a question of law arose but not one on which it could be said that the arbitrator's decision had been open to serious doubt, let alone obviously wrong. Ronly was not entitled to the relief sought or any relief.

DISCUSSION

21. In my judgment, with respect, the arbitrator's approach was unsustainable and Ronly is entitled to the relief sought.

22. ***(1) Leaving the matter in limbo***: In paragraphs 49-51 of the award, the arbitrator drew a distinction between (i) the position as he found it by reference to the agreement and hence the sums owing by Zestafoni to Ronly thereunder; and (ii) the amount directed to be immediately payable by Zestafoni to Ronly. The upshot was, as already observed, a shortfall amount of some US$5.995 million. In that regard, as it seems to me, the parties and the matter were left in limbo. The arbitrator was the only tribunal to which Ronly could turn to obtain payment of the shortfall amount. But the arbitrator has neither ordered payment thereof nor determined that the shortfall amount is not due to Ronly. Instead, notwithstanding the arbitrator's determination that that sum is outstanding under the agreement, the arbitrator has done no more than express the hope that the parties would "resolve by other means any outstanding differences that may remain concerning the contracts and arrangements from which they were derived". That cannot be right.

23. As a matter of principle:

i) An award must be final as to all issues decided (save exceptionally and irrelevant here, when the arbitrator is empowered by the parties to grant relief on a provisional basis pursuant to s.39 of the Act).

ii) Subject to iv) below, an award must be complete as to all issues before the tribunal; an award which leaves any such issues undecided, cannot be maintained.

iii) An arbitrator has no power to reserve a decision on issues before him to others to resolve.

iv) An arbitrator only has power to reserve issues to himself for later decision if he proceeds by way of an "interim" award (see now s.47 of the Act).

See, generally: *Mustill & Boyd* (2nd edition), at pp.386-8; *Russell* (21st edition), at para. 6-081.

24. On the face of it, the arbitrator's approach in paragraphs 49-51 of the award contravened principles ii) and iii) above; the issue of the shortfall amount was before him; but the fate of the shortfall amount was to be left to the parties or to others to resolve.

25. If it be said – I am not sure that Mr. McClure actually said it – that the award can survive as a valid interim award, then, with respect, I would be unable to accept a submission to this effect. As it seems to me, the parties and the arbitrator might have gone down that path, depending on their approach to the arbitrator's jurisdiction, but it is now too late for it to be viable. My reasons are these:

i) For the award to stand as an interim award, it must be contemplated that, if need be, the parties would return to the arbitrator for a determination as to whether the shortfall amount is to be paid by Zestafoni to Ronly or is to be credited by Ronly in favour of Zestafoni. It is here that the difficulties, arising from the course already taken by the arbitration, become insuperable.

ii) As paragraphs 49-51 of the award disclose, the arbitrator has already foresworn investigating the contracts and arrangements other than the agreement – accepting in this regard the submissions of Zestafoni that he had no jurisdiction to do so and should not do so. But unless the arbitrator explored those other contracts and arrangements, he could make no determination as to the destination of the shortfall amount going beyond that which he was already in a position to have made in the award. Further, if the parties were to return before the arbitrator, nothing said by Mr. McClure suggested to me that Zestafoni's position as to the arbitrator's jurisdiction would be any different from that which it had been until now.

iii) On this footing, a further hearing before the arbitrator would be futile. I cannot read the award as intending to commit the arbitrator and the parties to a pointless exercise. Whatever the theoretical position as embodied in paragraph 9 of the formal parts of the award, in my judgment, the award was not in this respect intended to stand as an interim award; as foreshadowed, the intention instead was that the parties or third parties would, somehow, resolve the destination of the shortfall amount.

26. Pulling the threads together, the arbitrator was appointed to determine the issues arising on the reference. On one view, he has failed to deal with an issue put to him, namely, the fate of the shortfall amount. Alternatively, having determined the sums outstanding under the agreement, he has taken upon himself a power to withhold payment of the shortfall amount pending a resolution of its fate by the parties or third parties. On either analysis the award cannot stand; the right answer, in the light of what had gone before in the arbitration, is that the arbitrator ought to have gone on to order payment of the shortfall amount to Ronly.

27. Accordingly, I am satisfied that Ronly is entitled to succeed under s.68 of the Act. For my part, I would have been minded to think that s.68(2)(d) is the sub-section most obviously applicable; the fact that it is not mentioned in the Claim Form is neither here nor there as it was addressed both in Mr. Gruder's skeleton and oral arguments. But it matters not because Ronly is any event entitled to succeed under s.68(2)(b) of the Act, a sub-section which was dealt with in terms in the Claim Form.

28. ***(2) Credits no longer part of the arbitration***: Mr. McClure argued that the arbitrator was right not to order payment of the shortfall amount because the arbitration had proceeded on the basis that the credits were agreed. He

adduced no evidence in support of this proposition and said, instead, that he relied primarily on the award. In particular, Mr. McClure relied on the concluding two sentences of paragraph 48 of the award and the sentence in paragraph 50 of the award which stated that there had not "even been a suggestion that the Claimants have themselves had second thoughts as to what, looking at the broader picture, it was appropriate to allow as a credit to the Respondents".

29. To my mind – quite apart from the fact that the arbitrator made no determination that the shortfall amount was not due to Ronly - there are a number of conclusive objections to this approach which would otherwise have had the effect, as Mr. Gruder aptly put it, of allowing Zestafoni to eat it and have its cake. First, Ronly's stance had been, as is apparent, premised on the "broader picture"; but that broader picture was not before the arbitrator, by reason of Zestafoni's insistence that the arbitrator's jurisdiction be confined to the agreement, even to the extent of not investigating other contracts or arrangements. Secondly, Ronly's "offer" as to the credits had not been "accepted" by Zestafoni. It follows that there was no agreement as to the credits offered by Ronly. Nor does an analysis in terms of estoppel assist Zestafoni; given that Zestafoni disputed the correctness and basis of Ronly's assertion as to credits, even if Ronly's assertion could be viewed as a representation, there was manifestly no reliance. Thirdly, once the amendment was permitted without the imposition of terms, there was no longer any live assertion before the arbitrator as to Ronly's position with regard to the "broader picture". It is as if an offer is withdrawn before any acceptance; that the offer was or may have been genuine is neither here nor there; no consequences flow from it. The analogy drawn by the arbitrator with admissions (in paragraph 50 of the award) is, with respect, either unhelpful or assists Ronly; here, Ronly had been allowed to withdraw its "admission".

30. In summary, I cannot accept and the award does not support the conclusion that the arbitration proceeded on the basis that the credits had been agreed. Instead the arbitrator did no more than seek to hold Ronly to a position which had been adopted on the basis of a different premise and from which it had, by its amendment, now been permitted to withdraw. That amendment, so far as the credits are concerned, was the end of the matter; as the credits were no longer on offer, they were no longer available to be taken into account; nor was there any live issue relating to them. For completeness, I add this; in paragraph 47 of the award the arbitrator speculated as to whether Zestafoni realised what would be the consequences of its decision not to agree an extension of his jurisdiction. All I would say is that if Zestafoni did not appreciate the likely consequences, that was not the fault of Ronly; the Ince & Co letter of 13th February, 2003 (set out above) could not have been more plain.

31. In the circumstances, on this basis as well, Ronly is entitled to the relief which it seeks. Though the matter could be put under s.67 of the Act, my preference is for s.68(2)(b); the arbitrator was exceeding his powers by dealing with a matter not or no longer before him. To have done so, *a fortiori* given Zestafoni's unyielding stance on jurisdiction, was simply unfair to Ronly.

32. *(3) The position as to set off:* For completeness, I must refer to the question of set-off. In the event, both counsel were agreed that there was no purpose in exploring this question, albeit for very different reasons. Mr. Gruder said that this was so because the arbitrator had no jurisdiction to consider any of the other contracts under which a set-off might have arisen and in any event made no binding determination in this regard. Mr. McClure submitted that as the parties were agreed on the credits to be allowed any further study was unnecessary.

33. For my part, by virtue of the conclusions to which I have already come, I cannot accept Mr. McClure's submission. Moreover, at least in one respect, I am not inclined to favour Mr. Gruder's argument as to jurisdiction. I agree, however, that no detailed consideration of set-off is called for. My reasons are these:

    i) Questions of some intricacy arise as to the classification of set-offs and the correct approach to be followed when a claim before an arbitrator is met by an argument that there is a set-off available arising under some separate transaction over which the tribunal does not have jurisdiction. Provisionally, I would be minded to think that an arbitrator does or should have jurisdiction to allow a "transaction" set-off, in effect amounting or akin to a defence, to be raised to reduce or extinguish a claim, even though that set-off arises under another contract, outside the tribunal's jurisdiction: see: ***Aectra Refining,*** at pp.1648 and following and ***Glencore v Agros,*** at pp. 416-417, both *supra*. As it seems to me, the investigation and determination of the availability and amount of such a set-off do not involve the arbitrator arrogating to himself a jurisdiction over separate contracts which he does not have (albeit that considerations of issue estoppel may well arise); instead, these steps form part of the process of arriving at a conclusion of whether a defence is properly available in respect of the contract as to which the arbitrator alone has jurisdiction. However, all these observations are provisional only, given that for reasons which follow, such questions do not arise for decision in this matter.

    ii) Where a decision is called for in respect of a set-off said to arise under a separate contract, then, absent agreement: (1) the point must be properly in issue before the arbitrator; (2) the arbitrator must necessarily investigate the position prevailing in respect of that separate contract; (3) if need be (and unless the arbitrator is proceeding by way of interim award, for example pending a decision on the separate contract by another court or tribunal and with an appropriate reservation of jurisdiction) the arbitrator must make a determination as to the position prevailing in respect of that separate contract; (4) in the light of any such determination, the arbitrator must come to a conclusion as to whether the alleged set-off is indeed available or whether, if not a transaction set-off, it faces a procedural bar, of the nature discussed in the two authorities referred to above.

    iii) In the present case, no issue of set-off was before the arbitrator. As already discussed, Ronly had withdrawn all reference to the credits it had been willing to allow. For its part, Zestafoni, far from raising a defence of

set-off, vigorously objected to the arbitrator considering any contract other than the agreement. But unless he did so, plainly he could reach no conclusion on the availability or amount of any set-off. For his part, the arbitrator accepted this Zestafoni submission.

iv) It was accordingly inevitable and is plain from the award that the arbitrator did not make any determination that the shortfall amount was not to be payable because it constituted a set-off. As already canvassed, he made no determination in this regard at all.

v) In the circumstances, it is not for the Court to consider whether the credits amounting to the shortfall amount might have constituted a transaction set-off potentially available to Zestafoni by way of a defence, serving to reduce Ronly's claim.

34. ***(4) Overall conclusion on the principal application:*** For the reasons given, I allow Ronly's application, under s.68, alternatively under s.67 of the Act, as set out above. There is accordingly no need to say any more of the application under s.69 of the Act.

35. In a nutshell, the award was incomplete in respect of the fate of the shortfall amount; in the circumstances of this arbitration, the arbitrator was instead bound to order payment of that amount to Ronly, given the conclusions to which he had already come as to the sums outstanding under the agreement. The award cannot be defended on the basis of the credits originally offered by Ronly; those credits had disappeared from the arbitration following the permitted amendments to Ronly's Points of Claim. Nor can the arbitrator's approach be justified by reference to the doctrine of set-off; the issue of set-off was not before him and he made no determination in that regard. That the arbitration might have followed a different course is now, on the particular facts of this matter, water under the bridge. In my judgment, the parties must address their overall accounting position against the reality of an order for immediate payment of the shortfall amount.

THE APPLICATION TO CORRECT THE AWARD

36. I can deal with this subsidiary application summarily. It would appear that Ronly raised with the arbitrator the question of correcting the award under s.57 of the Act (essentially, the slip rule), to reduce (by some very small sum) the amount payable to it. Curiously, Zestafoni opposed any such correction. The arbitrator thereafter declined to make any correction.

37. Before me, Mr. Gruder very fairly conceded that any application under s.57 faced insuperable jurisdictional difficulties. I agree. The power under that section is one for the arbitrator not the court to exercise. What remained, was an application, contained in the Claim Form, under s.68 of the Act, to the effect already summarised. I inquired of Mr. McClure as to Zestafoni's position and he told me that it continued to oppose any correction to the award. In these somewhat unusual circumstances, it seems idle to spend any more time on this application. It is unnecessary to say more than that I am not persuaded that there is in the present respect any serious irregularity in the award; I therefore dismiss Ronly's subsidiary application.

38. I shall be grateful for the assistance of counsel in drawing up an appropriate order reflecting my conclusions and on all questions of costs.

Jeffrey Gruder QC (instructed by Ince & Co) for the Claimant
Brian McClure (instructed by Derrick French & Co) for the Defendant