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CONSTRUCTION ACT REVIEW

Second Slip Article: Adjudicators' Decisions: The Slip Rule: The New Law and Jurisdictional Issues

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Introduction

The statutory slip rule permits an adjudicator to correct a decision so as to remove a clerical or typographical error arising by accident or omission. This may seem a simple and narrow rule but the scope and meaning of the rule is not as straightforward as it may appear.

Among the complications to be considered are the applicability and relevance of the law relating to the different slip rule applicable in arbitration, the applicability and relevance of the law relating to the slip rule in adjudication prior to its current statutory version, the time within which a slip may be corrected, whether an error has to be admitted by the adjudicator for the rule to be applicable or operable, whether the applicability of the rule is a subjective question for the adjudicator or an objective question for the court on the basis that the applicability of the slip rule is a question of jurisdiction. In addition, what happens when there is an error that is properly within the slip rule but it is not corrected under the slip rule or not in time? Should the parties or the adjudicator seek to make express provision as to the slip rule, and, if so, on what matters?

The Slip Rule in Arbitration

The "slip rule", was originally a term from arbitral proceedings, referring to a statutory rule[1] which permits the arbitral tribunal to correct inadvertent or clerical errors in its award. As the rule has been developed in the case law, the arbitral tribunal may make corrections so as to give effect to its original intention, or its "first thoughts", but not so as to give effect to any "second thoughts".[2]

The relevant provision in the Arbitration Act 1996 is as follows:

> "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 costs) which was presented to the tribunal but was not dealt with in the award."

Arbitration differs from adjudication in at least the following two respects that are relevant to the slip rule. The first is that arbitration is a slower process than adjudication. The second is that the slip rule in arbitration derives from statute, whereas originally the slip rule in adjudication did not. In addition, the statutory slip rule for arbitration is not in the same terms as the statutory slip rule for adjudication.

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[1] Arbitration Act 1996, s. 57. For a discussion, see Sheridan, *Construction and Engineering Arbitration* (Sweet & Maxwell) at p.364.
[2] See *R v Cripps ex parte Muldoon* [1984] Q.B. 686.

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The Slip Rule in Adjudication Originally

In adjudication, there was originally no statutory slip rule. The Housing Grants, Construction and Regeneration Act 1996 (the HGCR Act), prior to amendment, differed from the Arbitration Act 1996, in that the HGCR Act did not contain a slip rule.

However, rather than taking the apparently obvious view that there was no slip rule in adjudication, the courts developed a view that there was an implied slip rule in adjudication. The writer previously dealt with this topic in relation to adjudication in 2005.[3] The position then, in summary, was, subject to express terms and where the parties' contract did not provide expressly for a slip rule, that the *Bloor* case[4] was authority for the proposition that an adjudicator may, after giving his decision, alter that decision to correct a clerical mistake or error arising from an accidental slip or omission. The basis for the adjudicator having this discretion was said to be an implied term. It may be noted that the supposed implied term was closely related to the wording of the Arbitration Act.

Bloor was, not surprisingly, considered to be correct by the same judge (His Honour Judge Toulmin CMG QC) in *CIB v Birse.*[5] *Bloor* also had some limited support from Dyson J (as he then was) in *Edmund Nuttall v Sevenoaks*.[6] These earlier cases were previously reviewed in CAR.[7] His Honour Judge LLoyd Q.C. noted in one early case, without comment or analysis as no issue in the case apparently arose on this matter, that the adjudicator's decision, which was the subject of the case, had to be corrected and this was done.[8] The *Bloor* principle was then accepted in the TCC by Akenhead J[9] and was accepted for present purposes by counsel and so not argued in a case before Ramsay J.[10]

The position was reviewed by Akenhead J in the *YCMS* case, who stated after a consideration of *Bloor* and *CIB v Birse*:

> "(a) An adjudicator can only revise a decision if it is an implied term of the contract by which adjudication is permitted to take place that permits it. It does not follow that, if it is purely a statutory adjudication under the HGCRA (if there is no contractual adjudication clause), such implication can be said to arise statutorily.
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> (b) If there is such an implied term, it can and will only relate to 'patent errors'. A patent error can certainly include the wrong transposition of names or the failing to give credit for sums found to have been paid or simple arithmetical errors.
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> (c) The slip rule cannot be used to enable an adjudicator who has had second thoughts and intentions to correct an award. Thus for example, if an adjudicator decides that the law is that there is no equitable right of set-off but then changes his

[3] Construction Act Review: Adjudicators' Decisions: the Slip Rule (2005) 21 Const.L.J. No. 5 369.
[4] *Bloor Construction (United Kingdom) Ltd v Bowmer & Kirkland (London) Ltd* [2000] B.L.R. 764; [2000] 2 T.C.L.R 914; [2000] C.I.L.L. 1626 QBD (TCC).

[5] *CIB Properties Ltd v Birse Construction Ltd* [2005] 1 W.L.R. 2252; [2004] EWHC 2365 (TCC).
[6] *Edmund Nuttall Ltd v Sevenoaks District Council* [2000] Adj. L.R. 04/14.
[7] Construction Act Review: Adjudicators' Decisions: the Slip Rule (2005) 21 Const.L.J. No. 5 369.
[8] *David McLean Housing Contractors Ltd v Swansea Housing Association Ltd* [2002] B.L.R. 125; [2002] C.I.L.L. 1811.
[9] *YCMS Ltd v Grabiner* [2009] EWHC 127 (TCC); [2009] B.L.R. 211; 123 Con. L.R. 202; [2009] C.I.L.L. 2692.

[10] *O'Donnell Developments Ltd v Build Ability Ltd* [2009] EWHC 3388 (TCC).

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> mind having read some cases feeling that he has got that wrong, such a change would not be permitted because that would be having second thoughts.
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> (d) The time for revising a decision by way of the slip rule will be what is reasonable in all the circumstances. In the *Bloor* case, the adjudicator revised his decision within several hours and before the time for issuing a decision had been given. It will be an exceptional and rare case in which the revision can be made more than a few days after the decision. The reason for this is that, unlike a court judgment or an arbitration award, a principal purpose of the 1996 Act is to facilitate cash flow. If an adjudicator was able to revise his decision, say, 21 or 28 days later that would necessarily slow down and interfere with the speedy enforcement of adjudicators' decisions. That would in broad terms be contrary to the policy of the Act."[11]

Akenhead J introduces the concept of "patent errors" into the implied term rule. He does not define this term, which presumably just means obvious errors, but he gives examples, which are types of error normally regarded as clear cases of slips.

Akenhead J adopts the usual rule from arbitration concerning first and second thoughts or intentions, as Judge Toulmin had previously in the *Bloor* case.

With regard to the time for revising a decision by way of the slip rule, the revision in *Bloor* came on the same day as the original decision, so the operation of the slip rule did not impinge on the time limit for the adjudicator's decision. Often what happens in practice is that a decision is revised after the time limit for the decision has expired, albeit that the original decision was on time. Akenhead J was prepared to accept that a decision may be revised after the time limit has expired, provided that it is revised within a period of time that is reasonable in the circumstances. In the *O'Donnell* case, Ramsay J commented on this aspect of the *YCMS* judgment:

> "The slip rule has therefore been interpreted to apply even where the time for making the original decision has expired. This is on the basis that the adjudicator retains the power to correct slips even after the expiry of the time for his decision and that, when he corrects the decision, the correction takes effect as a correction to the original decision which was reached within time."[12]

The courts fought shy of indicating with any precision how many days may expire before a slip rule correction would be too late, because this was something that would depend on the circumstances.

However, any acceptance that the operation of the slip rule can be later than the date on which the decision was due created a tension between the mandatory statutory time limit for the adjudicator's decision and the implied slip rule.

In the *O'Donnell* case, Ramsay J was referred to *Coulson on Construction Adjudication* and the following passage:

> "If the parties are in dispute as to the obviousness (or otherwise) of the alleged 'slip', or the adjudicator does not accept that an error has been made, or does accept it but only some time after the publication of the decision, then it is thought that the approach in *Bouygues* will remain appropriate."

[11] *YCMS*, above, at para 50.
[12] *O'Donnell* at para 27.

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Ramsay J stated:

> "Mr Lofthouse submitted that it was only if the parties, in effect, agreed on the slip that the slip rule could be applied. I do not think that the passage cited expresses that view. What it is stating is that if the parties agree or the adjudicator decides that there has been a slip and does so within time, then the slip can be corrected. If that does not happen then in the in the circumstances set out in the passage cited, the position remains that there is an enforceable decision as set out in *Bouygues*."[13]

Although the *Bloor* approach seemed to have taken root in first instance cases in the Technology and Construction Court,[14] it was not, in the writer's view, correct. There are various difficulties with the supposed implied term, as follows.[15]

(1) An adjudicator is *functus officio* once he or she has made a decision determining the dispute between the parties.[16] It is unclear when an adjudicator becomes *functus officio* if there is some period after issuing a decision, during which it may be corrected for slips, particularly if a slip may be corrected after the expiry of the date for the adjudicator's decision. It is similarly unclear when it is no longer possible to correct slips, because the adjudicator has become *functus officio*.

(2) Parliament could have included a slip rule for adjudication in the HGCR Act in 1996, as it did for arbitration with the Arbitration Act in the same year. That indicated that there was no slip rule in adjudication, because Parliament did not intend to introduce one, not that there was a slip rule in arbitration (by statute) and also one in much the same terms in adjudication (not by statute). Parliament was obviously aware of the option of including a slip rule for adjudication but chose not to. The reasoning may have been that since adjudicators' decisions are not normally final, but are produced to a tight timetable, different considerations apply. An adjudicator's decision is binding even if it contains serious errors of fact or law, but it is not final. Parliament may have considered there was no need in these circumstances for a separate rule on one other category of error. An arbitrator's decision is generally final as well as binding. It is not subject to anything like the stringent timetable of an adjudication, so there is no difficulty with a rule for the prompt correction of slips.

(3) The supposed implied term is not capable of clear expression, or at least has not been the subject of clear expression by the courts, who have been unable to or have declined to state what the period is between a decision and its valid correction for slips, after which it is no longer possible to correct the slip. The rule as expressed by the courts was vague: the correction must be made within a reasonable time. What this meant was unclear, but it was arguable that an eight-day period was permissible,[17] while it was doubtful if a period as long as 28 days was permissible.[18]

(4) A slip rule is not necessary to give business efficacy to the contract.

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[13] *O'Donnell*, above, at para 31.
[14] A similar approach was also more recently taken in Scotland by Lady Wolffe in *NKT Cables A/S v SP Power Systems Ltd* [2017] ScotCS CSOH 38.
[15] A more detailed critique of the reasoning in the *Bloor* case is set out in the writer's earlier article, Construction Act Review: Adjudicators' Decisions: the Slip Rule (2005) 21 Const.L.J. No. 5 369.

[16] *Outwing Construction Ltd v H. Randell & Son Ltd* [1999] B.L.R. 156 at 158.
[17] *Edmund Nuttall Ltd v Sevenoaks District Council*, unreported, 2000, HT 00-119, QBD (TCC).
[18] *Bloor*, above.

(5) A slip rule is an improvement or supposed improvement to the contract, not a rule that is necessary either for business efficacy or to give effect to the parties' obvious, unexpressed intention. It is not the task of the courts to seek to improve on the parties' bargain.

(6) If the contract is silent, then that generally means that nothing is to happen (not that there is an implied term). That is the better view here. Lord Hoffmann observed in the *Attorney General of Belize* case that normally, when an instrument does not provide for something to happen, then the usual position is that nothing is to happen and losses lie where they fall. It is only where the instrument means, read against the relevant background, that something is to happen that a term is implied. The better view in relation to an adjudicator's decision containing a slip is that nothing is to happen, because the decision is not final. "The touchstone is always *necessity* and not merely *reasonableness*."[19]

It is notable that Judge Toulmin did not seek in the *Bloor* case to analyse the basis of the supposed implied term by reference to the well-known rules applicable to the implication of terms, perhaps because of the difficulties in doing so outlined above.[20]

One other consideration identified by Ramsey J in the *O'Donnell* case, which will remain relevant under the new slip rule law, concerns a distinction between exercising a jurisdiction which an adjudicator does not have and exercising a jurisdiction an adjudicator does have, wrongly. Ramsey J addressed this as follows.

> "On this application for summary judgment there is a threshold question as to how far the court can interfere with an adjudicator's exercise of his power under the slip rule. If an adjudicator has jurisdiction under the slip rule, to what extent can the court review the exercise of that jurisdiction by the adjudicator? This did not arise in *Bloor* and was not argued in *YCMS*.[21]
>
> …the distinction between disputes as to the jurisdiction of an adjudicator and disputes as to ways in which that jurisdiction should be exercised is not an easy one to draw…This can be illustrated in the case of the slip rule as follows. First if the adjudicator were to exercise a slip rule where there was no express or implied slip rule, that would clearly be a decision that was outside his jurisdiction. Secondly, if the adjudicator is asked by one party to correct a slip and he accepts that an error has been made within the slip rule then if the adjudicator makes an error of fact or law in so doing, I consider that such an error does not take the exercise of the slip rule outside his jurisdiction. Finally, if the adjudicator is asked by one party to correct a slip which the other party agrees is a slip within the slip rule but in operating the slip rule he makes [an] error of fact or law, then I do not consider that the court can interfere in that decision."[22]

The Slip Rule in Adjudication Now

In any event, perhaps because Parliament shared the writer's misgivings about the slip rule in adjudication as posited by the courts and supposedly based on an implied term, there has been statutory change since the writer's first slip article. Section 108(3A) of the HGCR Act,

[19] *Liverpool City Council v Irwin* [1977] A.C. 239 at 266.
[20] This was attempted, with a fuller analysis, by Lady Wolffe in the *NKT Cables* case, see fn 14 above.
[21] *O'Donnell*, above at [29].
[22] *O'Donnell*, above at [35].

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as amended by s.140 of the Local Democracy, Economic Development and Construction Act 2009 ("the LDEDC Act"), now provides as follows:

> "The contract shall include provision in writing permitting the adjudicator to correct his decision so as to remove a clerical or typographical error arising by accident or omission."

The Scheme for Construction Contracts (the Scheme) now provides at paragraph 22A[23]:

> "(1) The adjudicator may on his own initiative or on the application of a party correct his decision so as to remove a clerical or typographical error arising by accident or omission.
>
> (2) Any correction of a decision must be made within five days of the delivery of the decision to the parties.
>
> (3) As soon as possible after correcting a decision in accordance with this paragraph, the adjudicator must deliver a copy of the corrected decision to each of the parties to the contract.
>
> (4) Any correction of a decision forms part of the decision."

It should be noted that the statutory slip rule for adjudication does not follow the formulation of the Arbitration Act and does not enact the *Bloor* rule developed for adjudication by the courts, but is in different terms, which are narrower in scope. In addition, it may be noted that the statute still does not state when a correction may be made, although the Scheme does.

The HGCR Act applies to all construction contracts, whereas the Scheme applies only where the contract does not comply with s.108(1) to (4),[24] or where the contract incorporates the provisions of the Scheme. Thus, JCT contracts, which incorporate the provisions of the Scheme, have sufficient express terms to cover the slip rule, without recourse to implied terms, it is submitted. Where there is a construction contract, which complies with s.108(1) to (4) and does not incorporate the provisions of the Scheme, such a contract will include a provision permitting the adjudicator to correct his decision so as to remove a clerical or typographical error arising by accident or omission,[25] but it may not state the period within which this is permitted. In such a case, it would seem that regard would then be had to the case law on the adjudication slip rule prior to the introduction of the new legislation, for guidance on the implied provision as to the period within which an error may be corrected. As noted above, the case law does address this issue, although the guidance given by the courts is not clear. The parties would be well advised to make express provision on this issue, for the sake of clarity.

The *Axis M&E* Case[26]

Axis M&E was engaged by Multiplex for a residential development in London. A dispute arose and Axis referred it to adjudication, to which the Scheme applied.

[23] Added by regulation 3(10) of the Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (England) Regulations SI 2011/2333.
[24] S.108(5) of the HGCR Act.
[25] As required by s.108(3A).
[26] *Axis M&E UK UK Ltd v Multiplex Construction Europe Ltd* [2019] EWHC 169 (TCC).

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The adjudicator in this case made an error in his decision in the calculation of the sum payable, as a result of which he concluded that no sum was due to Axis and Axis's claim failed. The effect of correcting the error was that the sum of £654,119.65 was due to Axis. The error not only made a substantial difference in monetary terms; it made a difference to who won the adjudication.

The error the adjudicator made was to deduct the sum he had determined was the correct value of contra charges (£246,886.37) from the sum certified by Multiplex. However, the sum certified by Multiplex already included a deduction for contra charges, in an amount assessed by Multiplex (£783,924.60). So the adjudicator was deducting £1,030,810 (£246,886.37 plus £783,924.60) when he should have been deducting just the £246,886.37.

It was straightforward that this was an error, which the adjudicator readily accepted when it was pointed out to him. Having issued his decision early, he corrected it on the date his decision had originally been due. In the corrected decision, he deleted "the claim fails" and stated that Multiplex was to pay £654,119.65. He also reversed his decision as to payment of his fees from Axis paying his fees to Multiplex paying his fees. He also added some new text awarding interest to Axis. He regarded the question as to whether he could make these corrections as a jurisdictional matter and stated very fairly:

> "It is of course correct to say that my intention was that the contra-charges should be in the figure decided by me of £246,886.37, but whether or not this is a slip or not is not within my jurisdiction to decide, and therefore I will today send an amended decision correcting it as a slip, and it will be for the parties or others to decide which decision shall apply."

Axis sought to enforce the amended decision; Multiplex argued that the original decision was binding on the parties and the corrections in the corrected decision were outside the scope of the slip rule and were not made "so as to remove a clerical or typographical error arising by accident or omission".

Judge Ter Haar QC stated that on one view, applying the reasoning of Ramsey J in the *O'Donnell* case, the answer to this application might be said to be simply that if the adjudicator was wrong in deciding that the error was one which could be corrected under the slip rule, that was an error of law of the type which adjudicators can make without rendering the decision unenforceable.[27] However, the claimants had not suggested that the judge should adopt that simple route.

One reason for this may have been that the adjudicator did not decide that the error was one which could be corrected under the slip rule; he stated very fairly that that was a matter for others to decide and remained neutral himself on this issue.

Another reason may have been that Ramsey J's dictum was not regarded as a very firm foundation for the "simple route". It is appropriate here to consider exactly what Ramsey J was saying and whether it is correct. It is assumed for the purposes of the present consideration that the normal position on jurisdiction applies, *i.e.* that jurisdiction to decide his own jurisdiction is not conferred on the adjudicator and whether the adjudicator has jurisdiction is ultimately for the court to decide.

Ramsey J identified three situations. In the first of these, an adjudicator applies a slip rule where there was no express or implied slip rule; that would entail a decision outside his

[27] *Axis M&E*, above, at [34].

jurisdiction. That, it is respectfully submitted, is quite correct; it is not of much significance, though, any more as there is now always a statutory slip rule so long as the right to go to adjudication is statutory and not purely contractual.

In the second situation, the adjudicator is asked by one party to correct a slip and he accepts that an error has been made within the slip rule; Ramsey J stated that then if the adjudicator makes an error of fact or law in so doing, *i.e.* in accepting that the correction is within the slip rule, the error does not take the application of the slip rule outside his jurisdiction.

In this situation, there is a slip rule. Suppose the adjudicator accepts that an error has been made within the slip rule and that in so doing he makes an error of law; and that the error of law is that the error in the original decision is within the slip rule, when on a correct legal analysis it is not within the slip rule.

Ramsey J's point is understood to be that if there is a jurisdiction to correct a slip, an error of fact of law in deciding that the correction is within the slip rule does not invalidate the decision, because errors of fact and law do not invalidate adjudicators' decisions.

However, that over-simplifies the position. It is correct that errors of fact and law do not generally invalidate an adjudicator's decision. But if an error of law is an error that the adjudicator has jurisdiction, when in law he does not, that error of law does invalidate the decision. This is because of the normal principle of *kompetenz-competenz*, that an adjudicator may not decide his own jurisdiction; uultimately it is a decision for the court.

If Ramsey J were correct, then the adjudicator's subjective and incorrect view that he had jurisdiction to correct the slip would be effective. This is not the case with other questions of jurisdiction. For example, if as a matter of fact and law there is a matter before an adjudicator which is not part of the dispute between the parties referred to adjudication, and an adjudicator proceeds to a purported decision on this matter which in his subjective and incorrect view is part of the dispute referred, his decision will be invalid, either wholly, or in part if the part of the decision concerning the matter not properly part of the dispute may be severed.[28] An adjudication may proceed on the basis of an adjudicator's subjective and incorrect view that he has jurisdiction, but if in law he does not, the decision will not be effective and the court will so decide.

The normal rule is that an adjudicator's subjective view is not decisive; on the contrary it is not, it is submitted, even relevant to an analysis of whether there is jurisdiction or not.

Ramsey J does not identify any special feature of the slip rule that makes it different from other cases of exceeding jurisdiction and it is submitted that there is no such feature.

It is true that, as a matter of practicality, the slip rule can never be operated except where in the adjudicator's subjective view the slip rule is applicable. Because of the short time available to correct the slip, a correction can only be made if the adjudicator accepts that the original decision contains an error and he accepts it is within the slip rule. However, whether it is actually within the slip rule is a question of jurisdiction, it is submitted, and so it is not one on which the adjudicator's view is decisive. Similarly, with other jurisdictional issues, an adjudication will only proceed, as a matter of practicality, if in the adjudicator's subjective view he has jurisdiction.

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It is true also that an adjudicator is well placed to decide whether an error he has made is a typing or clerical error, or some other type of error. However, that does not mean that any decision of this type that an adjudicator makes will necessarily be correct.

In the third situation considered by Ramsey J, the adjudicator is asked by one party to correct a slip which the other party agrees is a slip and in operating the slip rule makes an error of fact or law; Ramsey J did not consider the court could interfere with that decision. The writer respectfully agrees with that. If the parties were incorrect in their view that the slip was within the slip rule, the parties would, it is submitted, be found to have conferred a jurisdiction on the adjudicator he otherwise would not have had.

The judge in *Axis M&E* found that the error in the adjudicator's decision, incorrectly over-deducting for contra charges, was an arithmetical error in adding or deducting sums, or a slip in carrying over a calculation from one part of the decision to another, and was within the statutory slip rule, *i.e.* was a clerical or typographical error arising by accident or omission.

Having corrected his decision in respect of the principal sum, the adjudicator then went further and awarded interest and reversed his order as to payment of his fees. While these changes to the decision accord with common sense, they were not in the nature of correcting a clerical or typographical error arising by accident or omission, but were substantive changes to other parts of the decision made *as a consequence of* the correction of a clerical or typographical error arising by accident or omission.

The judge referred to a similar situation in an arbitration case, *Gannett*.[29] The position there was that the tribunal had power to remove any error arising from an accidental slip or omission, under the Arbitration Act 1996 and also further powers under the LMAA Terms (1997) to correct any accidental mistake omission or error of calculation in its award. Once certain clerical errors had been corrected, the party "winning" the arbitration could be seen in a different light and the award on costs was also altered. The writer sees no difficulty with the result in that case, given the entirely different and much wider slip rule that was applicable and the parties' contractual choice of arbitration, referred to by Langley J in that case and another point of distinction from statutory adjudication.

Judge Ter Haar QC sought to take the same approach in the *Axis M&E* case. However, he did not do so by analysing the new decision on interest and the new decision as to the adjudicator's fees as clerical or typographical errors arising by accident or omission, perhaps because it is not feasible to do so.

In respect of the *Gannett* case, the judge stated:

> "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."[30]

It is correct that it was just to make corrections consequential on the correction of the principal sum. It is not correct, it is respectfully submitted, that the consequential corrections were permitted by the effect of that decision. The consequential corrections were permitted by the slip rule applicable in that case. The effect of the decision to correct the error as to the principal sum was that there was now an error as to costs. It is circular to argue that because there is a consequential error, there is a slip rule permitting its correction; because whether there is a slip rule permitting its correction is the very question that falls to be

[29] *Gannett Shipping Ltd v Eastrade Commodities Ltd* [2001] All E.R. (D) 74.
[3030] *Axis M&E*, above, at [50].

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decided. As noted above, the *Gannett* case was in the writer's view correctly decided, not by reference to the above circular argument but on the basis that the applicable slip rule permitted the consequential correction.

Judge Ter Haar then proceeded to the position in adjudication as follows.

> "I see no relevant distinction between that situation under arbitration law and the present situation where the correction of what I have called 'the gateway error' required consequential corrections to be made.
>
> Moreover, in my view once one element of a decision has been corrected, then any other changes consequential upon that correction should be made, since otherwise the decision is likely to be internally inconsistent."[31]

As noted above, the writer sees one major distinction between the position in *Gannett* and the position in *Axis M&E*, which is that in the former case the applicable slip rule permitted consequential corrections and in the latter case it did not. Further, in the writer's view, the only issue that arises when considering whether a correction may be made under the slip rule is whether the applicable slip rule permits it. Whether a correction under the slip rule "requires" consequential corrections to be made is not a question a tribunal should address. Whether a decision is rendered internally inconsistent is not a question a tribunal should address. There is no juridical basis for addressing these questions.

Simlarly, it is not enough to refer to the interests of justice in this context, in the absence of any juridical basis for making consequential corrections, because the courts have expressed insouciant acceptance of manifest injustice in the context of errors in adjudicators' decisions.[32]

A further difficulty with failing to see a distinction between the position in *Gannett* and the position in *Axis M&E* arises from the wording of s.108(3A). This wording only allows for the removal of errors. It does not, or arguably does not, permit new drafting, that goes beyond the removal of errors, or to put it another way, it does not allow for correction by any means other than the removal of errors.

One can readily see both the justice and the common sense of the result of Judge Ter Haar QC's decision on consequential corrections. The absence of any adequate juridical analysis to support it (in the writer's respectful view) results from the very narrow scope of the slip rule in adjudication. Because of the tight time limits in adjudication, errors are understandably common and it may well be that the scope of the slip rule is too narrow. This is something that may be addressed in the parties' construction contract or in the terms of the contracts on which adjudicators are appointed by the parties (usually standard terms proffered by adjudicators when appointed), with further statutory reform unlikely in the foreseeable future.

The reason for the very narrow scope may be that adjudicators' decisions are temporarily binding and the parties may proceed to a final decision. However, this is often likely to be an over-complicated and uneconomic solution to errors in decisions, particularly admitted errors. It would be more satisfactory if they could more simply be corrected.

[31] *Axis M&E*, above, at [51-52].
[32] See for example *Bouygues UK Ltd v Dahl-Jensen UK Ltd* [2001] 1 All E.R. (Comm) 1041; [2000] B.L.R. 522; [2001] 3 T.C.L.R. 2; (2000) 73 Con. L.R. 135; [2000] C.I.L.L. 1673 CA.

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Conclusions

Where an adjudicator is invited to correct a decision under the slip rule, but declines to do so, that is the end of the matter.[33] As a matter of practicality, if the adjudicator does not consider that the decision contains a clerical or typographical error arising by accident or omission, such an error, even if it exists, cannot be corrected under the slip rule. If an error within the slip rule remains, the proper mechanism for correcting it is by negotiation or final resolution of the dispute through litigation or arbitration. In the meantime, the decision stands, uncorrected.[34]

Where an adjudicator is invited to correct a decision under the slip rule and does do, or of his own volition elects to correct a decision under the slip rule, the correction stands as part of the decision if the correction is in fact and in law within the slip rule. The correction stands, like any other part of the decision, notwithstanding that the correction may itself contain an error of fact or law. If the correction is not within the slip rule, the correction is made without jurisdiction and is not effective, it is submitted. The decision stands as it was, uncorrected.

Where the Scheme applies, any correction of a decision under the slip rule must be made within five days of the delivery of the decision to the parties. Any correction or purported correction outside that time will have no effect. The original decision will stand, uncorrected, as a valid decision (other things being equal), it is submitted, unless overturned by negotiation or final resolution of the dispute through litigation or arbitration.

Where the Scheme does not apply, then it follows that the parties will have made provision in writing in the construction contract permitting the adjudicator to correct his decision so as to remove a clerical or typographical error arising by accident or omission. If, however, the parties have not made provision as to the time within which the error is to be removed, and the construction contract is otherwise compliant with s.108 (1) to (4) of the HGCR Act, then the Scheme provision as to the time within which the error is to be removed will not apply. There will in such a case be no express terms as to the time within which the error is to be removed. In that situation, the old law (applicable before the introduction of the LDEDC Act), with its implied term as to the time within which the error is to be removed, may still be applicable. As the implied term is vague and uncertain as to the time within which the decision may be corrected, the parties would be well advised to make express provision as to the time within which the error is to be removed, either in the construction contract or the contract appointing the adjudicator. In addition, the parties may give consideration to their own contractual provision that is HGCR Act compliant but also adds a broader category of slip that may be corrected.

The slip rule in arbitration is different and wider than the slip rule in adjudication. Caution should be exercised in seeking to apply arbitration case law on the arbitration slip rule to the narrower rule in adjudication. The “first thoughts/second thoughts” analysis is, it is submitted, not transferable from the broad slip rule in arbitration to the narrow slip rule in adjudication. Similarly, the case law on the supposed implied slip rule in adjudication prior to the introduction of the statutory rule should be viewed with care, as the supposed implied term was in terms that were different from and wider than the statutory slip rule that now applies.

[33] See for example *Shimizu Europe Ltd v Automajor Ltd* [2002] B.L.R. 113; (2002) 18 Const. L.J. 259; [2002] C.I.L.L. 1831–1834.
[34] *O’Donnell*, above.

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Whether the removal of an error is correctly undertaken in accordance with the slip rule is a jurisdictional question, it is submitted, to be determined only provisionally and temporarily by the adjudicator, but determined ultimately by the court.