Case No: CL-**2016-000807**

Neutral Citation Number: [2017] EWHC 137 (Comm)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 03/02/2017

Before :

THE HON. MR JUSTICE POPPLEWELL

- -

Between :

H

Claimant

and
(1) L
(2) M
(3) N
(4) P

Defendants

- -
- -

Neil Kitchener QC & Owain Draper (instructed by **K & L Gates LLP**) for the **Claimant**

Michael Crane QC, David Scorey QC and **David Peters**
(instructed by **Clyde & Co LLP**) for the **First Defendant**

The Second to Fourth Defendants did not appear and were not represented

Hearing date: 12 January 2017

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Judgment

The Hon. Mr Justice Popplewell :

Introduction

1. By a Claim Form issued on 21 December 2016 and amended pursuant to an order of Fraser J of 23 December 2016, the Claimant ("H") seeks an order pursuant to Section 24(1)(a) of the Arbitration Act 1996 ("the Act") that the Second Defendant, M, be removed as an arbitrator, and the appointment of a new arbitrator to replace him. Shortly after the conclusion of the hearing I announced my decision that the application would be dismissed. These are my reasons.

2. Section 24 of the Act provides:

   "24. Power of court to remove arbitrator

   (1) A party to arbitral proceedings may … apply to the court to remove an arbitrator on any of the following grounds –

      (a) that circumstances exist that give rise to justifiable doubts as to his impartiality; …."

3. Mr Kitchener QC appearing for H made clear that no allegation of actual bias or lack of impartiality was made against M. The application was founded on a submission that his conduct had given rise to an appearance of bias.

The Arbitration

4. As a result of an incident claims were brought in the United States of America against H, R and Q (by whom I mean to include affiliate companies within those groups). Judgment on liability was handed down in 2014 allocating blame between H, Q and R. After the liability hearing but before judgment, H negotiated a settlement of the claims against it for a very substantial sum. The settlement was announced two days before the liability judgment. Following the judgment, R settled for a lesser sum and also paid civil penalties to the United States.

5. H had liability insurance arranged in layers. The First Defendant ("L") is a Bermudan insurance company, which wrote the top layer. The policy was on the Bermuda Form and governed by New York law subject to specific modifications identified in the policy. It contained the arbitration clause in standard Bermuda Form terms which provided that:

   (1) arbitration was to take place in London under the provisions of the Arbitration Act 1996;

   (2) the tribunal was to consist of three arbitrators, one appointed by each party and the third by the two arbitrators so chosen; in the event of disagreement between the arbitrators as to the choice of the third, the appointment was to be made by the High Court;

   (3) the award was to be delivered within 90 days of the conclusion of the hearing;

   (4) there was to be no right of appeal from the award.

6. L declined to pay H's claim which was for the full extent of the layer. The principal grounds of defence of the claim are that H's settlement of the claims made against it was not a reasonable settlement, and that L had (reasonably) not consented to the settlement.

7. H commenced arbitration by the appointment of the Third Defendant, N, on 27 January 2015. The Fourth Defendant, P, was appointed on behalf of L.

8. There was no agreement on the identity of the third arbitrator, as a result of which an application was made to the High Court for appointment of a third arbitrator exercising its powers under section 18 of the Act. Following a contested hearing, in which a number of candidates were put forward on both sides, Flaux J appointed M as the third arbitrator by an order of 12 June 2015. M was L's preferred candidate.

9. M is a well-known and highly respected international arbitrator. He has extensive experience of insurance and reinsurance law, both English and New York law. He has extensive experience of both domestic and international arbitrations governed by the Act and of arbitral procedural law, practices and procedures. He has sat as a member of an arbitration tribunal in over thirty references concerning the Bermuda Form over many years. He enjoys a reputation as an international arbitrator of the highest quality and integrity.

10. Prior to expressing his willingness to be appointed, M disclosed that he had previously acted as arbitrator in a number of arbitrations in which L was a party, including appointments on behalf of L, and that he was currently appointed as arbitrator in two pending references in which L was involved. These did not impinge on his ability to act impartially in the subject reference, or form any impediment to his appointment as third arbitrator, and were not regarded by H or the Court as doing so. H was opposed to the appointment of M, but not on these grounds. Rather it adopted a general stance that it was uncomfortable with any retired English Judge or English QC being appointed because of a concern, apparently, that they would interpret the policy through English eyes and be incapable of applying the modified New York law governing the policy. These concerns were rejected by Flaux J, from whom there was no appeal. They were not maintained before me; indeed the potential replacements for M with whom H expressed itself to be content included Sir Stephen Tomlinson, whose availability at relatively short notice resulted from his recent retirement from the Court of Appeal.

11. Upon M's appointment by the Court, the tribunal was "deemed fixed" in the words of the arbitration clause. Pursuant to section 18(4) of the Act the appointment of M was thereupon to take effect as if made with the agreement of L and H.

The grounds for the application

12. The grounds for the application arise out of the discovery by H in November 2016 that subsequent to his appointment in the current reference, M had accepted appointment as an arbitrator in two other references. Each involved a claim by R against its excess liability insurers writing cover for R's liabilities arising out of

the incident. One involved a claim by R against L. The other involved a claim by R against another insurer on the same layer. M's acceptance of those appointments came about in the following circumstances:

(1) In December 2015 M accepted appointment by L through Clyde and Co, who are also L's solicitors in the current reference, in relation to the R v. L claim. Prior to doing so he reminded the partner at Clyde & Co of his appointment in the current H v L reference and invited him to disclose it to R. However neither he nor Clyde & Co disclosed the proposed appointment to H prior to it being made, or thereafter.

(2) M was not initially a member of the tribunal in the other R reference against the other insurer.

(3) Prior to his involvement in the other insurer reference, on 25 July 2016 an order was made in both R arbitrations for the determination of a preliminary issue. That was very shortly after close of pleadings in those references. That was a consent order. The preliminary issue was potentially dispositive of the claims if decided in favour of the insurers; it involved construction of the policy terms on undisputed facts turning on the exhaustion of underlying layers by reference to the fines and penalties paid by R.

(4) In August 2016 the chairman of the tribunal in the R reference against the other insurer was forced to resign through ill health and was replaced by M by the agreement of the parties. H was not informed of the appointment before M accepted it, or thereafter.

13. In November 2016 the preliminary issue was heard in both R arbitrations. The award is awaited.

14. The full hearing of the issues in the current reference was scheduled to commence on Tuesday 24 January 2017 with an estimate of 12 days.

15. H relies on three elements of M's conduct as giving rise to an appearance of bias:

(1) his acceptance of the appointments in the R arbitrations;

(2) his failure to disclose those appointments to H;

(3) his response to the challenge to his impartiality.

The Law

16. The relevant principles are as follows:

(1) Section 33 of the Act requires the tribunal to act fairly and impartially between the parties.

(2) The question whether circumstances exist which give rise to justifiable doubts as to an arbitrator's impartiality is to be determined by applying the common law test for apparent bias: ***Locabail (UK) Ltd v Bayfield Properties Ltd*** [2000]

QB 451 at [17], ***A v B*** [2011] 2 Lloyd's Rep 591 at [22], ***Sierra Fishing Co v Farran*** [2015] EWHC 140 at [51].

(3) The test is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased: ***Porter v Magill*** [2002] AC 357 per Lord Hope at [103].

(4) The fair-minded observer is gender neutral, is not unduly sensitive or suspicious, reserves judgment on every point until he or she has fully understood both sides of the argument, is not complacent and is aware that judges and other tribunals have their weaknesses. The "informed" observer is informed on all matters which are relevant to put the matter into its overall social, political or geographical context. These include the local legal framework, including the law and practice governing the arbitral process and the practices of those involved as parties, lawyers and arbitrators. See ***Helow v Secretary of State for the Home Department*** [2008] 1 WLR 2416 at [1]-[3]; ***A v B*** at [28] to [29].

(5) The test is an objective one. The fair-minded observer is not to be confused with the person who has brought the complaint, and the test ensures that there is a measure of detachment. The litigant lacks the objectivity which is the hallmark of the fair-minded observer. He is far from dispassionate. Litigation is a stressful and expensive business and most litigants are likely to oppose anything which they perceive might imperil their prospects of success, even if, when viewed objectively, their perception is not well-founded: see ***Helow*** per Lord Hope at [2]; ***Harb v HRH Prince Abdul Azsiz Bin Fahd Bin Abdul Aziz*** [2016] EWCA Civ 556 per Lord Dyson MR at [69].

(6) One aspect of the objective test is that it is not dependent on the characteristics of the parties, for example their nationality: see ***A v B*** per Flaux J at [23-24]. The test is the same whether or not foreign nationals are involved, and the test is not informed by the actual or stereotypical attitudes towards the arbitral process which may be held by a party who is, or is managed by, foreign nationals.

(7) The International Bar Association Guidelines on Conflicts of Interest in International Arbitration 2014 edition ("The IBA Guidelines") may provide some assistance to the Court on what may constitute an unacceptable conflict of interest and what matters may require disclosure. However they are not legal provisions and do not override the applicable legal principles which have been identified, as they expressly recognise in paragraph 6 of the Introduction; if there is no apparent bias in accordance with the legal test, it is irrelevant whether there has been compliance with the IBA Guidelines: see ***Cofely Limited v Anthony Bingham*** [2016] EWHC 240 (Comm) at [109]; ***A v B*** at [73]; ***Sierra v Farran*** at [58].

(8) All factors which are said to give rise to the possibility of apparent bias must be considered not merely individually but cumulatively: see e.g. ***Cofely v Bingham*** at [115].

Ground 1: accepting the R reference appointments

17. Mr Kitchener advanced two reasons why M should not have accepted the appointments in the R references without the informed consent of H, and why in doing so he gave the appearance of bias against H. The first was that the L appointment involved M being given a secret benefit by L in the form of the remuneration he would earn from the arbitration. The second was that M would learn information during the course of the R references which was relevant to the issues in the H arbitration, and available to L but not to H; this would be particularly pertinent information, he argued, because the overlap in the issues in the proceedings was substantial; in particular the central issue in each reference was the reasonableness of the settlements by H and R respectively.

18. I have little hesitation in concluding that neither of these would cause a fair-minded or informed observer to have any doubts about the impartiality of M; and that if they caused H to do so, it can only have been as a result of a fundamental misunderstanding of the nature of international arbitration in London governed by the Act.

19. As to the first, the duty to act independently and impartially involves arbitrators owing no allegiance to the party appointing them. Once appointed they are entirely independent of their appointing party and bound to conduct and decide the case fairly and impartially. They are not in any sense, as may sometimes be misunderstood by those in other jurisdictions, a representative of the appointing party or in some way responsible for protecting or promoting that party's interests. This independence is enshrined in s.33 of the Act, which requires the arbitrator to act fairly and impartially irrespective of who appointed him or her. This is fundamental and well known to all involved in London international arbitration. The fair-minded and informed observer would expect M, with his extensive experience and high reputation, to treat as second nature the fact that his duty of impartiality was entirely unaffected by the identity of the party appointing him, and would expect such independence to inform his entire approach to the subject reference.

20. The appointment of M by L in the R reference confers no immediate benefit on him in terms of his fees. L does not undertake to bear those fees; the tribunal as a whole, exercising its obligations under s. 33, will decide who ultimately is to bear them, in the light of the course of the arbitration and the result. It is true that an arbitrator gains a benefit from any appointment in the sense that the appointment contributes to the opportunity for him to earn his living. It would be absurd, however, to conclude that once appointed, the fact of appointment would dispose him to decide the case in favour of the appointing party. Were it so, no arbitrator could ever accept an appointment without being capable of removal for apparent bias. Such an approach is self-evidently wrong and inconsistent with the very nature of the arbitrator's role in London arbitration, reflected in s.33 of the Act.

21. As to Mr Kitchener's second reason, it is equally unsound whatever the degree of overlap in the subject matter of the arbitrations. It is a regular feature of international arbitration in London that the same underlying subject matter gives rise to more than one claim and more than one arbitration without identity of parties. This is common in insurance and reinsurance claims where there has been

a large casualty and is a consequence of the spread of risk which insurance and reinsurance provides. It is common too in maritime disputes where an incident may give rise to a claim under a bill of lading and one or more of a string of charterparties; and in commodity disputes with string contracts. In such cases it is common for those with relevant expertise as arbitrators to sit in different arbitrations arising out of the same factual circumstances or subject matter.

22. It is desirable that they should be able to do so for three reasons. First arbitration is a consensual process derived from the arbitration agreement between the parties, and the principle of party autonomy which underpins the Act, enshrined in s. 1(b), dictates that parties should be free to appoint their chosen arbitrator in accordance with the procedure agreed in the arbitration clause in fulfilment of the contractual bargain.

23. Secondly, arbitration is chosen in many contracts as the preferred form of dispute resolution because the parties desire their tribunal to have particular knowledge and expertise in the law and practices of the business or markets in which the parties are operating. Arbitrators with such knowledge and expertise who command the confidence of the parties often comprise a limited pool of talent. It is undesirable that parties should be unnecessarily constrained in their ability to draw on this pool if there are multiple arbitrations arising out of a single event or overlapping circumstances.

24. Thirdly, the principle of speedy finality which underpins the Act, enshrined in s. 1(a), is served if the tribunal is already familiar with the background to and uncontroversial aspects of the subject matter of the dispute.

25. Generally, the fact that an arbitrator may be involved in an arbitration between party A and party B, whose subject matter is identical to that in an arbitration between party B and party C does not preclude him or her from sitting on both tribunals. The duty enshrined in s. 33 of the Act requires an arbitrator to decide the case by reference to material available to the parties to the particular reference. Where the evidence or argument in one arbitration is not the same as that in another arbitration on the same issue, the duty in each case is to decide the issue on the evidence and argument in the particular reference. That may occasionally dictate a different result in the two arbitrations, as a result of differences in the evidence and argument, but if so it is the result of the consensual and confidential nature of the arbitral process taking precedence over the desideratum of avoiding irreconcilable decisions. It causes no difficulty in the arbitrators acting fairly or impartially, as all those involved fully understand. Arbitrators are well able to put out of their minds material they may have encountered in another reference if it is not introduced as material in the case they are deciding, just as they put out of their minds what they may have read in the general or trade media unless it is common ground or supported by material in the reference (I use the expression “material” rather than “evidence” because many arbitrations are conducted on the basis that strict rules of evidence do not apply). They will not decide a reference on the basis of an argument or material which has been raised in another arbitration without giving the parties an opportunity to deal with it. But that is a far cry from treating knowledge of such arguments or material as inconsistent with an ability to decide the subsequent case impartially, which generally it is not.

26. If authority were needed it is to be found in the case of ***Amec Capital Projects Ltd v Whitefriars City Estates Ltd*** [2004] EWCA Civ 1418. An adjudicator had decided a case without jurisdiction as a result of defects in the procedural mechanism for his appointment. His adjudication was set aside and he was then reappointed to decide the same dispute, between the same parties, and decided it in the same way. At first instance it was held that his second adjudication should be set aside for apparent bias because, amongst other things, he had already decided the same issue. The Court of Appeal reversed the decision. Dyson LJ said:

> "20. In my judgment, the mere fact that the tribunal has previously decided the issue is not of itself sufficient to justify a conclusion of apparent bias. Something more is required. Judges are assumed to be trustworthy and to understand that they should approach every case with an open mind. The same applies to adjudicators, who are almost always professional persons. That is not to say that, if it is asked to redetermine an issue and the evidence and arguments are merely a repeat of what went before, the tribunal will not be likely to reach the same conclusion as before. It would be unrealistic, indeed absurd, to expect the tribunal in such circumstances to ignore its earlier decision and not to be inclined to come to the same conclusion as before, particularly if the previous decision was carefully reasoned. The vice which the law must guard against is that the tribunal may approach the rehearing with a closed mind. If a judge has considered an issue carefully before reaching a decision on the first occasion, it cannot sensibly be said that he has a closed mind if, the evidence and arguments being the same as before, he does not give as careful a consideration on the second occasion as on the first. He will, however, be expected to give such reconsideration of the matter as is reasonably necessary for him to be satisfied that his first decision was correct. As I have said, it will be a most unusual case where the second hearing is for practical purposes an exact rerun of the first.
>
> 21. The mere fact that the tribunal has decided the issue before is therefore not enough for apparent bias. There needs to be something of substance to lead the fair-minded and informed observer to conclude that there is a real possibility that the tribunal will not bring an open mind and objective judgment to bear."

27. Those comments apply with as much force to arbitrators in international reinsurance arbitration as they do to adjudicators in building disputes. Just as an arbitrator or adjudicator can be expected to bring an open mind and objective judgment to bear when redetermining the same question on the same evidence between the same parties, it is all the more so where the evidence is different and heard in a reference between different parties.

28. The position in Bermuda Form arbitrations is accurately summarised in a leading textbook, Liability Insurance in International Arbitration 2nd edn at 14.32 in these terms:

> "14.32 Commencing a Bermuda Form Arbitration
>
> The decision in *Locabail*, and the foregoing discussion, is also relevant in the fairly common situation where a loss, whether from boom or batch, gives rise to a number of arbitrations against different insurers who have subscribed to the same programme. A number of arbitrations may be commenced at around the same time, and the same arbitrator may be appointed at the outset in respect of all these arbitrations. Another possibility is that there are successive arbitrations, for example because the policyholder wishes to see the outcome of an arbitration on the first layer before embarking on further proceedings. A policyholder, who has been successful before one tribunal, may then be tempted to appoint one of its members (not necessarily its original appointee, but possibly the chairman or even the insurer's original appointee) as arbitrator in a subsequent arbitration. Similarly, if insurer A has been successful in the first arbitration, insurer B may in practice learn of this success and the identity of the arbitrators who have upheld insurer A's arguments. It follows from *Locabail* and *Amec* that an objection to the appointment of a member of a previous panel would not be sustained simply on the basis that the arbitrator had previously decided a particular issue in favour of one or other party. It equally follows that an arbitrator can properly be appointed at the outset in respect of a number of layers of coverage, even though he may then decide the dispute under one layer before hearing the case on another layer."

29. The informed and fair-minded observer would not therefore regard M as unable to act impartially in the reference between H and L merely by virtue of the fact that he might be an arbitrator in other references arising out of the incident, and might hear different evidence or argument advanced in another such reference. The objective and fair-minded assessment would be that his experience and reputation for integrity would fully enable him to act in accordance with the usual practice of London arbitrators in fulfilling his duties under s. 33 by approaching the evidence and argument in the H reference with an open mind; and in deciding the case, in conjunction with the other members of the tribunal, in accordance with such material, with which H will have a full and fair opportunity to engage.

30. Mr Kitchener also argued that M owed an enhanced duty to maintain demonstrable impartiality because his position as chairman of the tribunal meant that he should be the ultimate guarantor of fairness and impartiality. This too betrays a fundamental misunderstanding. Being chairman has no special status so far as impartiality is concerned. The duty to act fairly and impartially enshrined in s. 33 rests in equal measure on all arbitrators. That is well understood in London international arbitration, in which party appointed arbitrators are not, and should

not be seen to be, party pris. The submission seems to proceed from the false premise that party appointed arbitrators cannot be expected to comply with their own duties of impartiality and need the chairman to ensure that they do not exercise bias in favour of their appointees, a proposition which is as offensive to the international arbitration community in general, and to N and P in particular, as it is erroneous.

31. Mr Kitchener's submission is not improved by characterising the evidence and argument which M would receive in the R reference in which he was appointed by L, as "secret communications between L and M" and giving L "privileged access" to M. True it is that they would be secret from H in just the same way as any of M's knowledge of anything he may ever have heard about the incident, whether from the press, another arbitration, or any other source of information, would not automatically be known to H. Nor would M's knowledge, derived from his long experience in cases as an advocate and arbitrator, of the relevant policy terms and of the legal arguments and principles commonly applied as to their meaning and effect, whether it came to any extent from L as well as others. These are not "secret communications" or "privileged access" in any pejorative sense. They are merely part of the everyday experience of the London community of international arbitrators who are as fully cognisant of their duty to decide cases impartially and fairly on the material before them as are judges who take the judicial oath. No fair-minded and informed observer would think otherwise.

32. Mr Kitchener relied on the decision in ***Beumer Group UK Ltd v Vinci Construction UK Ltd*** [2016] EWHC 2283 (TCC) in which an adjudicator, Dr Chern, had been appointed in two disputes arising out of a building contract, one between Beumer and Vinci, and one between Beumer and Logan. Vinci successfully applied to have Dr Chern removed as an arbitrator for apparent bias on the grounds, amongst others, that Dr Chern had not disclosed to Vinci that he had been appointed as adjudicator in the other adjudication between Beumer and Logan. Mr Kitchener relied in particular on paragraph 31 in which Fraser J said:

> "If unilateral telephone calls are strongly discouraged (if not verging on prohibited) due to the appearance of potential unfairness, **it is very difficult, if not in my judgment impossible, for an adjudicator to be permitted to conduct another adjudication involving one of the same parties at the same time without disclosing that to the other party.** Conducting that other adjudication may not only involve telephone conversations, but will undoubtedly involve the receipt of communications including submissions, and may involve a hearing. **If all that takes place secretly, in the sense that the other party does not know it is even taking place, then that runs an obvious risk in my judgment of leading the fair minded and informed observer to conclude that there was a real possibility of bias.** All of this can be avoided by disclosing the existence of the appointment at the earliest opportunity." (Mr Kitchener's emphasis)

33. I do not read the judgment as a whole as suggesting that Fraser J was intending to assert any general principle that an adjudicator cannot accept two appointments

where one party is common to both appointments. The striking feature of the factual circumstances he was considering was that the common party, Beumer, was putting forward mutually inconsistent cases in the two adjudications, which the adjudicator knew, but Vinci did not. At paragraph 38 Fraser J said:

> "38. It is entirely correct to read *Amec v Whitefriars*, which is relied upon by Mr Curtis QC, as stating that adjudicators can be trusted to approach matters with an open mind, and to decide disputes only on the evidence and material placed before them on that particular dispute. That is plain, in particular, from the passages in the leading judgment of Dyson LJ (as he then was) at paragraphs [20] to [22]. Further, in paragraph [21] the following is stated:
>
> > "There needs to be something of substance to lead the fair minded and informed observer to conclude that there is a real possibility that the tribunal will not bring an open mind and objective judgment to bear."
>
> That is dicta clearly directed at the second limb of the rules of natural justice, namely the impartiality of the tribunal. The "something of substance" here is the appointment of Dr Chern in BL II at the same time, **and the conducting of that adjudication**, with all that involved in terms of contact with Beumer, without notifying Vinci of that fact." (my emphasis)

34. The words I have emphasised are important: it was not the fact of the adjudicator being appointed in both adjudications which of itself brought doubt on his ability to act impartially; it was the conduct of the arbitration in which he knew, but Vinci did not, that Beumer was running inconsistent cases, of which Fraser J took "a very dim view" (at [25]) and of which Dr Chern left Vinci in ignorance.

35. For these reasons there is nothing in the acceptance of the R appointments by M which gives rise to an appearance of bias against H. That is the position even if the issues which had to be decided in the references were identical or substantially overlapping. In fact there is little risk of M having to address issues in the H arbitration which coincide with any issue on which he will have heard evidence or argument in the R references. The preliminary issue in the R references turns upon arguments of law which are not replicated in the H reference. They involve no examination of the events giving rise to the explosion and environmental disaster, the proceedings against H and R, or the reasonableness of their respective settlements, beyond uncontroversial agreed facts. The H arbitration is due to commence on 24 January for 12 days so that a final award can be expected within months. It is not known when the award on the preliminary issues in the R references will be issued. If the preliminary issue is determined in insurers' favour, that will bring the R references to an end. If the preliminary issue is determined against insurers, it may well be that the tribunals in those references will not have cause to consider any of the material relevant to the merits of the substantive dispute until after the award in the H reference is published. The risk of any relevant substantive information reaching M in the R arbitrations before then, being information which would overlap with that which he might be required

to consider in the H reference, is reduced to the point of virtual elimination by two further factors:

(1) The issue as to the reasonableness of the H settlement is legally and factually distinct from that of the R settlement: R and H played different roles, were alleged to have committed different breaches of duty and reached different settlements.

(2) M has offered to resign in the R references if the preliminary issue is resolved against insurers so as to leave the other issues in play in those references.

36. Mr Kitchener makes the point that M could not have been confident of the absence of overlap at the time of the appointment. But nor, equally could he have been confident that there was overlap. Even on the false hypothesis that a degree of overlap disqualifies an arbitrator from acting in both references, there would be no apparent bias in accepting an appointment and remaining involved in the reference until any overlap giving rise to a conflict of interest became apparent. This sometimes occurs as arbitrations take their course, and the common experience in London arbitration is that where a genuine conflict of interest arises, arbitrators will tender their resignations in one or both of the references. There is no reason to think that M would not have taken this view; on the contrary, he has said that he did not understand there to be any overlap between the issues, and his good faith in holding and expressing that view is not challenged. When it was vehemently argued by H that there was such an overlap, he offered to resign from the R references if the preliminary issue is decided against L, even though there would in fact be no impropriety in his continuing as an arbitrator in all three references. All this would serve to reinforce the impression of impartiality in the mind of the fair-minded observer, not to undermine it.

Ground 2: Failure to disclose the R appointments

37. There are two reasons for rejecting this ground. First, if, as I have held, M's acceptance of the R appointments does not itself give rise to any justifiable concerns over his independence, then ex hypothesi he can have been under no obligation to disclose the same; there is no obligation to disclose circumstances which the informed observer would not regard as raising a real possibility of impartiality. If a particular circumstance does not give rise to any justifiable concerns as to an arbitrator's impartiality, then his failure to disclose that circumstance cannot, without more, give rise to any equivalent concern. Any other approach would allow a claimant to pull itself up by its bootstraps.

38. Flaux J reached a similar conclusion in the context of s. 68 of the Act in ***A v B*** at [88]:

> "In other words, I consider that, in so far as Article 5.3 [of the LCIA Rules] is imposing an obligation on the arbitrator to disclose circumstances likely to give rise to any justified doubts as to his impartiality or independence, that is only an obligation to disclose matters which amount to apparent bias i.e. where there is a "real possibility". Whilst arbitrators may indeed make wider disclosure out of caution, they are under no obligation to

> do so, let alone under an obligation breach of which could entitle the aggrieved party to say there was a serious irregularity, for the purposes of section 68 of the Arbitration Act, notwithstanding that there was not in fact any arguable case of apparent bias."

39. That is not to say that arbitrators should never make disclosure in such circumstances. There may be many good reasons for doing so. The arbitrator may lack some information and so not be as fully informed of all the circumstances as the fair-minded and informed observer would be. He may benefit from submissions on the question from the parties. He may wish merely to reinforce his impartiality in the parties' minds by disclosing matters which are a long way from requiring disclosure, still less affording any ground for thinking there is any risk of bias. Disclosure may be prudent simply to avoid any risk of subsequent and spurious ground for challenge by a party disaffected by the result.

40. Nevertheless, whatever the arguments for or against making disclosure, if the arbitrator is fully informed as to the relevant circumstances and correctly judges that the circumstances do not give rise to a possibility of apparent bias, no fair minded observer would regard him as biased simply by failing to disclose those circumstances. There may be exceptional cases where the approach which the arbitrator adopts in deciding not to give the relevant disclosure generates free-standing concerns as to his impartiality by reason of things said or done in reaching that decision. However this is not such a case.

41. The second reason why this ground of challenge fails is that even if M ought to have disclosed the two R appointments, his failure to do so would not give rise to a real possibility of apparent bias against H. He has explained in correspondence that he did not do so because it did not occur to him that there was any obligation to do so. The accuracy and honesty of that explanation is not challenged. Even if such honest belief were mistaken (which it is not), the fair-minded observer would not think that it would raise a real possibility of apparent bias: see ***Helow*** per Lord Mance at [58]. It would not justify his removal under s.24(1)(a).

42. H's reliance upon the IBA Guidelines does not advance matters. The IBA Guidelines do not represent the English law of apparent bias, as set out above, which is relevant for the purposes of s.24 of the Act. They do not purport to do so as is clear from paragraph 6 of the Introduction:

> "These Guidelines are not legal provisions and do not override any applicable national law or arbitral rules chosen by the parties."

43. As Flaux J observed in ***Av B*** at [73]:

> "Furthermore, in my judgment that conclusion is not altered in any way by the IBA Guidelines, which do not assist the claimants for a number of reasons. First, as paragraph 6 of the Introduction to the Guidelines makes clear, the Guidelines are not intended to override the national law. It necessarily follows that if, applying the common law test, there is no apparent or unconscious bias, the Guidelines cannot alter that conclusion."

44. Further, and in any event, the advisory "requirement" to disclose so-called 'Orange List' circumstances imports no suggestion or presumption of doubt as to the arbitrator's impartiality arising from such circumstances. This is clear from the following:

    (a) At page iii of the Preface to the IBA Guidelines by the co-chairs of the IBA Arbitration Committee, it states:

    > 'It is also essential to reaffirm that the fact of requiring disclosure – or of an arbitrator making a disclosure – does not imply the existence of doubts as to the impartiality or independence of the arbitrator. Indeed, the standard for disclosure differs from the standard for challenge.'

    (b) Explanation to General Standard 3 at (c) (page 8 of the IBA Guidelines) states:

    > 'A disclosure does not imply the existence of a conflict of interest. An arbitrator who has made a disclosure to the parties considers himself or herself to be impartial and independent of the parties, despite the disclosed facts, or else he or she would have declined the nomination, or resigned. … It is hoped that the promulgation of this General Standard will eliminate the misconception that disclosure itself implies doubts sufficient to disqualify the arbitrator, or even creates a presumption in favour of disqualification.'

Ground 3: M's response to H's complaint

45. H's lawyers, K & L Gates LLP ("KLG") wrote to M on 29 November 2016, stating that they had become aware of the R reference appointments. The letter asserted that the IBA Guidelines required prior disclosure of the intention to accept such appointments as Orange List disclosable situations; sought confirmation of the fact of the appointments; and sought an explanation for failure to make prior disclosure. The letter was sent to M only, not copied to L as it should have been.

46. M responded briefly on Friday 2 December 2016 explaining that his professional commitments that week had prevented access to the files in his office but promising to go into the office over the weekend and prepare a full response. His detailed response was sent by email on Monday 5 December 2016, in which he explained the fact and circumstances of his appointment in the two R references. He confirmed that he had not made disclosure to H at the time of those appointments because it did not occur to him at the time that he was under any obligation under the IBA Guidelines to do so. He said: "*I do not think and did not think that the above circumstances put any obligation upon me to make any disclosure to you or your clients under the IBA Guidelines. However, I appreciate, with the benefit of hindsight, that it would have been prudent for me to have informed your clients through your firm, and I apologise for not having done so.*" He stated that although the references all arose out of the same incident it was not the case that they raised the same or even similar issues: as he understood it, H and R played very different roles. He went on to confirm that his only involvement to date in the R references had concerned the issue of policy

construction and that he had received no information which could not be shared in the H reference. He concluded by assuring KLG and their clients that in the 20 years he had practised as a full time arbitrator he had at all times remained independent and impartial and would continue to do so; that he readily acknowledged that it was important that both parties in an arbitration should share confidence that the dispute would be fairly determined on the evidence and the law without bias; that he did not believe any damage had been done; but that if H remained concerned, he would consider tendering his resignation from the R references if the determination of the preliminary issues did not effectively bring them to an end.

47. KLG responded to M by letter of 11 December 2016, this time copied to the co-arbitrators and Clyde & Co LLP. In the response the author, Mr Birsic, said that H continued to have serious and justifiable doubts about his impartiality and independence which had only been heightened by his email of 5 December. It asserted that the only proper course was for M to resign immediately. It described M's offer to resign from the R references as "*an impractical and empty one*" which "*only serves to heighten further H's concerns*". The first reason given was in these terms:

> "First, the merits hearing in this arbitration is due to take place in January 2017. We have no idea whether the tribunals in those other references will have decided the preliminary issues you refer to by that time; and we anticipate that it would not be proper to rush the awards out in those references in order to beat the deadline of the start of the hearing in this arbitration simply so that you can remain on the tribunal. Accordingly, there must at least be the risk that the hearing in this arbitration will proceed while you remain on the tribunals in the other references."

48. There followed further correspondence in which, amongst other things, Mr Payton of Clyde & Co articulated L's objections to any such resignation on the grounds that there were no good reasons for it and that it was likely to imperil the forthcoming substantive hearing and so cause increased cost and delay.

49. M responded to KLG's letter of 11 December by email on 15 December 2016. He said:

> "It is in accordance with my duty to both parties that my response seeks to take into account what I believe to be the best interests of both.
>
> I do not think that it would be helpful to either party for me to continue the debate as to whether or not, by accepting appointment in the two R arbitrations, I was in breach of any duty to Mr. Birsic's clients by failing to disclose the fact, and presumably, giving them an opportunity to object. I would merely add that, even if the IBA Guidelines did apply (and I think Mr. Payton is probably right in his view that they did not) I remain unpersuaded that I was in breach of them. However, I

have accepted in my earlier letter that, with the benefit of hindsight, it would have been prudent for me to have made disclosure to avoid any sense of a lack of transparency on my part.

In relation to the other points raised in Mr. Birsic's letter I can only repeat that neither him nor his clients need have any fear that I will have learned anything in the course of the R arbitrations which could be of any relevance in the H case. The points so far considered relate only to preliminary issues of construction as to the attachment point, and I learned nothing about the facts of the incident and its consequences which is not public knowledge and which would not be well-known to my co-arbitrators.

…

Putting the above to one side, the current potion [sic] is clearly unsatisfactory, to say the least. I repeat that I believe it is of fundamental importance that both parties should have confidence in the impartiality of the members of the Tribunal, and in particular the chairman, and, if my first letter together with what I have added above does not both put Mr. Birsic's and his clients' minds at rest, there is what seems to be a total *impasse* between the parties, to both of whom I owe an obligation.

Mr. Payton wishes me to remain as chairman and for the hearing to go ahead. But if I were to decline Mr. Birsic's invitation to resign, I have little doubt that an application would be made to the Court to remove me which may well take some time to resolve. If decided in favour of H, then it would be likely to be too late to try to agree upon a replacement chairman before the hearing date. If no decision were reached before the hearing date the Tribunal could decide to go ahead with the hearing with the Tribunal's constitution unchanged, but this would, in my view, be wholly unsatisfactory. Quite apart from the fact that, if I were subsequently to be removed by the Court, any decision reached would be open to review, it would be unsatisfactory for a three-week hearing to go ahead in which the impartiality of the chairman remained in issue. If decided in favour of L it would not prevent what I have already described as an unsatisfactory situation.

Despite Mr. Birsic's suggestion that I might try to "rush" the decision of the tribunal in the R cases in order to be in a position to retain my appointment in this case (which I am bound to say I found offensive), were the decision left to me to be determined in accordance with my own self-interests, I would resign. I have no wish to continue to serve as chairman in a tribunal in a case in which one of the parties, through its

> legal team, has expressed serious doubts as to my impartiality. Furthermore, as you may know, I plan to retire later this year and would not wish that my long career as an international commercial arbitrator which has spanned over three decades should end with my being the subject of a debate in the Commercial Court as to whether I have behaved improperly.
>
> However, as I have already indicated, I have duties to both parties: by accepting the Court's appointment as chairman, I undertook to continue to serve in that capacity until I had completed the task, unless prevented by circumstances beyond my control and I would, I think, be in breach of those duties were I simply to resign in the face of strong opposition from one party.
>
> In these circumstances, might I venture to propose to the parties that, even now, they put aside their differences to the extent of concentrating their attention on trying to agree upon a mutually acceptable replacement chairman who would be available for the hearing, without spending further time on argument, and applications to the Court.
>
> Were they to do so, I would gladly resign. If that does not occur, I fear that I would have no alternative but to leave my fate in the hands of the Court."

50. Mr Kitchener argued that various aspects of the correspondence gave rise to a real possibility of apparent bias. His main point was that M asserted in his email of 5 December that the references did not raise the same or similar issues, whereas it was clear that there were identical issues as the central defences advanced by insurers against both H and R; that M was not accurate or complete in his initial account of the overlap between the issues; and that he exacerbated H's legitimate concerns by failing thereafter to recognise the overlap.

51. I have already observed that the extent of overlap is minor, if it exists at all, and not such as to give rise to any difficulty in M acting independently and impartially. M was bound by duties of confidentiality in the R references which precluded him from giving detail of the issues in those references or of doing more than stating his conclusions on the point. The subsequent waiver of confidentiality by R has confirmed that his view was sound.

52. Mr Kitchener argues that the overlap is contained in (1) the defence advanced by insurers in each case that the settlement was not reasonable and (2) a number of coverage issues or issues as to loss of subrogation rights. As to (1) the argument proceeds from an entirely fallacious elision into a single issue of what are two quite distinct issues turning on separate fact and law i.e. the reasonableness of two separate settlements, on different terms, at different times, by different parties, owing different liabilities, and facing different allegations. The fact that they both faced claims in the same litigation does no more than suggest some relatively inconsequential overlap in the procedural background. As to (2), these are common Bermuda Form legal points and are no more than the common currency

dealt with in many Bermuda Form arbitrations irrespective of the parties. They were not raised in the correspondence and are not the kind of overlap which M was or would have been understood to be addressing.

53. In summary, M's stated view, as he understood it, of the degree of overlap was in all material respects correct. That is an end to the point.

54. In any event, Mr Kitchener made clear that no such challenge was being made as to the honesty or accuracy of his statement that that was the view he formed. Mr Kitchener argued merely that M was remiss in not analysing the pleadings in all the references so as to reach the opposite conclusion. However even if such an exercise would have mandated such opposite conclusion (which it would not), a mere failure to analyse closely the degree of overlap would not give rise to any possibility of apparent bias: M was at the time offering to resign from the R arbitrations if not effectively terminated by the preliminary issue result, thereby providing a solution which would render irrelevant any overlap (even if overlap were otherwise relevant, which it was not).

55. Mr Kitchener's next point was that M exhibited hostility by an "inexplicable misreading" of KLG's letter of 11 December and taking offense at a suggestion which had not been made.

56. M's remark in his 15 December 2016 email that he found offensive the suggestion that he might try to rush the decision of the tribunal in the R cases in order to be able to retain his appointment in the H reference was a measured reaction to an entirely fair construction of the passage in the 11 December letter. It was not an "inexplicable misreading" of the passage: it was its obvious meaning. If it had not been intended to raise that suggestion as a possibility, it would have been unnecessary to refer to it at all: if the only point being made were that in the last sentence of the paragraph, namely that the risk of the R preliminary issue award not being published prior to the commencement in the substantive hearing gave rise to a risk of M serving on both panels at the same time, the point would be fully made without the offending passage. The offending passage referred not merely to the possibility of the award being rushed but to an improper purpose in doing so, namely a desire on M's part to retain his H appointment. There can have been no reason to mention such an improper purpose if not to insinuate that it might be something which M would do, an impression reinforced by the fact that this was said to be a reason why the offer to resign from the R references increased H's concern about his impartiality. The suggestion was indeed grossly offensive, and M's response was in the circumstances tempered, moderate and appropriate. It does not begin to suggest any animus towards L which the fair-minded observer would think gave rise to a real risk of bias.

57. Mr Kitchener's next point was that M was unjustifiably dismissive in an email of 4 January 2016 by referring to the content of an email from Mr Meredith of KLG of the same date as a "speculative reference" to the overlap between the two arbitrations.

58. M's characterisation of Mr Meredith's letter of the same date was neither pejorative nor inaccurate. It was descriptive, not dismissive Mr Meredith was indeed speculating about the issues in the R references. He had no access to the

pleadings or submissions in that reference. M did, but was at that time constrained by duties of confidentiality as to what he could disclose. Mr Meredith was seeking further information whilst at the same time providing comment on the overlap described by M in the latter's email of 5 December on a basis which speculated about the issues in the R references. To refer to Mr Meredith's letter as a "somewhat speculative reference" to his own email of 5 December in which the overlap was addressed was a fair and accurate description. There is no merit in this complaint.

59. Mr Kitchener's next point was that M's offer to resign from the R arbitrations should those arbitrations not be concluded in L's favour on the preliminary issues would give the fair-minded observer further cause to doubt his impartiality, because it placed M in a position where his interest in putting an end to the challenge to his impartiality coincided with L's interest in succeeding in the R arbitrations: each of M and L stand to benefit from the preliminary issues being determined against R.

60. This was a practical solution put forward by M to seek to assuage what were in fact wholly unjustified concerns being advanced by H. Such a course seeks to reinforce his appearance of impartiality, not undermine it. The suggestion that M might abandon his duty of impartiality in the R references to find in favour of L in those references in order to maintain the benefit of the H appointment is as absurd as it is offensive and unworthy.

61. Finally Mr Kitchener argued that H has lost confidence in M, who as a result of the "unpleasantness" generated by the current challenge may realistically find it impossible to treat H without at least sub-conscious bias. The point is essentially that given the complaints made about him in correspondence, M will find it difficult henceforth to avoid treating H unfairly (albeit unconsciously).

62. If, as I have found, there is no other justifiable ground for doubting M's impartiality, it is immediately apparent that the point is misconceived. If there are no circumstances which objectively give rise to the possibility of an appearance of bias, it can never be a proper ground for removal of an arbitrator that the process of unsuccessfully advancing misconceived submissions to the contrary has of itself created such a possibility. The argument is in effect that the possible offence taken by an arbitrator at an unmeritorious attempt to remove him should itself raise justifiable doubts as to his future conduct of the reference, with the paradoxical result that the more obnoxious the challenge the stronger this ground will be. It is self-evidently misguided.

63. The argument also has wider ramifications. In order to uphold the principle of party autonomy and the efficacy of the arbitral process, arbitrators and the courts should be vigilant not to accede to removal applications merely because the arbitrator would feel more comfortable if he or she did not have to sit in judgment over a party who has been critical and avowed a lack of confidence in the impartiality of the tribunal, albeit one which no fair-minded observer would feel. No tribunal wishes a party to be nursing a sense of grievance, however unjustified. However that is not a good reason for resignation or removal. In ***Dobbs v Triodos Bank NV*** [2005] EWCA Civ 468, Chadwick LJ said:

> "7. It is always tempting for a judge against whom criticisms are made to say that he would prefer not to hear further proceedings in which the critic is involved. It is tempting to take that course because the judge will know that the critic is likely to go away with a sense of grievance if the decision goes against him. Rightly or wrongly, a litigant who does not have confidence in the judge who hears his case will feel that, if he loses, he has in some way been discriminated against. But it is important for a judge to resist the temptation to recuse himself simply because it would be more comfortable to do so. The reason is this. If judges were to recuse themselves whenever a litigant -- whether it be a represented litigant or a litigant in person -- criticised them (which sometimes happens not infrequently) we would soon reach the position in which litigants were able to select judges to hear their cases simply by criticising all the judges that they did not want to hear their cases. It would be easy for a litigant to produce a situation in which a judge felt obliged to recuse himself simply because he had been criticised – whether that criticism was justified or not. That would apply, not only to the individual judge, but to all judges in this court; if the criticism is indeed that there is no judge of this court who can give Mr Dobbs a fair hearing because he is criticising the system generally. Mr Dobbs' appeal could never be heard."

64. The same concern was expressed more briefly by Rix J in ***Laker Airways v FLS Aerospace*** [2000] 1 WLR 113 at 117E:

> "Arbitration is a consensual process and therefore it is perhaps particularly unfortunate that one party should feel any apprehension about the impartiality of an arbitrator. Nevertheless, arbitration would become impossible if one party could require an arbitrator to retire by making unjustified allegations about impartiality or bias".

65. Moreover courts and tribunals will be vigilant to detect and guard against improper tactical deployment of such challenges which are made in the hope that the tribunal will provide some grounds for removal in its response to the challenge.

66. M has provided no such grounds. He has dealt with the challenge in a courteous, temperate and fair way, demonstrating commendable even-handedness. His response would only serve to reinforce the confidence any fair-minded observer would have in his ability and intention to continue to conduct the reference fairly and impartially.

Conclusion

67. In summary, none of the grounds advanced, whether individually, or cumulatively, establish any circumstances which give rise to any justifiable doubts as to M's impartiality.

CPR Rule 3.1(7)

68. Mr Kitchener submitted in the alternative that the Court had power to revoke or vary the order of Flaux J appointing M under Rule 3.1(7); and should do so by replacing him with Sir Stephen Tomlinson, even if the s. 24 challenge failed. He advanced the following reasons: M has expressed a view that he would prefer not to continue if he does not retain the confidence of the parties; H remains concerned as to his impartiality; the possibility of an appeal against the s. 24 challenge ruling gives rise to the risk that the substantive hearing will result in an award which will be set aside and therefore a risk of delay and wasted expense; and if Flaux J had known then what the Court knows now, he would have selected a candidate with whom both sides were content.

69. None of these provide good reasons for revisiting Flaux J's order. M has quite properly recognised that L is entitled to insist on the arbitrator appointed in accordance with the contractual machinery if the court finds there is no good reason for his removal for apparent bias. H's subjective and unjustified concerns cannot themselves justify any variation; on the contrary for the reasons explained above, it would be wrong to replace M merely because H's unjustified challenge had left it with a sense of grievance. The threat of an appeal does not assist: I must decide the issues before me in accordance with my own views. Flaux J's order was made on the material before him, was not appealed, and has been acted on. There has been no material change of circumstances. Sir Stephen Tomlinson is not an agreed replacement, as the contested hearing demonstrates.

70. There is, however, a more fundamental objection to the argument, which is that Rule 3.1(7) does not provide jurisdiction to make such an order.

71. Rule 3.1(7) provides:

> "A power of the court under these Rules to make an order includes a power to vary or revoke the order."

72. Flaux J was not exercising any power under the Civil Procedure Rules. He was exercising the statutory powers conferred by s. 18 of the Act. But for such powers expressly conferred by the Act, the Court would have no jurisdiction to interfere in the arbitral process by appointment of an arbitrator. As its heading suggests, Rule 3.1 is concerned with case management powers, which are governed by secondary legislation. Flaux J was exercising powers under primary legislation, which carefully circumscribes the limits of permissible judicial intervention. Those limits form part of the contractual bargain between the parties when choosing to arbitrate in London subject to the supervisory jurisdiction of the courts of the seat of the arbitration.

73. Once a power of appointment has been exercised in accordance with section 18, the effect is identified in s.18 (4): the court appointment is deemed to be made with the agreement of the parties. The position is the same as if the Court had not been involved and the parties had agreed the appointment. The arbitration clause in this case also provides expressly that once the third arbitrator accepts the appointment the tribunal is "deemed fixed". The Court has no power to undo such an appointment, save in accordance with the express terms of the Act. The powers

to effect or sanction removal contained in sections 23 to 26 are exhaustive. None apply in this case.

74. Mr Kitchener argued that the order was made "under the Rules" because the s. 18 Claim Form was issued and pursued in accordance with Part 8 and Part 62. However those rules merely dictate the procedure by which the court can be invited to exercise its statutory powers. The order is not made under them. The power derives from the Act, not the Rules. This is illustrated by the fact that an Arbitration Claim Form is a form of originating process which is concluded by an unappealed judgment determining whether to grant the relief sought. H's Rule 3.1(7) application was advanced informally in argument; but it could not properly have formed the subject matter of a formal application notice in the current proceedings commenced by an Arbitration Claim Form seeking s.24 relief; nor in the separate proceedings which were before Flaux J in which he made his order, which have been finally determined without appeal.