

BRIEFING

CONSEQUENTIAL CORRECTIONS
ARISING OUT OF THE SLIP RULE

APRIL 2019

- UNDER THE SLIP RULE ADJUDICATORS CAN CORRECT ERRORS IN THEIR DECISIONS TO GIVE EFFECT TO “FIRST THOUGHTS”
- CORRECTING AN ERROR CAN GIVE RISE TO FURTHER CONSEQUENTIAL CORRECTIONS



A significant recent decision of the Technology and Construction Court of England and Wales¹ has clarified the scope of the slip rule in the context of adjudication decisions and, for the first time, considered the matter of consequential corrections. The decision will be welcome news for parties to construction contracts and should ensure that the repercussions of clear errors can be resolved without recourse to the courts.

“THE SLIP RULE OPERATES AS A USEFUL SAFETY MECHANISM TO PREVENT UNINTENDED RESULTS.”

What is the slip rule?

The slip rule allows an adjudicator to correct a clerical or typographical error in their decision. Given the short timeframes in which adjudications are conducted, such slips can be all too commonplace and so the slip rule operates as a useful safety mechanism to prevent unintended results.

The statutory basis for the slip rule is section 108(3A) of the Housing Grants, Construction and Regeneration Act 1996 (the “HGCRA”) and paragraph 22A of the Scheme for Construction Contracts 1998 (the “Scheme”). Section 108(3A) states that any construction contract must include a written provision permitting the adjudicator to correct their decision so as to remove a clerical or typographical error arising by accident or omission. If a construction contract fails to include such a provision, paragraph 22A of the Scheme allows an adjudicator to correct a ‘slip’ in their decision, either on the initiative of the adjudicator or on the application of one of the parties.

¹ *Axis M&E UK Ltd & Anor v Multiplex Construction Europe Ltd* [2019] EWHC 169 (TCC)

However, even before amendments were made to the HGCRA and the Scheme to include the above provisions, it was held in *Bloor Construction (UK) Ltd v Bowmer & Kirkland (London) Ltd*² that a term could be implied into a construction contract allowing an adjudicator to correct an error made in relation to the calculation of the sum payable. Subsequently, *CIB Properties v Birse Construction*³ confirmed that if an adjudicator makes a slip but refuses to correct it, the court may not review the decision. Both *Bloor* and *CIB Properties* highlighted the distinction between “having second thoughts and intentions”, which would not be covered by the slip rule, and “correcting an award to give effect to first thoughts or intentions”, which would.

Axis and consequential corrections

In *Axis* the adjudicator committed a mathematical error in concluding that the claimant, Axis, was not entitled to any sum. In making this mistake, the adjudicator had deducted too much by way of contra-charges.

The dispute concerned valuation of works at a residential development. After determining their value the adjudicator deducted contra-charges but, in fact, contra-charges had already been accounted for. This meant that the claimant’s claim failed, resulting in the claimant not being entitled to anything and having to pay the adjudicator’s fees. Subsequently, the position was clarified and the adjudicator amended the decision, meaning that there was now a balance in favour of the claimant. As well as being entitled to interest, it was now for the defendant, Multiplex, to pay the adjudicator’s fees. However, the adjudicator stated that it was not within his jurisdiction to decide whether this was a slip or not. The claimant sought to enforce the amended decision, but the defendant argued that the correction was outside the slip rule and that the first decision was binding on the parties.

“THE REALLY NOVEL QUESTION IN THIS CASE WAS WHETHER THE ADJUDICATOR HAD BEEN RIGHT TO GO ON TO AWARD INTEREST AND REVERSE THE DECISION ON PAYMENT OF HIS FEES AS A RESULT OF THE CHANGE TO THE PRINCIPAL SUM.”

The judge, Mr Roger ter Haar QC, concluded that the adjudicator’s slip in this case was one that fell under the statutory slip rule. The adjudicator had been asked to decide the appropriate value of the variations and what contra-charges, if any, should be deducted. Once this had been decided, it was only for the adjudicator to calculate the correct sum in order to give effect to his decision. The adjudicator subsequently over-deducted contra-charges. The judge considered that this error came under the type of error described by Lady Wolffe in *NKT Cables A/S v SP Power Systems Ltd*⁴ as “an arithmetical error in adding or subtracting sums [or] ... a slip in carrying over a calculation from one part of the decision to another”.

So far, so good. However, the really novel question in this case was whether the adjudicator had been right to go on to award interest and reverse the decision on payment of his fees as a result of the change to the principal sum.

In arriving at his decision, the judge drew parallels with the decision in *Gannet Shipping Ltd v Estrade Commodities Ltd*⁵, an arbitration case which found that section 57(3)(a) of the Arbitration Act 1996, which allows for the correction of an award “so as to remove any clerical mistake or error arising from an accidental slip or omission” was broad enough to encompass the correction of the original award, together with the correction of the award of costs. Though *Gannet Shipping* was a

² [2000] EWHC 183 (TCC)

³ [2005] BLR 173

⁴ [2017] CSOH 38

⁵ [2001] All ER (D) 74

decision in respect of an arbitration award and, therefore, the issue of whether an arithmetical error could be corrected was considered under a different regime, this was not considered to be a material distinction by the judge.

He stated that “once the door had been opened to correct that initial error, then the effect of that decision permitted and indeed, in the interests of justice, required, that any corrections consequent upon the correction of that gateway error to be made”.

Therefore, the judge decided that the adjudicator had acted within his jurisdiction in awarding interest, and there was a summary judgment in favour of the claimant for the interest, on top of the principal sum. The adjudicator’s fees had already been paid prior to the enforcement decision.

Conclusion

This decision confirms that, in the context of adjudications, not only an error which comes under the slip rule can be rectified, but consequential errors arising from that “gateway error” can also be corrected. Parties seeking to have a slip rectified in a decision can now expect that consequential errors in relation to interest and fees may also be corrected by the adjudicator. This should aid parties in obtaining consistent results in amended decisions.

“THE SLIP RULE REMAINS LIMITED TO VERY CLEAR ARITHMETICAL OR CLERICAL ERRORS WHICH PREVENT AN AWARD GIVING EFFECT TO AN ADJUDICATOR’S FIRST THOUGHTS.”

However, parties should be conscious of the limits to the slip rule. Importantly, in both *Axis* and *Gannet Shipping*, the consequential errors were also ancillary to the gateway error. It is clear that the slip rule remains limited to very clear arithmetical or clerical errors which prevent an award giving effect to an adjudicator’s first thoughts. It must be stressed that this does not extend to cases where an adjudicator might change their mind and seek to give effect to second thoughts.

Parties should also note that care should be taken when inviting an adjudicator to use the slip rule to correct their decision, as this can result in waiver of the right to challenge the enforcement of the decision, as was covered in a previous WFW briefing note at: <http://www.wfw.com/wp-content/uploads/2017/06/WFW-Briefing-SlipRule-June2017.pdf>

FOR MORE INFORMATION

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