COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Westnav Container Services Ltd. v. Freeport Properties Ltd.,* 2010 BCCA 33

Date: 20100125
Docket: CA036928

Between:

Westnav Container Services Ltd.

Appellant
(Petitioner)

And

Freeport Properties Ltd.

Respondent
(Respondent)

Before: The Honourable Madam Justice Saunders
The Honourable Madam Justice D. Smith
The Honourable Madam Justice Garson

On appeal from: Supreme Court of British Columbia, February 17, 2009
(*Westnav Container Services Ltd. v. Freeport Properties Ltd.,* 2009 BCSC 184, Docket No. S087300)

Counsel for the Appellant:	M. Andrews, Q.C. S. Coval
Counsel for the Respondent:	J. Fraser
Place and Date of Hearing:	Vancouver, British Columbia October 26, 2009
Place and Date of Judgment:	Vancouver, British Columbia January 25, 2010

Written Reasons by:
The Honourable Madam Justice Saunders

Concurred in by:
The Honourable Madam Justice D. Smith
The Honourable Madam Justice Garson

Reasons for Judgment of the Honourable Madam Justice Saunders:

[1] At issue is the jurisdiction of an arbitrator to issue a corrected award. The corrected award confirmed the original decision while deleting portions of the award that discussed an erroneous fact and supplementing the discussion of the basis of the award. The Supreme Court of British Columbia dismissed a petition to quash the award, and that dismissal is appealed to this Court.

[2] The arbitration was conducted under the *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55, to settle the fair market rent for a property leased by the appellant Westnav Container Services Ltd. The property, near the Fraser Surrey Docks, was leased by the owner to the respondent Freeport Properties Ltd., and subleased to Westnav. Westnav exercised a right to renew the sublease in December 2004, extending the lease through January 2019.

[3] Disputes arose between Westnav and Freeport and were settled by an agreement remitting the determination of rent, on the basis of fair market value, to arbitration.

[4] The arbitration was held in April 2008 before Mr. Leon Getz, Q.C. Each party presented expert evidence tendered by an appraiser. The appraiser called by Westnav, Mr. Dybvig, described the premises as generally poor; the appraiser called by Freeport, Mr.Johnston, described the premises as fair to average. The arbitrator stated he was inclined to the assessment of the Westnav tendered appraiser.

[5] The appraisers utilized different methods in determining the fair market rental value of the property. The appraiser called by Westnav employed a method described as “rate-times-value” method, and estimated the fair market rent at $282,500 per year. The appraiser called by Freeport used a “direct comparison” approach and estimated the fair market rent at about $740,000 per year.

[6] The arbitrator accepted the direct comparison method used by the appraiser called by Freeport, but not his conclusion as to the fair market rental value. The arbitrator found the fair market rent to be $660,000 per year.

[7] The direct comparison approach required the arbitrator to review the comparability of other properties. In his analysis the arbitrator mistakenly said the rent for a property known as the Ewen property was $4.38 per square foot for the building. In fact that rent represented the rent for both the building and the land.

[8] In light of this error, Westnav applied to the arbitrator for correction of “what appears to be an accidental or arithmetical error in paras. 90 to 94 of the Award”, or alternatively for clarification pursuant to s. 27 of the *Act*. Freeport contended the award should remain as it was, arguing the error could make no difference to the original award.

[9] On September 17, 2008 the arbitrator released the corrected award. The covering letter acknowledged the error, but stated that the decision as to rent was the same. The corrected award deleted the mention of the Ewen property from the analysis and included fresh passages explaining the original conclusion. Westnav characterizes the additional explanation as an alternate explanation. Freeport characterizes it as an expanded explanation.

[10] Westnav objected to the arbitrator’s actions. It sought, by petition, a declaration that the arbitrator had exceeded his powers by amending the award to correct an error, a declaration the arbitrator had

committed an arbitral error by failing to observe the rules of natural justice when amending the award, and an order in the nature of *certiorari* setting aside the award and ordering a new arbitration before a new arbitrator.

[11] Mr. Justice Silverman dismissed the petition. He concluded the arbitrator had not engaged in new analysis, but rather had clarified his original reasoning as permitted by s. 27 of the *Act*, and thus had not exceeded his jurisdiction. He held, further, the arbitrator had not violated principles of natural justice. He concluded there was therefore no basis on which to set the award aside.

[12] Westnav appeals from the order dismissing its petition. It contends Mr. Justice Silverman erred in law in finding the arbitrator had not exceeded his powers under the *Commercial Arbitration Act* to correct errors, and in finding the process comported with the principles of natural justice.

The *Commercial Arbitration Act*

[13] The arbitrator relied upon s. 27 of the *Act*. That section provides:

> 27 (1) On the application of a party or on the arbitrator's own initiative, an arbitrator may amend an award to correct
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> (a) a clerical or typographical error,
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> (b) an accidental error, slip, omission or other similar mistake, or
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> (c) an arithmetical error made in a computation.
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> (2) An application by a party under subsection (1) must be made within 15 days after the party is notified of the award.
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> (3) An amendment under subsection (1) must not, without the consent of all parties, be made more than 30 days after all parties have been notified of the award.
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> (4) Within 15 days after being notified of the award, a party may apply to the arbitrator for clarification of the award.
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> (5) On an application under subsection (4), the arbitrator may amend the award if the arbitrator considers that the amendment will clarify it.
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> (6) Within 30 days after receiving the award, a party may apply to the arbitrator to make an additional award with respect to claims presented in the proceedings but omitted from the award, unless otherwise agreed by the parties.

[14] By definition in s. 1 the award is both the result and the reasons:

> "award" means the decision of an arbitrator on the dispute that was submitted to the arbitrator and includes
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> (a) an interim award,
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> (b) the reasons for the decision, and
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> (c) any amendments made to the award under this Act;

[15] A party may apply to the Supreme Court of British Columbia to set aside an award under s. 30:

> 30 (1) If an award has been improperly procured or an arbitrator has committed an arbitral error, the court may
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> (a) set aside the award, or
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> (b) remit the award to the arbitrator for reconsideration.
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> (2) The court may refuse to set aside an award on the grounds of arbitral error if
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> (a) the error consists of a defect in form or a technical irregularity, and
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> (b) the refusal would not constitute a substantial wrong or miscarriage of justice.

(3) Except as provided in section 31, the court must not set aside or remit an award on the grounds of an error of fact or law on the face of the award.

[16] "Arbitral error", referred to in s. 30, is defined in s. 1:

"arbitral error" means an error that is made by an arbitrator in the course of an arbitration and that consists of one or more of the following:

(a) corrupt or fraudulent conduct;

(b) bias;

(c) exceeding the arbitrator's powers;

(d) failure to observe the rules of natural justice;

Discussion

1. Jurisdiction

[17] Westnav complains that the corrected award removes all reference to the Ewen property in Part Nine of the original award and inserts a new section discussing properties not referred to in the arbitrator's original analysis in place of reference to that property. It contends the arbitrator was permitted to correct the ruling to deal with his misstatement of the rent of the Ewen property but was not permitted by the *Act* to remove his reliance on the Ewen property rent as a comparable, having relied upon it in the original award. It submits that in deleting the fact of his reliance upon it, the arbitrator deleted something that is not in error (his reliance), and so acted beyond his jurisdiction. Nor was he empowered by the *Act*, says Westnav, to alter the balance of his analysis.

[18] Freeport agrees the arbitrator made an accidental error regarding the Ewen property rent, but says it was open to him to both correct the error (by deleting it) and to clarify the basis of his award by explaining that the erroneously described comparable, the Ewen property, was not the foundation for the award. It characterizes the corrected award as saying the arbitrator did not rely upon the Ewen property in the original award, and says the arbitrator, having said he had omitted to explain how he reached his decision on value in the first instance, was entitled to explain how he arrived at the valuation. Freeport says this discussion is within the powers of an arbitrator set out in s. 27. It submits the challenge is more akin to an allegation that the arbitrator has backfilled his reasons "to support a knowingly incorrect result" and so would seem to be more a complaint of arbitral error under (a) of the s. 1 definition (corrupt or fraudulent conduct), than of exceeding the arbitrator's powers or failing to observe the rules of natural justice referred to in (c) and (d) of that definition. Freeport urges us to put trust in the arbitrator, and to conclude his "corrections" are in the nature of correcting an accidental slip (s. 27(1)) and clarification (s. 27(5)).

[19] The question is both one of characterizing the nature of the changes to the award made by the arbitrator, and of interpreting the statute to determine the scope of an arbitrator's authority after an arbitration award is published. It is not, with respect, a matter of trusting the arbitrator. Nor is it a matter of his integrity, which is unquestionably high. Rather, it is, objectively, a question of where the permissible boundary of change is, so as to preserve the integrity of commercial arbitration and to keep the arbitrator within his role as contemplated by the Legislature.

[20] Prior to passage of the *Act* in 1996 the ability of an arbitrator to alter the face of the decision was limited to the traditional slip rule, which allows correction of accidental slips, omissions and clerical errors. Interpretation of the *Arbitration Act*, which had remained much the same from its initial passage in 1893, prohibited an arbitrator from clarifying an award once it was published, on the basis the arbitrator was

functus officio. Any re-working of an award could be done only after application to a court and an order remitting the matter to the arbitrator. See, for example, *Gulf Islands Intermediate and Personal Care Society v. Hospital Employees' Union Local No. 180*, [1984] B.C.J. No. 184 (B.C.S.C.).

[21] In 1986, in a comprehensive rewriting of the regulatory framework for commercial arbitration as part of a bid to make commercial arbitration a more attractive dispute resolution process, provision was made for clarification of an award by an arbitrator.

[22] In other jurisdictions, though the model is not identical, the trend in legislation and jurisprudence also has been to give more scope for post-award alterations by an arbitrator. Thus, for example, in *Mutual Shipping Corp. of New York v. Bayshore Shipping Co. of Monrovia ("The Montan")*, [1985] 1 All. E.R. 520 (C.A.); *Gannet Shipping Limited v. Eastrade Commodities Inc.*, [2002] 1 Lloyd's Rep. 713 (Q.B. – Comm. Ct); and *AHT v. Tradigrain*, [2002] 2 Lloyd's Rep. 512 (Q.B.), the courts discuss the scope of an arbitrator's jurisdiction to remedy an error in an award as part of the slip rule.

[23] In *Mutual Shipping Corp.*, Sir John Donaldson M.R. addressed the distinction in the slip rule between a clerical error and an error arising from an accidental slip or omission, and an intended decision which the arbitrator later accepts as erroneous, saying at p. 526:

> The High Court slip rule (RSC Ord 20, r 11), which is similarly worded, was considered only recently by this court in *R. v. Cripps, ex p Muldoon* [1984] 2 All ER 705, [1984] QB 686. We there pointed out the width of the power, but also drew attention to the fact that it does not enable the court to have second thoughts (see [1984] 2 All ER 705 at 711-712, [1984] QB 686 at 697).
>
> It is the distinction between having second thoughts or intentions and correcting an award of judgment to give true effect to first thoughts or intentions, which creates the problem. Neither an arbitrator nor a judge can make any claim to infallibility. If he assesses the evidence wrongly or misconstrues or misappreciates the law, the resulting award or judgment will be erroneous, but it cannot be corrected either under s 17 or under Ord 20, r 11. It cannot normally even be corrected under s. 22. The remedy is to appeal, if a right of appeal exists. The skilled arbitrator or judge may be tempted to describe this as an accidental slip, but this is a natural form of self-exculpation. It is not an accidental slip. It is an intended decision which the arbitrator or judge later accepts as having been erroneous.
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> [Emphasis added.]

[24] In *Gannet Shipping Ltd.* the court permitted the arbitrator not only to correct an agreed error, but also to correct the order of costs which followed upon the original incorrect conclusion. Langley J. said at para. 24:

> ... The authorities draw distinctions between errors affecting the expression of the tribunal's thought (which can be corrected) and errors in the tribunal's thought process (which cannot) and to not permitting corrections to reflect "second thoughts". I do not think such distinctions are material in the present context. Granted an error in the amount of the award was properly corrected, I do not think these principles preclude the tribunal from addressing the question whether the corrected figure may reveal other errors. If an error properly falls to be corrected, how it is to be corrected and its consequences is always likely to involve some new consideration.
>
> [Emphasis added.]

[25] In *AHT v. Tradigrain* the court considered s. 57 of the *Arbitration Act 1996* (U.K.), 1996, c. 23, a provision in substance much like our s. 27. The section permits an arbitrator to "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". The court concluded that inadequate rationale or incomplete reasons would require clarification, and that such clarification is permitted under the arbitration scheme. The court held that issuing further reasons, where reasons are incomplete, and providing reasons, where none are given, can be within the jurisdiction of an arbitrator. However *AHT* does not deal with the question of an arbitrator

resiling from reasoning earlier set out.

[26] Westnav contends that under our *Act* an arbitrator should be subject to the same limitation on correction of his thought process. Further it submits that the provision allowing the Arbitrator to clarify the award does not permit the arbitrator to substantially re-write his rationale for the decision which, it says, he did in this case. The appellant urges us to conclude the changes made in the corrected award are corrections in the tribunal's thought processes – second thoughts, as it were.

[27] Freeport contends the arbitrator was within his jurisdiction in clarifying the award by setting out more fully his reasoning process, and did not cross the line described in these cases.

[28] Section 27, in permitting correction of accidental errors and slips, and in permitting clarification, contemplates amendment of an original award through change to the reasons for the decision, whether or not the change affects the result. Yet there is a line between permitted correction and clarification, and alteration that strays into the thought processes. The distinction drawn in *Mutual Shipping Corp.* and *Gannet Shipping Ltd.* between expression of the tribunal's first thoughts, and corrections that reflect second thoughts, is equally applicable here. While the expanded language in s. 27 from the provisions of the former legislation is intended to assist with finality of the arbitration process and limit applications that bounce the final determination between the arbitrator and the courts, it does not contemplate any shift of the well understood prohibition, founded in the concept of *functus officio*, against subsequent alterations in either the thought processes or the basis of the award. Such amendments step beyond correction of an accidental slip or error, and beyond clarification. Indeed the word "clarification" implies adherence to the same thought processes, but with more precise expression of the thought.

[29] By appealing, Westnav assumes the task of persuading us the judge erred in law in his analysis, or reached a conclusion not supported by the record before him.

[30] In stating the applicable principles on the issue of jurisdiction and distinguishing between correcting expression and having second thoughts, the judge correctly referred to the distinction discussed in *Gannet Shipping Ltd.* and *Mutual Shipping Corp.*, and adopted the statement of the principle in J. Kenneth McEwan, Q.C. & Ludmila B. Herbst, *Commercial Arbitration in Canada: A Guide to Domestic and International Arbitrations* (Aurora, Ont.: Canada Law Book, 2008) at 9-50 – 9-51:

> Authorities draw a distinction between errors affecting the expression of the tribunal's thought (which can be corrected) and errors in the tribunal's thought process (which cannot) and do not permit corrections to reflect "second thoughts".
>
> ... If the arbitrator assesses the evidence wrongly or misconstrues or misappreciates the law, the resulting award or judgment will be erroneous, but it cannot be corrected as an accidental slip or omission. The remedy is to appeal, if a right of appeal exists.

[31] I am, however, respectfully of the view that in spite of reference to the correct principles, the judge erred by imputing to the arbitrator a view of the relevance of the Ewen property to his original thinking not expressed by the arbitrator, and by failing to consider the objective view of the events.

[32] I consider it to be of assistance to refer directly to the two awards. The original award was structured in thirteen parts. The first eight described the issues, the property, the evidence of valuation adduced by both parties and their responses to each other's case, including correct references to the Ewen property. Analysis of the material before him started in Part Nine, entitled "CONCLUSIONS AS TO MARKET RENT FOR LEASED PREMISES", leading with this line:

> [81] Given the state of the evidence and in particular the contrasting approaches and opinions of

Messrs. Dybvig and Johnston, it seems virtually inescapable that in essence I must choose between their respective approaches. ...

[33] The arbitrator made his choice known later in Part Nine:

> [84] I have come to the conclusion, on balance and taking account of Westnav's criticisms, that Mr. Johnston has the better view on this and that the indices that in the end he relies on [footnote deleted] can fairly and without distortion and for the reasons that he gave be considered comparables. ...

[34] The arbitrator then said he did not agree, however, with that appraiser's final opinion as to value, and went on to express his own conclusions. Under the heading "Building value" the arbitrator discussed two properties that had been advanced as comparables, the Topco property (in his para. 89) and the Ewen property (in his para. 90). As to the Topco property, the arbitrator found the appraiser's "seemingly heavy reliance" upon it to support his valuation was not justified. The arbitrator then said as to the Ewen property, wrongly referring to the rent as for the building only:

> [90] It was common ground between Mr. Johnston and Mr. Dybvig that, at least in terms of size, site coverage, building quality and rail access, the Ewen Avenue property is comparable to the Leased Premises; and both of them seemed to agree that the $3.75 per square foot building rental rate in effect there as at July 1, 2006 was low as a guide to the market rent of the building component of the Leased Premises and required upward adjustment. As indicated, in 2005 the building rent effective as of October 1, 2006 for that property was fixed at $4.38. Mr. Johnston, as I have said, [footnote deleted] considered Ewen Avenue significantly inferior to the Leased Premises. My own view is that he has exaggerated the relative merits and demerits of Ewen Avenue as compared to those of the Leased Premises.
>
> [Emphasis added.]

[35] The arbitrator then concluded:

> [91] Making the best judgment that I can of the information in evidence, I have reached the conclusion that the fair market rent for the building component of the Leased Premises, was $5.35.

[36] From there, still in Part Nine of his award, the arbitrator went on to value canopies and the surrounding land, concluding:

> [94] In summary, then, I conclude that the market rental value for the Leased Premises as at July 1, 2006 was:
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> | | | | |
> |---|---|---|---|
> | Building | 64,057 sq. ft | $5.35 | $342,705 |
> | Canopies | 21,701 sq. ft | $3.00 | $65,103 |
> | Land | 290,133 sq. ft | $0.87 | $252,415 |
> | TOTAL* | | | $660,223.00 |
>
> * rounded
>
> In the result the fair market rental value of the Leased Premises for the five year term from July 1, 2006 to June 30, 2011 is $3,300,000.

[37] In his ruling on the application to correct or clarify the award, the arbitrator said:

> [13] Since paragraph [90] is the only place in this section of the Award in which any reference is made to the Ewen Avenue lease, deleting it might appear to respond comprehensively to Mr. Coval's point. I think, however, that this is a superficial view of that point – which goes, rather, to my apprehended reliance on Ewen Avenue as the principal basis for my conclusion.
>
> [14] I can understand how a reader might form that view. It is clear, in retrospect, that this section of the Award simply fails to explain how and why I reached my conclusion as to building value.
>
> [15] As a result, the mere removal of paragraph [90] is not enough. If it is removed, the components of

this section are:

(a) an observation concerning the condition of the building (paragraph [88]);

(b) a reservation about the weight attributed by Mr. Johnstone to the Topco lease (paragraph [89]); and

(c) a statement of my conclusion that the fair market rent for the building component was $5.35 (paragraph [91]).

[16] While the conclusion in paragraph [91] is perhaps not technically a *non sequitur* it is certainly not explained by paragraphs [88] and [89]. In this sense this section of the Award is simply defective. It fails to provide what the parties have a right to expect and an arbitrator must deliver, namely, a reasoned decision [footnote deleted]. I acknowledge the failure. I cannot think of a creditable explanation for it.

[Emphasis added.]

[38] The arbitrator then deleted para. 90 of the original award, rewrote the two previous paragraphs and supplemented the award with eight paragraphs discussing the Topco property and other properties referred to in the summary of evidence. He made no reference at all to the Ewen property in this discussion.

[39] In reviewing this trail of writing the judge said:

[53] I am satisfied that the Correction Ruling in this case is the type of clarification contemplated by s. 27. It is a clarification of the Arbitrator's reasoning in the original Award. He did not embark upon a new analysis or rationale. He acknowledged in the ruling that the building value component of the Award had been inadequately explained, and he proceeded to make it more understandable. He indicated that the reasoning in the Correction Ruling is not a new analysis. I am satisfied that this is so.

[54] The Arbitrator could have simply deleted the word "building" from paragraph 90 and permitted everything else to remain as it was. I accept that his reason for not doing so was because he felt compelled to provide the comprehensive analysis of his reasoning, which he acknowledges should have been present in the original Award.

[55] The Arbitrator changed nothing from the Award. He simply augmented it to fill in a gap in his analysis by explaining how he determined building rent in the first place.

[56] The Correction Ruling provides supplemental reasons to the Award. Supplemental reasons are not the same as changed reasons.

[40] The trial judge then found that the Ewen property was not the principle factor in the reasoning of the arbitrator's original award, and that the valuation was based on all the information in the evidence, not just that particular site.

[41] With respect, I do not consider it can be said, as the judge did in para. 55, that the arbitrator changed nothing in his award.

[42] The arbitrator deleted, in the discussion as to valuation in his corrected ruling, all reference to one of only two properties he had originally specifically referred to in his comparative analysis. While it is correct to say, as the judge did at para. 58, that the arbitrator referred in para. 91 of the original award to "the information in evidence" and thus broadly recognized the body of evidence before him, this ignores the specific reference to the property. It must be taken by the reference to the Ewen property in para. 90 of the original award that the evidence of this property was material to the decision. It was not open to the arbitrator, in my view, to simply delete all reference to evidence which was sufficiently cogent to him as to comparability that he made prominent mention of it in the original award.

[43] Objectively, the appearance is that the arbitrator has changed his mind as to the comparability of the subject property to the Ewen property. I do not understand the arbitrator to deny that he originally considered the Ewen property comparable to the property in issue. If the Ewen property was reasonably comparable, the fact that the rent was for both land and buildings would be relevant to valuation.

Nevertheless, it was ignored entirely in the analysis in the corrected award.

[44] The arbitrator did say he recognized he had failed to give reasons for reaching his conclusion, and proceeded to provide reasoning in several paragraphs discussing other properties referred to in the evidence. It may have been open to him to write these paragraphs in the spirit of completing incomplete reasons as suggested in *AHT v. Tradigrain*, and I make no final determination of that issue, but it was not open to him to do so without any reference to evidence he had earlier put into a position of prominence.

[45] The arbitrator recognized this difficulty in his corrected award in the passages at paras. 13 and 14 of his correction ruling, replicated and underlined above.

[46] The matter of releasing additional reasons after a decision has been announced is delicate. Certainly in the realm of arbitration the *Act* contemplates additional and corrective, to a degree, rulings.

[47] As I earlier stated, the issue is not one of the integrity of the arbitrator. I recognize in this unfortunate situation the arbitrator has sought to rescue the arbitration process through his correction ruling. However, and with respect, I have come to the view that in doing so he has stepped outside his jurisdiction. The matter is one of the integrity of the arbitration process. Viewed objectively one may ask whether an objective bystander, reading these awards, could have confidence in the outcome in light of the arbitrator's silence in the corrected award on the effect of the Ewen property as a comparable on his analysis, given its prominence in the analysis in the original award. I conclude the answer is in the negative. I consider an objective review of the award reveals a correction in reasoning through exclusion from the reasons of a factor previously considered material, creating objectively an impression the corrected award was an alternate explanation for the result rather than clarification of the original reasoning.

[48] This, in my view, goes beyond s. 27. As it is not permitted by s. 27, it exceeded the arbitrator's powers and is an arbitral error. I conclude the judge erred in finding it was not.

[49] The question, then, is remedy. Freeport urges us, if we find error, to remit the matter to the arbitrator. It says reference to a new arbitration goes beyond the remedy originally available to Westnav under s. 30 of the *Act*.

[50] Section 30 permits this Court to do nothing in respect to the award even if arbitral error is found, to set the award aside, or to refer the matter back to the arbitrator.

[51] In my view, given the sequence of events and the basis for my conclusion, neither doing nothing nor sending it back to the arbitrator are appropriate responses, even recognizing the delay and expense that is attendant on my decision. I would allow the appeal and set the award aside.

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Madam Justice D. Smith"

I AGREE:

"The Honourable Madam Justice Garson"