**Danae Air Transport Societie Anonyme v Air Canada [1999] EWCA Civ 2011**

CA on appeal from Commercial Court (Mr Justice LOngmore) before Kennedy LJ; Ward LJ; Tuckey LJ. 29th July 1999.

**Lord Justice Tuckey:**

**Introduction.**

1. By a final award published in London on 26th October 1998 arbitrators ordered the Claimants (Danae) to pay the costs of the award from 15th August 1995 (£519,659.) and the Respondents (Air Canada) costs from that date (a substantial sum still to be assessed). The arbitrators made this costs award because they thought that Danae had not beaten a Calderbank offer made by Air Canada on 15th August 1995. Danae contend and Longmore J. accepted that in reaching this conclusion the arbitrators made a basic arithmetical error. They had in fact beaten the offer so they should have been awarded all their costs. However, the arbitration agreement between the parties excluded all rights of appeal. Danae therefore sought to have the award remitted or set aside under sections 22 and/or 23 of the Arbitration Act 1950. The Judge rejected this application but gave leave to appeal saying "*My decision results in undoubted injustice to (Danae)*"

2. Danae acted as Air Canada's agent in Greece until April 1989 when, as the arbitrators found, their appointment was wrongly terminated. At the time of termination Danae held money from the sale of tickets which they were obliged to pay over to Air Canada but they held on to it as partial security for their claim. In the arbitration which started in early 1995 Air Canada counterclaimed this money held by Danae. Although the principal amount held by Danae in this way had been agreed by August 1995 there were arguments about the period during and the rate at which Air Canada should receive interest.

3. The essence of the Calderbank offer was that Air Canada would forego their counter-claim and pay Danae an additional Can$500,000. Danae rejected the offer. It is agreed that the effect of the arbitrator's final award, adjusted so as to reflect interest up to August 1995, was that Danae were awarded Can$1,904,481 on their claim and Air Canada were awarded Can$1,026,811 on their counterclaim. The arbitrators ordered the counter-claim to be set off against the claim, so on these figures Air Canada had to pay Danae Can$877,670 and Danae did not have to repay the money which they were holding. It is self-evident from this summary that Danae did better (by Can$377,670.) by going on with the arbitration than they would have done if they had accepted the Calderbank offer.

4. And yet the arbitrators by a majority (Bruce Coles QC. and W.E. McKie, Esq.) held otherwise. They made their order for costs on the basis that Danae had failed to beat the offer by about Can$400,000. The financial consequences of this error from Danae's point of view, if it cannot be corrected, are enormous. They will end up paying well in excess of £1m. when, if the arbitrators had not made the error, they had good prospects of not having to pay anything and receiving a substantial additional costs order in their favour.

5. I shall have to trace the history of how this has come about in a little more detail but that is the position in a nutshell. Air Canada simply say the Judge was right. The courts cannot interfere. They say they are not taking advantage of the arbitrator's error although they have not given any convincing reason to justify this assertion. This stance suggests that they know that it would be unacceptable for a large international airline to admit that they are taking advantage of an obvious error in their favour at the expense of a former agent of lesser means. But that is exactly what they are doing.

**History.**

6. Following the publication of the arbitrators' fourth interim award in September 1997 the parties turned their attention to the question of costs and in particular to whether Danae had beaten the offer. Each side on their own initiative and not in response to one another produced schedules which analysed the value of the award in the same way. By coincidence the arbitrators had awarded Can$500,000 to Danae as damages for "moral prejudice". This was therefore the same amount as Air Canada's cash offer and the two amounts cancelled one another out. The comparison between the award and the offer could therefore be made by a straight comparison between the award to Danae on their claim (ignoring the Can$500,000) and the award to Air Canada on their counter-claim. At this stage the latter only exceeded the former by on Air Canada's figures about Can$44,000 and on Danae's about Can$35,000.

7. These schedules were used at a hearing before the Arbitrators on 24th September 1997 at which a number of costs and interest issues were argued. I need only refer to two of these issues. The first arose out of the terms of the Calderbank offer. It included the payment of all Danae's costs with the exception of certain costs which had been incurred in the recent past or would be incurred if the arbitration settled, which the offer proposed should be borne equally. Danae calculated that their share of these costs was Can$57,185. They submitted that the value of Air Canada's offer should be reduced by this amount. Of course this relatively small amount was crucial having regard to the difference between claim and counterclaim.

8. The second issue arose out of what is described as the "Ballotta incident". Mr. Ballotta had been a senior employee of Air Canada until November 1989 who, (contrary to his assertion) as the arbitrators subsequently found, had "clearly been concerned with the events which gave rise to the arbitration". Nevertheless Air Canada appointed Mr. Ballotta as their arbitrator and in spite of Danae's protests resisted all attempts to remove him for two years during which the progress of the arbitration was considerably delayed. Danae argued that Air Canada should be deprived of interest on their counter-claim for the period of this delay. The value to Danae of this argument, as subsequent events to which I will come show, was Can$400,000.

9. Air Canada resisted Danae's attempts to improve their position on both these issues. They relied on the figures in their schedule which showed that the amount of the award exceeded the amount of the offer. Their written submissions on this point concluded with the following paragraph : *"In addition to the amounts awarded in drachma, Danae was awarded Can$500,000 in tort. By coincidence this amount equates precisely to the additional sum offered to Danae in the sealed offer. It follows that the net amount awarded to Danae by the arbitrators is not only substantially less than that contained in the sealed offer, but is less even than the amount of the additional Can$500,000 then offered to Danae in addition to the value of Air Canada's counter-claim."*

10. I do not really understand the last sentence of this paragraph but it certainly does not suggest the error which the arbitrators subsequently made.

11. The hearing was followed by an exchange of correspondence with the arbitrators in which the solicitors for the parties each took a number of confusingly bad points but again the error which the arbitrators subsequently made was not suggested, or at least clearly suggested.

12. The arbitrators produced a draft final award in November 1997. This is where the error first appeared. They valued the offer by adding the value which Air Canada had put on their counterclaim in the Calderbank letter (Can$818,500.) to the Can$500,000. But they valued the award by subtracting their award on the counterclaim from their award on the claim. On the figures they used this showed that Danae had failed to beat the offer by about Can$800,000. No one had suggested that the calculation should be done in this way. It was palpably wrong because the arbitrators were not comparing like with like. If the value of the counterclaim was to be added to the amount of the cash offer for the purpose of valuing the offer it shou ld not have been subtracted for the purpose of valuing the award. On the basis that Danae failed to beat the offer the draft final award had said that they were to pay the costs of the award and Air Canada's costs from 15th August 1995. Air Canada were to pay Danae's costs up to that time.

13. The arbitrators accepted Danae's arguments on the first issue to which I have referred so they reduced the value of the offer by Can$57,185. On the Ballotta incident they said that as they had already dealt with interest on the counter-claim in an earlier award and as no submissions had been made to them about the incident before they made that award they had no jurisdiction to deal with the matter.

14. The draft final award, as one would expect, caused great concern in the Danae camp. Their solicitors made increasingly frantic efforts to persuade the arbitrators of their error. They bombarded them with letters, submitted an accountant's report and eventually persuaded them to hold a further hearing. Air Canada's stance was that having published their award in draft, the arbitrators could not reconsider their decision and that they had not made any error. Indeed, their solicitors asserted that the arbitrators were "plainly and obviously correct".

15. But this error was not the only thing which concerned Danae. Contrary to what was said in the draft final award, they had raised the Ballotta incident in submissions to the arbitrators before they made their earlier award. In a letter of 21st January 1998 Mr. Coles accepted this. What is more however, he disclosed that in fact at that time the arbitrators had decided to disallow interest on the counter-claim for the entire two year period. The award which they had made did not reflect this decision. This was due to "an error in typing up the final version" of the award. Mr. Coles suggested various methods by which the error could be rectified which required the parties agreement. No agreement was forthcoming.

16. The final hearing before Mr. Coles took place on 21st May 1998. At this hearing both parties maintained the stance they had adopted in correspondence since publication of the draft final award.

17. The final award was published, as I have said, on 26th October 1998. The arbitrators decided they could correct the error in their earlier award to reflect their decision about the Ballotta incident. This had the effect of reducing Air Canada's counter-claim by Can$400,000. They decided that had jurisdiction to do this under the slip rule contained in section 17 of the 1950 Act and under the UNCITRAL rules which the arbitration agreement enabled them to apply "with flexibility and discretion".

18. But the error in the draft final award was repeated although the effect of the correction for the Ballotta incident was that the majority thought that Danae had failed to beat the offer by about Can$400,000. This is how they reached this result:

**Value of Offer**

| | |
|---|---|
| Air Canada's valuation of counterclaim | Can$818,500 |
| Cash offer | Can$500,000 |
| Less | Can$ 57,185 |
| Total: | Can$1,261,315 |
| Value of Award (at 15/08/95) | |
| Claim | Can$1,904,481 |
| Less counter-claim | Can$1,026,811 |
| Total | Can$ 877,670 |
| Difference: | Can$ 383,645 |

19. In fact the arbitrators valued the claim and counter-claim at 31st July 1998 so the difference was greater than these figures show, but this is not significant. They sought to justify this conclusion for reasons which I find very difficult to follow. Mr. Collins, QC., Counsel for Air Canada submitted (very faintly, it is fair to say) that they were right. They were not, for the reasons I have given.

20. The final chapter in this story relates to the arbitrators assessment of the costs of the arbitration. In their final award they assess them at a total of £740,955.52. In a letter of 24th June 1999 the solicitors who acted as secretaries to the arbitration say that the total should in fact have been £845, 825.24. The letter ends by saying that if a further sum for the solicitors' costs is added, the costs before 15th August 1995 are £303,534,39 and since that date £542,838.55. No suggestion is made as to how these errors should be corrected.

**The Law.**

21. This arbitration was not governed by the Arbitration Act 1996 although if it had been broadly similar issues would have arisen as arise on this appeal. The relevant provisions of the 1950 Act are :

*17. Unless a contrary intention is expressed in the arbitration agreement, the arbitrator ........ shall have power to correct in an award any clerical mistake or error arising from any accidental slip or omission.*

(Article 36 of the UNCITRAL rules gives arbitrators the power to correct *"errors in computation, any clerical or typographical errors, or any errors of similar nature")*.

*22(1) In all cases of reference to arbitration the High Court may from time to time remit the matters referred or any of them, to the reconsideration of the arbitrator ........*

*23(2). Where an arbitrator ........ has misconducted himself or the proceedings ........ the High Court may set the award aside.*

22. The relevant provisions of the 1979 Act are :

*1. (1) In the Arbitration Act 1950 ........ section 21 (statement of case for a decision of the High Court) shall cease to have affect and, without prejudice to the right of appeal conferred by sub-section 2 below, the High Court shall not have jurisdiction to set aside or remit an award on the arbitration agreement on the ground of errors of fact or law on the face of the award.*

*(2) ........ an appeal shall lie to the High Court on any question of law arising out of an award made on an arbitration agreement; and on the determination of such an appeal the High Court may by order -*

*a) confirm, vary or set aside the award; or*

*d) remit the award to the reconsideration of the arbitrator ........ together with the court's opinion on a question of law which was the subject of appeal ........*

23. The power to set aside or remit an award for error on the face of the award was a common law remedy although whether it could have been invoked for errors of fact is doubtful.

*24.* The interaction between section 1 of the 1979 Act and section 22 of the 1950 Act where the discretion to remit is expressed in wide terms has been considered in a number of cases. In this case however both parties accepted the general statement of principle by Lord Donaldson in ***King -v- Thomas McKenna Ltd .*** (1991) 2 QB 480 (CA), at p.491G where he said: *"In my judgment the remission jurisdiction extends ........ to any cases where, notwithstanding that the arbitrators have acted with complete propriety, due to mishap or misunderstanding, some aspects of the dispute which has been the subject of the reference has not been considered and adjudicated upon as fully or in a manner which the parties were entitled to expect and it would be inequitable to allow any award to take effect without some further consideration by the arbitrator. In so expressing myself I am not seeking to define or limit the jurisdiction or the way in which it should be exercised in particular cases, subject to the vital qualification that it is designed to remedy deviations from the route which the reference should have taken towards its destination (the award) and not to remedy a situation in which despite having followed an unimpeachable route, the arbitrators have made errors of fact or law and as a result have reached a destination which was not that which the court would have reached. This essential qualification is usually underlined by saying that the jurisdiction to remit is to be invoked, if at all, in relation to procedural mishaps or misunderstandings. This is, however, too narrow a view since the traditional grounds do not necessarily involve procedural errors. The qualification is however of fundamental importance. Parties to arbitration, like parties to litigation, are entitled to expect that the arbitration will be conducted without mishap or misunderstanding and that subject to the wide discretion enjoyed by the arbitrator, the procedure adopted will be fair and appropriate. What they are not entitled to expect of an arbitrator any more than that of a judge is that he will necessarily and in all circumstances arrive at the "right" answer as a matter of fact or law. That is why there are rights of appeal in litigation and no doubt would be in arbitration were it not for the fact that in English law it is left to the parties, if they so wish, to build a system of appeal into their arbitration agreements and few wish to do so, preferring "finality" to "legality". "*

*25.* In an earlier case (***The Montan*** (1985) 1 WLR 625) where the arbitrator had mistakenly attributed the evidence of one party to the other and consequently, made an award in favour of the wrong party, in remitting the award to the arbitrator Lord Donaldson said at page 632 : *"Section 22 empowers a court to remit an award to an arbitrator for reconsideration. It provides the ultimate safety net whereby injustice can be prevented, but it is subject to the consideration that it cannot be used merely to enable the arbitrator to correct errors of judgment, whether on fact or law, or to have second thoughts, even if they would be better thoughts. "*

*26.* In that case the arbitrator admitted the mistake but Lord Donaldson said : *"The arbitrator admits that he made an accidental error, but I should not like it to be thought that such an admission is a pre-requisite for the exercise of the court's jurisdiction to remit. If the arbitrator says nothing and there is a strong prima facie case that there has been an accidental error, the award could be remitted to him with a direction to reconsider it and to revise it if, but only if, there was such an error."*

27. Robert Goff LJ said at page 638 : "*Without laying down any hard and fast rule, I think that as a general rule the court should not intervene in cases of simple mistake unless there is a clear admission by the arbitrator that he has made a mistake. Nowadays, arbitrators should be able to correct any clerical mistakes in their awards, or any mistakes in their awards arising from accidental errors or omissions, under section 17 of the Act of 1950. The most likely case which may arise in which the court may be asked to exercise its power to remit an award on grounds of error will be where an arbitrator, having made a mistake is not certain whether he has power to correct his award under section 17, as he may not be when one party disputes his power to do so. In such a case, or if the arbitrator otherwise declines to exercise his power, the aggrieved party may apply to the court for a remission. Such cases apart, I cannot but think that the court's power of remission will be very rarely exercised in cases of mistake, but, as I have said, I do not wish to restrict the width of the power to order remission in the interests of justice.*

28. Sir Roger Ormrod was less restrained. He said: "*Whichever way of looking at this problem is correct it is clear to my mind that the parties themselves cannot blindfold the court, only the court itself can do that and in the vast majority of cases it will do so. But in those rare cases where an error occurs, of the kind which we are considering in this case, the court cannot decline to interfere without gravely prejudicing in the eyes of the lay world the machinery of justice. For my part I do not think that either conclusion will significantly endanger the finality of arbitration awards. Section 17 of the Act of 1950 is limited to clerical mistakes or accidental errors. Section 22 of the same Act is limited by the discretion being subjected to the constraints imposed by the overriding importance of preserving finality in all but the most exceptional situations.* "

29. In a number of cases the courts have had to consider the application of these principles to costs awards. In ***Blexen Ltd -v- G. Percy Trentham Ltd.*** (1990) 2 EGLR9 it was contended that in deciding whether the claimants had beaten a sealed offer the arbitrator failed to take account of the fact that the respondents had succeeded in reducing the claim by amendments made after the offer. In allowing an appeal against an order remitting the award Lloyd LJ after referring to section 23 of the 1950 Act said at page 10 : "*But the question is whether that power exists when the only misconduct alleged is an error of fact or law in a reasoned award. I am quite clear that it does not. To hold otherwise would defeat one of the main purposes of the 1979 Act. Whatever may have been the position as to costs in the old days, the only course open today, where an arbitrator states his reasons, is to challenge those reasons by seeking leave to appeal under ........ the 1979 Act. This the claimants never did.* "

30. In ***King -v- Thomas McKenna Ltd.*** at page 495 Lord Donaldson said: "*I therefore conclude that there is now no remedy for bona fide error on behalf of the arbitrator in the matter of costs where the arbitration is subject to an exclusion agreement and not all parties consent to an appeal.* "

31. However, the court in that case upheld a decision to remit where an arbitrator had made a costs award in ignorance of a sealed offer because Counsel had not told him clearly that there was one or asked for the issue of costs to be held over. Lord Donaldson characterised this as a procedural mishap.

32. Finally, in ***President of India -v- Jadranska*** (1992) 2 Lloyd's Rep. 274 the dissatisfied party to a costs award applied for the award to be remitted on the ground that there was no basis on which the arbitrators could possibly have exercised their discretion on costs in the way they did. In dismissing this application Hobhouse J. said at page 279 : "*The procedure and remedy under s.22 may only be invoked where there has been some excess of jurisdiction, some distinct element of misconduct or procedural mishap, not simply some alleged unjudicial exercise of the discretion. Examples of such distinct misconduct could be making an award which went outside the rival contentions of the parties or making an award without giving both parties an opportunity to be heard. The* ***King*** *case was one of procedural mishap. Such complaints can only be raised on a motion under ss. 22 or 23; they cannot be raised by way of an appeal under s.1. Sections 22 and 23 therefore, do not become wholly irrelevant, they simply become unavailable where the complaint is a failure by the arbitrator to apply the principles governing the judicial exercise of his discretion.*"

33. I do not discern from these authorities any special rules relating to the remission of costs awards. If there have been deviations from the route by which the decision comes to be made sections 22 and 23 are available to remedy the situation. If the arbitrators have followed an unimpeachable route but have made errors in the exercise of their discretion then the only remedy, if it has not been excluded, is by way of appeal on a question of law under section 1 of the 1979 Act.

**The Judgment.**

34. The Judge accepted what I have just said about the law. By reference to what Hobhouse J, said in ***Jadranska*** he held that there was no excess of jurisdiction. The arbitrators were invested with the power to award costs. Nor was there a procedural mishap. Nothing happened by accident and the Ballotta incident did not in the event make any difference to the result. However the draft final award came about Air Canada subsequently argued that the arbitrators approach was correct so the final award did not go outside the rival contentions of the parties. He therefore dismissed the application for remission having granted leave to Danae to rely on section 23 as well as section 22. On his direction the proceedings were served on the arbitrators together with the judgment to enable them to respond if they wanted to. They have not.

**The Appeal.**

35. Mr. Tomlinson, QC., Counsel for Danae, submits that the Judge took too restrictive a view of his powers under section 22 which should have enabled him to right the injustice which he concluded Danae had suffered. This was not an error of law but a procedural mishap because the arbitrators made a simple mathematical error. Whilst

the parties had to accept the possibility that the arbitrators would make the wrong decision they had not accepted that they would fail to apply the absolutes of mathematics. Alternatively, the draft final award did produce a conclusion which was outside the rival contentions of the parties and the Ballotta incident was undoubtedly a procedural mishap. Since the award will have to be amended to correct the recently discovered errors it should in any event be remitted.

36. Mr. Collins submits that the Judge was right for the reasons he gave. There is no escape from the fact that this is a challenge to the arbitrators' decision as such and not to the route by which it was reached. The arbitrators resolved issues which were before them as to how the offer and the award should be valued and their decision could only have been challenged on appeal. If the draft final award was outside the rival contentions of the parties this was beside the point because for the best part of the following year the parties debated the very point which the arbitrators then decided. Whilst the Ballotta incident was a procedural mishap, it was not one which had any impact on the final award because that award took it into account. If the recently discovered error requires the award to be remitted, it should only be remitted for that purpose. There is no jurisdiction to remit it for any other purpose.

**Conclusions.**

37. In the course of his submissions Mr. Collins accepted that a simple error of arithmetic by arbitrators can ordinarily be amended under the slip rule (section 17 of the 1950 Act and/or the UNCITRAL rules). Either party raising such an error would not be challenging any conclusion or decision of the arbitrators as to the primary facts. Mr. Collins conceded that in such a case if the arbitrators did not make the correction their failure to do so would be a procedural mishap.

38. I think he was right to make this concession. He of course maintained that this was not a simple error of arithmetic. What is more he relies on the fact that it was not accidental or admitted. It was made after consideration of endless argument and justified, rightly or wrongly, by lengthy written reasons.

39. The fact that such an error is not accidental or admitted will not of course alter its character. It remains a simple error even if it is made deliberately and there is a continuing refusal to correct it. Nor does it matter that one party encouraged the making of the error and the refusal to correct it by arguing that there was no such error.

40. To take Mr. Tomlinson's example, if the arbitrators had thought that 2 + 2 = 5 and made an award which they refused to correct on this basis, could the court remit under section 22 ? I think they could. The court would not be inhibited by the fact that the mistake was not accidental or admitted. Deliberately making a simple error of this kind could properly be characterised as a procedural mishap and in exceptional circumstances the court has power to remit if the error is not admitted. (See ***The Montan).***

41. So I think the question for our decision is whether the error in this case was a simple error of mathematics and nothing more. I think it was. In order to compare like with like, what the arbitrators had to do can be expressed as follows :

    Offer = Can$442,815 (Can$500,000 - Can$57,185.)
    Award = Can$877,670 (Can$1,904,481 - Can$1,026,811)
    A > O by Can$434,855.

42. This takes the counterclaim into account in each case. What the arbitrators have done is to add the value of the counterclaim to O whereas they have subtracted it from A. The nature of the error can be illustrated in other ways but I think whichever way one looks at it it can be characterised as a simple mathematical error. No real process of reasoning is required to make the comparison properly. It is an error of recognition as much as anything else.

43. It follows that I think that the court does have jurisdiction to remit the costs award under section 22 on the narrow ground of arithmetical error resulting from procedural mishap. In other words there has been a deviation from the route which the reference should have taken because ordinary principles of mathematics were not applied. The parties were entitled to expect that the arbitration would be conducted without a mishap or misunderstanding of that kind.

44. However, I also think that the case is made out for remission on the wider ground advanced by Mr. Tomlinson. The way in which the arbitrators dealt with the Ballotta incident was undoubtedly a procedural mishap. If it had not happened, by September 1997 instead of a difference of approximately $40,000 between the claim and counterclaim, the difference would have been about $360,000 in Danae's favour. No fine tuning arguments would have made any difference. The correct approach adopted by each of the parties independently in their schedules would have shown that Danae had comfortably beaten the offer and the arbitrators would not have had the opportunity to make the error which they did. As it was, the Ballotta incident provided the opportunity for the arbitrators to make this error. They first did so, it seems to me, by going outside the rival contentions of the parties. This was also a procedural mishap. The combined effect of both mishaps carried through into the final award in the sense that if neither of them had occurred I do not think the majority would have made the error which they did. I do not think it is any answer to say that the final award took account of the Ballotta incident or that Air Canada adopted the error after it was first made. This is beside the point if, but for the procedural mishaps, the error would not have occurred.

45. Finally I think Mr. Collins is right about the effect of the recently discovered error. Jurisdiction to remit part of an award cannot justify remission at large.

46. Mr. Collins submitted that if we allowed this appeal we should not remit the costs award to the arbitrators, but set it aside. This course was justified, he argued, by the fact that there was no guarantee that if remitted the arbitrators would not repeat their error and because this arbitration has already lasted too long and cost too much. I certainly agree that this arbitration has lasted too long and cost too much but that is no reason why it should not at least end with a just result. I am sure that if the award is remitted so that the arbitrators can reconsider their costs award in the light of this judgment and the judgment of Longmore J., they will produce a just award. Simply setting aside the costs award will not do so.

47. I should like to end this judgment by saying that Mr. Tomlinson invited us to extend the limits of the discretion to remit which have been set in the cases to which I have referred if that was necessary to do justice in this case. I do not think this is necessary. I think the decision I have reached falls within the general principles laid down in ***King -v- Thomas McKenna Ltd.*** Every case of this kind involves an attack on the arbitrators' decision but the basis for remission is not that the decision itself is wrong but that there has been a procedural mishap in the way in which it has been reached. Naturally, I am pleased to be able to reach this conclusion to right an obvious injustice, but I am conscious of the risk that hard facts make bad law. I do not intend to do so and do not think that I have done so.

48. For these reasons I would allow this appeal and remit the costs award to the arbitrators for their reconsideration in the light of this judgment. It will be for them to decide how they wish to do this and of course what costs award they should make.

**Lord Justice Ward:**

49. I have read in draft the judgments of Tuckey and Kennedy L.J.J. I am happy to find any way to agree that the appeal be allowed and the matter remitted to the arbitrators for their reconsideration.

50. I express myself thus to make it plain that unless the appeal is allowed, an egregious injustice will have been perpetrated and the integrity of international arbitration in London, in which we take pride, and in which the High Court has still a correcting role to play, will have been sullied.

51. The role now played by section 22 of the Arbitration Act 1950 is necessarily severely restricted. Restricted entry must be zealously maintained because:-
    i) the achievement of finality through arbitration must not be undermined;
    ii) freedom to exclude appeals must be upheld; and
    iii) attempts to challenge awards must be channelled through the narrow gateway of leave to appeal.

52. That said, the jurisdiction conferred by section 22 is unfettered. See, for example, ***Blexen Ltd v G. Percy Trentham Ltd*** [1990] 2 EGLR 9, 12, where Lloyd L.J. said:- *"Where an unfettered discretion has been granted by Parliament, it is never desirable to hedge it about with too much guidance, in case the guidance comes to be regarded as an infeasible rule of law or practice. It can be no such thing."*

53. And ***King v Thomas McKenna Ltd*** [1991] 2 Q.B. 480, 489C, where Lord Donaldson of Lymington M.R. said:- *"In ascertaining the limits of the court's jurisdiction, properly so called, I can see no reason why section 22 and the other section should not be construed as meaning what they say. Certainly so far as section 22 is concerned, there is no element of doubt or ambiguity. The jurisdiction is wholly unlimited."*

54. Later in the same case at p.491, Lord Donaldson said:- *"In my judgment, the remission jurisdiction extends beyond the four traditional grounds to any cases, where, notwithstanding that the arbitrators have acted with complete propriety, due to mishap or misunderstanding, some aspects of the dispute which has been the subject of the reference has not been considered and adjudicated upon as fully or in a manner which the parties were entitled to expect and it would be inequitable to allow any award to take effect without some further consideration by the arbitrator. In so expressing myself I am not seeking to define or limit the jurisdiction or the way in which it should be exercised in particular cases, subject to the vital qualification that it is designed to remedy deviations from the route which the reference should have taken towards its destination (the award) and not to remedy a situation in which despite having followed an unimpeachable route, the arbitrators have made errors of fact or law and as a result have reached a destination which was not that which the court would have reached. This essential qualification is usually underlined by saying that the jurisdiction to remit is to be invoked, if at all, in relation to procedural mishaps or misunderstandings. This is, however, too narrow a view...Parties to arbitration, like parties to litigation are entitled to expect that the arbitration will be conducted without mishap or misunderstanding and that, subject to the wide discretion enjoyed by the arbitrator, the procedure adopted will be fair and appropriate. What they are not entitled to expect of an arbitrator any more than of a judge, is that he will necessarily in all circumstances arrive at the 'right' answer as a matter of fact or law."*

55. Provided this residual power is most sparingly exercised only in the truly exceptional case, then it can be described as remaining available so as not '*to restrict the width of the power to order remission in the interests of justice*', to quote Robert Goff L.J. in *Mutual Shipping Corporation v Bayshore Shipping Co. Ltd., (The Montan)* [1985] 1 W.L.R. 625 at 638F. The judgment of Sir Roger Ormrod in that case expressed the same view but in his characteristically robust way.

56. I would wish to emphasise, however, that vigilance must be exercised, lest a free and easy unstructured resort to doing justice leads to a plethora of totally hopeless applications. It may be true in a sense that any result is unjust where the arbitrator has made an error of law or fact but such 'ordinary' injustice will never entitle the use of section 22. That is because the risk that the arbitrator, or the judge, will err is a known and acceptable risk and

the slings and arrows of such misfortune fall over a very generous ambit. It is, however, not difficult to see when they exceed that boundary. The point at which injustice becomes unacceptable is when it is rank or "gross and obvious", to borrow Sir Roger's favourite and famous phrase, repeated in ***The Montan*** at p.639G, or, if one wishes the language to be more elegant, when it becomes, in the words of section 68 of the 1996 Act, a 'substantial injustice'.

57. It is because this palpable error has produced just that kind of injustice that I cheerfully agree to characterise it as a simple arithmetical error, or a procedural mishap or a deviation from the accepted path, for what happened is each of those things, and I would allow the appeal and remit the matter accordingly.

**Lord Justice Kennedy:**

58. The facts are set out in the judgment of Tuckey LJ, with which I agree. Those facts demonstrate that when the arbitrators turned to consider the question of costs they made a fundamental and important error. They concluded, wrongly, that the net value of the award to Danae, taking into account the counterclaim, was less than the Calderbank offer made by Air Canada in August 1995, and the arbitrators then made their award of costs upon the basis of that false conclusion. All of us are capable of making simple errors in relation to figures, but what I find astonishing is that the error should have been persisted in by the arbitrators after it was pointed out. It is troubling that it should have been adopted by Air Canada and their legal representatives, and even more troubling that it should be persisted in by them in the light of the judgment of Longmore J. Of course it is unattractive for those who represent Air Canada to be put in the position of having to argue in this court that a reputable airline is entitled to hold onto a huge award of costs even though it knows that the award was made as a result of what Mr Tomlinson QC for Danae understandably describes as a simple arithmetical mistake, but that in reality is the only tenable argument which can be put forward on behalf of Air Canada. The argument that there is not and never was any mistake is not tenable, and Mr Michael Collins QC sensibly devoted relatively little of what he had to say to that argument. I say no more about it. All I propose to deal with in the remainder of this judgment is the extent of this court's jurisdiction to interfere.

59. When the parties to a dispute decide to refer the dispute to arbitration they have deliberately chosen not to litigate in the courts, and one of the objects of the Arbitration Acts, and of the authorities decided under those Acts, is to support the system of arbitration by ensuring that those who have chosen arbitration maintain their choice. A party who is dissatisfied with all or part of an arbitrator's award cannot then simply opt out and raise the matter in the courts. But the courts can never be shut out entirely, not least because in the last resort they must enforce the arbitrators' award, and it is the extent of the residual jurisdiction which is the central issue in this case. Sections 22 and 23 of the Arbitration Act 1950 so far as material provide that -

*"22(1) In all cases of reference to arbitration the High Court or a judge thereof may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrator or umpire. ......*

*23(2) Where an arbitrator .... has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the High Court may set the award aside."*

60. As Lord Donaldson M.R. said in ***King v Thomas McKenna Ltd*** (1991) 2 Q.B. 480 at 489 C - *"I see no reason why section 22 and the other sections should not be construed as meaning what they say. Certainly so far as section 22 is concerned, there is no element of doubt or ambiguity. The jurisdiction is wholly unlimited."*

61. However, as Lord Donaldson also made it clear in that case at 488 H - *"I think that a clear distinction has to be made between the nature and scope of the remedy which Parliament has entrusted to the courts under section 22 and the use which the courts are prepared to make of it in the exercise of a judicial discretion and in the light of precedent."*

62. The first controlling factor is the very nature of arbitration proceedings - the matter to which I have already referred, and since the passing of the Arbitration Act 1979 it has not been possible for a party to an arbitration to seek the assistance of the High Court in respect of an error on the face of the record. Leave to appeal can be obtained on a point of law, but that avenue can, as in the present case, be blocked by an exclusion agreement, so the interpretation of sections 22 and 23 has to be approached with those statutory constraints in mind. But, that said, section 22 does have an important role. As Sir John Donaldson M.R. said in the ***Montan (***1985) 1 WLR 625 at 632 A - *"Section 22 empowers to court to remit an award to an arbitrator for reconsideration. It provides the ultimate safety net whereby injustice can be prevented, but it is subject to the consideration that it cannot be used merely to enable the arbitrator to correct errors of judgment, whether on fact or law, or to have second thoughts, even if they would be better thoughts."*

63. In the ***Montan*** the arbitrator mistakenly attributed the evidence of the expert witnesses to the wrong parties, so that he ordered the charterers to pay the owners when he should have ordered the owners to pay the charterers. Unlike the arbitrators in the present case he admitted his error, but counsel for the owners contended, as counsel for Air Canada contends in this case, that it was too late for the error to be corrected. This court disagreed, and although before us Mr Collins places some reliance on the arbitrator's admission it is clear that it was not critical. At 632 F Sir John Donaldson M.R. said - *"The arbitrator admits that he made an accidental error, but I should not like it to be thought that such an admission is pre-requisite for the exercise of the courts jurisdiction to remit. If the arbitrator says nothing and there is a strong prima facie case that there has been an accidental error, the award could be remitted to him with a direction to reconsider it and to revise it if, but only if, there was such an error."*

*64.* Robert Goff LJ was inclined to be somewhat more restrictive, saying at 638 C that "as a general rule the mistake must be admitted by the arbitrator", but he made it clear at 638 F that he had no desire *"to restrict the width of the power to order remission in the interests of justice."*

*65.* In the ***Montan*** the arbitrator accidentally made a major error which, as the Master of the Rolls said at 632 C - *"If uncorrected would lead to the charterers paying the owners when it is the owners who should be paying the charterers."*

*66.* As Mr Tomlinson submits, that is the position in this case. If the error is uncorrected the party which has succeeded ends up having to pay as if it had lost. The Master of the Rolls continued - *"No court could lend the power of the state to the enforcement of such an award, and no court should stand by when it has power to correct such an accidental error and I stress the word 'accidental'."*

*67.* Mr Collins submits that the present case is different because the error was not accidental. Danae made submissions and the arbitrators apparently considered them before making their final award. To that Mr Tomlinson's response is that where, as here, the error is the result not of any of the functions which the parties entrusted to the arbitrators - such as evaluation of witnesses, drawing of inferences, and even application of relevant principles of law - but rather it is the result of the arbitrators' failure to apply basic mathematical principles which, until the problem arose, everyone would reasonably have concluded that the arbitrators would both understand and apply, then the error can properly be described as accidental. In any event it may not always be appropriate to see whether an error can properly be described as accidental. That approach, though useful, is not definitive. As Lord Donaldson made clear in the later case of ***King*** it is not easy to define the limits of the court's powers to intervene. At 490 F in that case he said - *"Whilst it may be impossible, or at least undesirable, to seek to determine those limits, save on a case by case basis, I personally find it helpful to ask myself what in truth the parties accepted when they agreed to arbitrate, although I am far from saying that this is the exclusive touchstone."*

68. Mr Tomlinson invites us to consider whether the parties in truth accepted, when they agreed to arbitrate, that the arbitrators would be free to misunderstand or misapply basic mathematical principles, and to answer that question in the negative. In my judgement that is a powerful argument. Mr Collins' response is, and can only be, that when the parties agreed to arbitrate they vested in the arbitrators jurisdiction to resolve all issues which might arise, fettered only by an obligation to act in good faith, and that once a final award is made that is an end of the matter. If that is right then, as it seems to me, the ***Montan*** was wrongly decided, unless it can be distinguished on the basis that in that case the arbitrator recognised his error, and, as I have already said, that was a matter which the members of the court considered but which they did not regard as critical. The case was decided after the implementation of the 1979 Act, so the statute law was the same as the law we have to apply, and when dealing with section 22 of the 1950 Act Sir Roger Ormrod said at 640 E -

*"The section gives the court an entirely unfettered discretion but it is accepted that the overriding importance of preserving the finality of awards imposes severe constraints on its exercise. The section and its predecessors were, presumably, inserted to preserve the powers of the court at common law or, perhaps more accurately, the practice adopted by the courts before the law was codified. Codification converts a practice into a discretion and subtly changes its complexion.*

*Just as under the common law the court in its prerogative jurisdiction, interfered with the decisions of inferior tribunals in strictly limited circumstances, so it interfered with arbitral awards, if the interests of justice demanded and the circumstances permitted.*

*I find it impossible to imagine that the court, on facts like those before us in this case, would not have intervened under the old practice and I can see no justification for not intervening now under section 22 of the Act of 1950."*

69. At 641 C he rejected the argument that the use of section 22 would endanger the finality of arbitral awards, saying that for that reason the section will not be used to grant relief "in all but the most exceptional situations". Mr Tomlinson submits that in the present case we have a most exceptional situation, and if relief is refused that will not in reality support arbitration. It will simply, in the words of Sir Roger Ormrod, prejudice in the eyes of the lay world the machinery of justice.

*70.* Perhaps the high water mark of the hands-off approach which Mr Collins invites us to adopt is to be found in ***Blexen Ltd v G. Percy Trentham Ltd*** (1990) 2 EGLR 9. In that case the arbitrator's award was less than the amount of a pre-existing sealed offer, and costs were awarded accordingly. The claimants then persuaded a judge to remit the award on the basis that the arbitrator had been guilty of technical misconduct within the scope of section 23(2) because he had disregarded later amendments to the defence which reduced the award, and which if known at the time of the offer might have induced the claimants to accept it. When granting leave to appeal Bingham LJ doubted whether a reasoned award on costs could be challenged on grounds of misdirection or legal error otherwise than by leave under the 1979 Act. When giving judgment in this court Lloyd LJ, with whom the other two members of the court agreed, said at 10 J that he was "*quite clear"* that the power to set aside or remit for misconduct does not survive when *"the only misconduct alleged is an error of fact or law in a reasoned award"*. He continued - *"To hold otherwise would defeat one of the main purposes of the 1979 Act. Whatever may have been the position as to costs in the old days, the only course open today, where an arbitrator states his reasons, is to challenge those reasons by seeking leave to appeal on a question of law under section 1(3) of the 1979 Act. This the claimants never did."*

71. In the present case no application could be made under section 1(3) because of the exclusion agreement. Lloyd LJ then went on to find, at 11 F "no shadow of misconduct on the part of the arbitrator in the way he dealt with costs, not even misconduct of the most technical kind". Finally at 12 A Lloyd LJ said - *"Further than that I do not find it necessary or desirable to go. Each case, as is so often said, must be considered in the light of its own particular facts. Where an unfettered discretion has been granted by Parliament it is never desirable to hedge it about with too much guidance, in case the guidance comes to be regarded as an inflexible rule of law or practice. It can be no such thing."*

72. Three points seem to me to be of significance when considering the decision in ***Blexen's*** case. First, the complaint had no obvious merit. The arbitrator did not, as alleged, disregard the amendments altogether, and the weight which he attached to them was plainly within his remit. Secondly, the decision under appeal was the decision made pursuant to section 23(2). Before us it has been no part of the case for Danae that the arbitrators misconducted themselves, technically or otherwise. Thirdly, although there is nothing in the report in the ***Blexen's*** case to show that reference was made to the decision in the ***Montan***, the final paragraph of the judgment of Lloyd LJ does show that the court was alive to the need not to fetter the statutory discretion.

73. In ***King v Thomas McKenna Ltd*** an inexperienced advocate appearing for the respondents allowed the arbitrator in his final award to deal with the costs of the arbitration when, because there was a sealed offer, the issue of costs should have been held over. The result was an inequitable award in respect of costs, which was remitted to the arbitrator pursuant to section 22(1). The ***Montan*** and ***Blexen's*** case were both considered, and Lord Donaldson M.R., having reviewed the history of section 22 concluded that the proper approach was as set out earlier in this judgment, namely to recognise that by statute the discretion is wide, but that there are compelling reasons to restrict the use of the statutory power. At 491 C he said - *"In my judgment the remission jurisdiction extends beyond the four traditional grounds to any cases where, notwithstanding that the arbitrators have acted with complete propriety, due to mishap or misunderstanding, some aspects of the dispute which has been the subject of reference has not been considered and adjudicated upon as fully or in a manner which the parties were entitled to expect and it would be inequitable to allow any award to take effect without some further consideration by the arbitrator. In so expressing myself I am not seeking to define or limit the jurisdiction or the way in which it should be exercised in particular cases, subject to the vital qualification that it is designed to remedy deviations from the route which the reference should have taken towards it destination (the award) and not to remedy a situation in which, despite having followed an unimpeachable route, the arbitrators have made errors of fact or law and as a result have reached a destination which was not that which the court would have reached. This essential qualification is usually underlined by saying that the jurisdiction to remit is to be invoked if at all, in relation to procedural mishaps or misunderstandings. This is, however, too narrow a view since the traditional grounds do not necessarily involve procedural errors. The qualification is however of fundamental importance. Parties to arbitration, like parties to litigation, are entitled to expect that the arbitration will be conducted without mishap or misunderstanding and that, subject to the wide discretion enjoyed by the arbitrator, the procedure adopted will be fair and appropriate. What they are not entitled to expect of an arbitrator any more than of a judge is that he will necessarily and in all circumstances arrive at the 'right' answer as a matter of fact or law."*

74. Mr Tomlinson submits that due to misunderstanding the costs aspect of the dispute has not been considered and adjudicated upon in a manner which the parties were entitled to expect, and that it would be inequitable to allow that part of the award to take effect without some further consideration by the arbitrators. There has been a deviation from the route which the reference should have taken because ordinary principles of mathematics were not applied. The parties were entitled to expect that the arbitration would be conducted without a mishap or misunderstanding of that kind.

75. The last of the authorities cited to us to which I need refer is ***President of India v Jadranska Slobodna Plovidba*** (1992) 2 LL. R 274. In that case the charterers were ordered to bear all of their own costs of the arbitration, and to pay about two thirds of the owners' costs. The charterers contended that there was no basis for such a conclusion, and sought an order that the issue of costs be remitted for reconsideration. At 279 Hobhouse J said - *"The procedure and remedy under section 22 may be invoked only where there has been some excess of jurisdiction, some distinct element of misconduct or procedural mishap, not simply some alleged unjudicial exercise of the discretion. Examples of such distinct misconduct could be making an award which went outside the rival contentions of the parties or making an award without giving both parties an opportunity to be heard. The King case was one of procedural mishap. Such complaints can only be raised on a motion under section 22 or 23; they cannot be raised by way of an appeal under section 1. Sections 22 and 23, therefore, do not become wholly irrelevant; they simply become unavailable where the complaint is a failure by the arbitrator to apply the principles governing the judicial exercise of his discretion."*

76. In my judgment, despite the persuasive arguments advanced by Mr Collins, the authorities do not show that the wide jurisdiction granted to the courts by sections 22 cannot be used so as to grant relief in a case such as this. For that reason I too would allow the appeal.

**ORDER:** Appeal allowed with costs here and below. The final award in respect of costs will be remitted for reconsideration by all three arbitrators in the light of the decision of this court. (Order not part of approved judgment)

MR S TOMLINSON QC and MR P SHEPHERD (Instructed by Messrs Brown Cooper, London WC1A) appeared on behalf of the Plaintiff
MR M COLLINS QC and MR V FLYNN (Instructed by Messrs Dibb Lupton Alsop, Finsbury Square, London) appeared on behalf of the Defendant