JUDGEMENT : GILLEN J : QBD. High Court Northern Ireland. 20th January 2000.

1 These matters come before the court in the form of two applications. The Northern Ireland Housing Executive ("the respondent") applied on 9 July 1999 for an order that the second interim award dated 18 June 1999, and delivered 1 July 1999 of Terence Devlin B.ARCH.RIBA.FCIARB.MAE., the arbitrator in the above entitled arbitration, be set aside in part or be remitted to the arbitrator, for reconsideration on the grounds that serious irregularity has caused or will cause substantial injustice to the NIHE, within the meaning of paragraphs (d), (f) and (g) of sub-section 2 of Section 68 of the Arbitration Act 1996. Alternatively for an order that the NIHE be granted leave to appeal on a point of law arising out of the award and that on the basis of the findings of fact in the said award the decision was obviously wrong or was open to serious doubt. The second application was that of William John Dolan trading as WJ Dolan Construction ("the applicant"). Although the application set out a number of grounds of relief Mr Orr QC, who appeared on behalf of the applicant before me, helpfully indicated at the outset of this hearing that in essence the relief sought was pursuant to Section 68(2)(b) of the Arbitration Act 1996 ("the Act") in that the arbitrator had exceeded his powers in making and publishing on 2 August 1999 a supplementary award correcting the arbitrator's second interim award published by the arbitrator on 18 June 1999. Accordingly, he submitted that the supplementary award of 2 August 1999 be set aside in whole or in part.

The Factual Background

2 The factual background to these applications is well set out in the affidavit of Mr Feargal Logan dated 11 October 1999 which grounded the application of the applicant. In brief, the salient factors are as follows:

1. The applicant had contracted to carry out certain construction works to existing dwellings at Skea Arney, County Fermanagh, the property of the respondent. The contract was a JCT standard form of building contract, 1980 edition. The contract contained a valid arbitration agreement. A dispute arose concerning the applicant's claim for payment of loss and/or expense and after the parties had failed to agree on the appointment of a person as an arbitrator, Terence Devlin was appointed as the arbitrator.
2. Having heard the evidence from both parties, the arbitrator published his second interim award in the matter on 18 June 1999. In paragraph 64.01 he specifically found as a fact that a Mr McMenamin "was not a working foreman" and "that he worked full-time in a supervisory capacity". At page 101 the arbitrator decided that "the respondent shall pay to the claimant (the applicant) the sum of £4,946.47 on account of loss and expense incurred during the period 11 March to 9 May 1985". The arbitrator further awarded that "the respondent shall pay to the claimant (the applicant) the sum of £5,147.73 as interest on the sum of £4,946.47 and that therefore the respondent shall pay to the claimant a total sum of £10,094.20".
3. On or about 9 July 1999 the respondent applied to the arbitrator for "correction of arbitrator's second interim award under Section 57 of the Arbitration Act 1996", on the grounds that the award contained an error on the face of it in that the arbitrator had found, at paragraph 64.01 of page 61 of the said award that the foreman on the contract was not a working foreman and that he had worked full-time in a supervisory capacity and that the arbitrator had then proceeded to allow the costs of the foreman as a working foreman. The respondent appended to the application a copy of a "definition of prime costs of day works carried out under a building contract" and the respondent submitted that, at paragraph 4 of the application, "had Mr McMenamin (the applicant's foreman) been listed correctly as the foreman then he would have been excluded from the basic value of day works and in fact paid through the 120% add on percentage adjustment to the hourly rates as defined by the RICS at 6.1(b)". The respondent went on to submit to the arbitrator that, "the sums claimed for a supervisory site foreman must first be excluded to arrive at a correct basic day work's value to which the 120% add on percentage is then applied".
4. The arbitrator, at paragraph 62.07 of page 47 of the second interim award stated "with his letter dated 9 May 1985 the claimant submitted seven day work sheets as forming the detail of the loss and/or expense arising from the application, required for ascertainment by the architect. I am satisfied that those day work sheets met the requirements of sub-clause 26.1.3 when the original claim was made. No additional information has since been provided in this arbitration. The claimant's claim for payment of loss and expense arising from this application is still based solely on the seven day works sheets". The arbitrator at paragraph 64.02.01 at page 62 of the second interim award said "on all seven day work sheets submitted in support of the 25 April 1985 application Mr McMenamin's (site foreman) trade is given as bricklayer and his hours are recorded as acting in that capacity not as site foreman". The arbitrator at paragraph 67.03, at page 77 of the second interim award said "the claimant seeks to recovery a further £6,856.47 being the value of the seven day work sheets less £3,041 included in interim certificate number 1 for the work to which the day work sheets relate. The claimant's figure of £6,856.47 is too high. The value of the day work sheets should be reduced by the gross value of interim certificate number 1 at £4041.00 plus the £1,000 allowance by the architect making the claim £4,946.47".
5. The applicant, upon receipt of the application mentioned above by the respondent for correction of the arbitrator's second interim award, submitted that the respondent had placed fresh evidence before the arbitrator which had not previously been adduced at the hearing and that consequently the said evidence did not fall to be considered by the arbitrator under the "slip rule".
6. On 2 August 1999 the arbitrator published his supplementary award correcting the second interim award. The arbitrator at paragraph 6, page 3 of the supplementary award states "I did not consider the point. It

was a point that required submissions by the parties. It was and is within my knowledge that 120% addition includes, inter alia, supervision costs. I gave no thought to the duplication of Mr McMenamin's costs as bricklayer and a site supervisor. I should have done so. It would not have been my intention to duplicate all or part of any payment for loss and/or expense to which I found a claimant entitled. I made an error which, under Section 57 of the Arbitration Act 1996, I have power to correct and I do so". The arbitrator consequently reduced the amount payable to the claimant by the respondent from £10,094.20 to £7,090.26.

7. By correspondence of 23 August 1999 Logan and Corry, Solicitors acting on behalf of the applicant, applied to the arbitrator pursuant to Section 57(3)(a) and (b) of the Act requesting the arbitrator to amend his supplementary award to make provision in respect of value added tax. By correspondence of 25 August 1999 Johns Elliot, Solicitors on behalf of the respondent, rejected the applicant's proposal. By correspondence of 15 September 1999 the arbitrator replied to the applicant's solicitor refusing their application for the award of value added tax on the award. Wisely I believe, counsel on behalf of the applicant has not pursued that aspect of this matter before me.

Submissions

3 Before me, Mr Orr QC made the following submissions on behalf of the applicant:

1. Relying on Section 68(2)(b) of the Act, Mr Orr submitted that the arbitrator had exceeded his substantive jurisdiction and had been guilty of a serious irregularity in attempting to correct his second interim award by relying on the provisions of Section 57(3) of the Act. Section 57(3) of the Act reads:
   "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 or clarify or remove any ambiguity in the award, or
   (b) make an additional award in respect of any claim (including a claim for interest or cost) which was presented to the Tribunal but was not dealt within the award".

   In essence Mr Orr argued that the amendment in this instance was not a proper exercise of the slip rule.

2. Mr Orr argued that by virtue of the arbitrator having taken into account the material appended to the respondent's application of 9 July 1999 he had in effect transgressed the rules of natural justice by basing his amendment on specific matters which the parties never had the chance to deal with and was relying on his own personal experience without mentioning that to the applicant so that comment could be made thereon.

3. Mr Orr asserted that his application was within time under the provisions of Section 70 of the Act. Section 70(3) of the Act reads: *"Any application or appeal must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process".*

4 Mr Orr argues that the correspondence with reference to the value added tax issue referred to above by me between 25 August 1999 and 15 September 1999 ("the correspondence") amounted to an arbitral process of appeal or review and that since the applicant's application was dated 11 October 1999 he was within the relevant time limits.

5 Mr O'Reilly, who appeared on behalf of the respondent, made the following submissions:

1. He argued that the application now before me on behalf of the applicant was outside the time limits imposed by Section 70(3) on the basis that the entire correspondence had been on the VAT issue and had made no reference whatsoever to the amendment of the award now being canvassed. In other words, he argued that the VAT matter was the only issue which was the subject of the arbitral process of appeal or review and that it was not open to the applicant now to raise an entirely separate issue outside the period of 28 days beyond the date of the award.

2. He argued that in light of the findings of the arbitrator that Mr McMenamin had been a supervising foreman, the arbitrator was bound to exclude that sum from the day work charges and that this was fully the intention of the arbitrator. The fact that he failed to do so was clearly, in Mr O'Reilly's argument, an example contemplated by Section 57 of the Act.

3. Moving to the respondent's own application, Mr O'Reilly argued that even if the arbitrator had not properly acted under Section 57, nonetheless the respondent was entitled to succeed on its own application pursuant to Section 68(d) of the Act. The relevant sections of Section 68 are as follows:
   "68(1) A party to arbitral proceedings may (upon notice to the other parties and to the Tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the Tribunal, of the proceedings of 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 - ...
   (d) failure by the Tribunal to deal with all the issues that were put to it."

   Mr O'Reilly argues that the determination of the status of Mr McMenamin was clearly one of the issues put before the arbitrator and the arbitrator has candidly admitted that he failed to deal with it in his award.

4. Mr O'Reilly argued that he introduction by the respondent of the reference to the RICS document and the definition of the prime costs of day works did not constitute fresh evidence since those documents were

specifically referred to in clause 13.5.4 of the contract and were part of the contract documents and of which the arbitrator must have been aware.

Conclusions

6 My conclusions in this matter are as follows:

1. The applicant's application is in accordance with Section 70(3) of the Act. The wording of Section 70(3) is extremely wide and refers to *"any arbitral process of appeal or review"*. It is common case between the parties that the raising of the issue of VAT did amount to an arbitral process of appeal or review. Had it been the intention of Parliament to confine the eventual application or appeal only to those issues which arose in the arbitral process of appeal or review, then appropriate wording could have been used to ensure this was so. As it is I am of the view that the statute can be construed sufficiently widely to embrace an appeal on issues which were not raised in the arbitral process of appeal or review. To do so would not be inconsistent with a purposive construction of the Act. Circumstances might well arise where there is one clear point of appeal but a further point may be the subject of a review. Once the latter point has been determined, only then might it be appropriate for the former point to be canvassed by way of a straight appeal. I therefore determine that it is appropriate for me to consider the application of the applicant.

2. I have concluded that the arbitrator was entitled to correct his second interim award under Section 57 of the Act. The following matters govern my reasoning for so finding:

   (a) Once a final award is made, an arbitrator becomes functus officio. This means in terms that his authority to act ceases and the reference terminates. The Act has provided the arbitrator with power under Section 57 to correct clerical mistakes or errors arising from an accidental slip or omission or to clarify or remove any ambiguity in the award and also with power to make an additional award. Save for these two situations, an arbitrator has no power to amend or recall an award once it has been made and notified to the parties unless it is remitted by the court. The power to correct therefore covers three distinct situations. The first is a clerical mistake, a slip of the pen or something of that kind. The second is an error arising from an accidental slip or omission, ie something is wrongly put in or left out by accident. The third situation enables a tribunal to clarify or remove any ambiguity in the award. The meaning of "accidental slip" has been considered in ***Food Corporation of India v Marastro Cia Naviera S.A.*** (the "Trade Fortitude") (1986) 2 Lloyd's Rep 209.. In that case, by a charter party the owners had let their vessel, the Trade Fortitude to the charterers for the carriage of a cargo of wheat from the United States Gulf to India. The vessel was to be lightened at Calcutta into ocean-going ships as a prelude to discharge at that port. The lightening was to be at owner's risk and laytime was to be computed only in respect of the discharge by lighters at Calcutta. It was argued that the arbitrator had fallen into error in subtracting steaming time from time on demurrage instead of adding it to laytime. The court was unable to ascertain in fact what the arbitrator had done and on that ground hesitated to describe the error as arising from an accidental slip. Lloyd LJ said at page 216: *"In one sense, of course, all errors are accidental. You do not make a mistake on purpose. But here the words take their colour from their context. I do not suggest that Section 57(3)(a) is limited to clerical mistakes. But, in general, the error must, in the words of Rowlatt J in* **Sutherland & Company v Hannevig Brothers Limited** *(1921) 1 KB 336 at 341 be an error affecting the expression of the Tribunal's thought, not an error in the thought process itself ... The fact that the error ... was an elementary error is not sufficient to make it accidental."*

   (b) If the Tribunal assesses the evidence wrongly or misconstrues or fails to appreciate the law, it cannot correct the resulting errors in its award under the slip rule. However, in ***Mutual Shipping Corporation of New York v Bay Shore Shipping Company of Monrovia ("the Montan")*** (1985) 1 AER 520 a dispute arose between the owners and the charters of a vessel regarding, inter alia, the amount of fuel used by the vessel. The dispute was referred to the arbitrator. The arbitrator accepted the charterer's figures but by mistake transposed the names of the parties thereby incorporating the owner's figure. Accordingly he determined the charterers were required to pay the owners a sum whereas he should have determined that the owners were required to pay the charterers a sum. Goff LJ said at page 529c: *"Furthermore there is authority that if a court makes an order in certain words which do not have the effect which the court intended them to have, that order may be corrected under the slip rule to make it accord with the court's actual intention ... I for my part can see no reason why, if a court gives judgment in, for example, a certain sum and the order is then drawn up and perfected, and it is afterwards discovered that the court has by accident miscalculated the figure or omitted an item from it, the error in the order should not be corrected under the slip rule. ... The crucial question, under this part of the slip rule, is whether the error does indeed arise from an accidental slip or omission."*

   Plainly, of course, this power cannot be exercised to enable a tribunal "to reconsider a final and regular decision once it has been perfected, even if it has been obtained by fraud". (See Sir John Donaldson MR in ***R v Cripps ex parte Muldoon and Other*** (1984) 2 AER at page 710.)

   (c) In the present case however it seems clear that the arbitrator had made a finding about the status of Mr McMenamin which inevitably meant that it would have been his intention to exclude provision for him from the day work charges. In paragraph 64.01 of the second interim award published 18 June 1999 and delivered 1 July 1999 the arbitrator had found as a fact that Mr McMenamin "*was not a working foreman" and "that he worked full-time in a supervisory capacity*". Additionally he stated: *"I am satisfied that Mr*

McMenamin supervised the works as site foreman. I am also satisfied that his costs in that role were incorporated within the rights used by the claimant to price the bill of quantities. ... The claim for the additional costs of a site foreman is now allowed".

I have not the slightest doubt that in view of this finding it was never the intention of the arbitrator to award to the claimant the whole of the sums claimed on the seven day work sheets because the sums claimed for a supervisory site foreman had to be excluded in order to arrive at the correct basic day works value. The arbitrator has frankly admitted, having found that McMenamin was the applicant's full-time site supervisor, he should not have allowed his costs as a bricklayer on each of the seven day work sheets submitted to the architect by the applicant with his letter dated 9 May 1985. It could never have been his intention to have duplicated an award. As he frankly admitted, he simply failed to consider the point when making the appropriate calculations.

I consider therefore that this is a case of an error by an arbitrator affecting the expression of his thought rather than in the thought process itself. I do not consider that a consideration by the arbitrator of RICS' definition of prime cost amounted to fresh evidence ("the document"). The inclusion of the site foreman in the day work sheets was always an issue between the parties and in fact was determined by the arbitrator as a matter of fact having heard all the evidence. This is a document well known to those familiar with building contracts and in any event the document is specifically referred to in Clause 13.5.4 of the contract. When the arbitrator, as he must have done, had read through the entirety of the contract terms and examined them closely, he would have been well aware of the nature of the day work charges. He must have been well aware that the RICS conditions were included.

One must bear in mind the reality of the situation that this particular arbitrator had been appointed to arbitrate on a building contract and one simply does not expect him to act as a complete layman without the slightest knowledge of the most obvious facets of building contract issues. In ***Zermalt Holdings SA v NU Life Upholstery Repairs Limited*** (1985) 2 EGLR, Bingham J (as he then was) said at page 15: *"I fully accept and understand the difficulties in which an expert finds himself on acting as an arbitrator. There is an unavoidable inclination to rely on one's own expertise and in respect of general matters that is not only not objectionable but is desirable and a very large part of the reason why an arbitrator with expert qualifications is chosen. Nevertheless, the rules of natural justice do require, even in an arbitration conducted by an expert, that matters which are likely to form the subject of decision, in so far as they are specific matters, should be exposed for the comments and submissions of the parties. If an arbitrator is impressed by a point that has never been raised by either side then it is his duty to put it to them so that they have an opportunity to comment. If he feels that the proper approach is one that has not been explored or advanced in evidence or submission then again it is his duty to give the parties a chance to comment. If he is to any extent relying on his own personal experience in a specific way then again that is something that he should mention so that it can be explored."*

I think that that instance is very far removed from the present situation. I believe that this RICS definition of prime costs is one of the general matters which will be known to all the parties in an arbitration of this kind and in any event it is a document that must have been well known to all the parties including the arbitrator in this instance since it is specifically included in the contract itself. I have no doubt therefore that the arbitrator therefore was entitled to say that it was within his knowledge that 120% addition includes supervision costs and that the parties were at all material times well aware of this.

3. If the arbitrator in this case had not been entitled to act under Section 57 of the Act in accordance with the slip rule (contrary to my findings), I would have acceded to the application of the respondent in this matter, namely that the second interim award dated 18 June 1999 should be remitted to the arbitrator for reconsideration on the grounds that a serious irregularity had caused substantial injustice to the applicant within the meaning of paragraph 68d. At paragraph 6 of the corrected second interim award the arbitrator states: *"I did not consider the point. It was not a point that required submissions by the parties. It was and is within my knowledge that the 120% addition includes, inter alia, supervision costs. I gave no thought to the duplication of Mr McMenamin's costs as bricklayer and of site supervisor. I should have done so. It would not have been my intention to duplicate all or part of any payment for loss and/or expense to which I found the claimant entitled."*

7 It is difficult therefore to conceive of a clearer example of a failure by a tribunal to deal with an issue that was put before it than this and the fact that the arbitrator has been so candid would have fuelled my determination in this regard. In the event I do not need to go this far given my finding that the matter does come within the slip rule.

8 Accordingly I dismiss the application by the applicant in this matter with costs to the respondent. So far as the respondent's claim is concerned I shall listen to argument as to the best way of disposing of it.