|  |
| --- |
| **WARNING: reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.** |
| **This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.** |

|  |  |
| --- | --- |
| crestIN THE HIGH COURT OF JUSTICEBUSINESS AND PROPERTYCOURTS OFENGLAND AND WALESQUEENS BENCH DIVISION COMMERCIAL COURT**[2018] EWHC 3136 (QB)** | No. LM-2018-000055 |

Rolls Building

Tuesday, 25 September 2018

Before:

HIS HONOUR JUDGE WAKSMAN QC

(Sitting as a Judge of the High Court)

(**In Private**)

B E T W E E N :

 PAKISTAN REINSURANCE COMPANY LIMITED Applicant

- and -

1. EQUITAS LIMITED Respondents

(2) EQUITAS INSURANCE LIMITED

(3) C

REPORTING RESTRICTIONS: ANONYMISATION APPLIES

\_\_\_\_\_\_\_\_\_\_

MR T. KILLEN (counsel) appeared on behalf of the Applicant.

MR N. CALVER QC (instructed by Cooley LLP) appeared on behalf of the Respondents.

\_\_\_\_\_\_\_\_\_\_

**JUDGMENT**

HIS HONOUR JUDGE WAKSMAN QC:

1. This is an application by the claimant, Pakistan Reinsurance Company Limited (“PRL”), the defendant to the putative arbitration with which I am concerned, made pursuant to section 24 of the Arbitration Act 1996, to remove the sole arbitrator, to whom I shall refer simply as “C”.
2. C is the third respondent to this application and the first and second respondents, Equitas Limited and Equitas Insurance Limited (to whom I shall refer collectively as “Equitas”), are the claimants in the underlying arbitration.
3. The underlying claims brought by Equitas concern long-tail claims pursuant to policies of reinsurance effected between the Lloyds syndicates, who were the predecessors in title to the benefit of the policies with PRL as reinsurer. They all go back to policies incepted over the period 1977-1984, although, because of their long-tails, claims can arise under them very many years after the event, which is the case here.
4. The application pursuant to section 24 is made on the basis that there are circumstances which exist that give rise to justifiable doubts as to the impartiality of the arbitrator. The background to that is of course the injunction contained in the general principle set out at section 1(a) of the Act, that:

“the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;”

1. As I shall develop later on, it is common ground between the parties that the test under section 24(a) in this context is to be applied by reference to the common law test for the existence or otherwise of apparent bias. It is not suggested by PRL that this is a case of actual bias.
2. C, himself, is a well-known and highly experienced commercial arbitrator. As he states in paragraph 4 of his witness statement, he spent all his life working in the insurance industry from 1970. He has worked for a number of major insurers and reinsurers over the years, sometimes as an underwriter and sometimes on the claims side. He has also had non-executive directorships, as well as acting as an independent peer review of the ten Lloyds syndicates, and has come across many different classes of business. He has acted as an expert witness in numerous insurance and reinsurance cases here, in the US, Canada and Ireland. He has been appointed in 54 litigated cases and 28 arbitrations, all now concluded. He is involved in six ongoing cases. He has had 88 appointments in all.
3. C says that he has had appointments to act for insurer or reinsurer, but that does not affect his understanding, which is to provide honest and unbiased impartial opinions as an expert and not as a hired gun. He has also been appointed as an arbitrator in 36 references in the USA, Canada, Dubai and Romania to date, including the subject case; predominantly reinsurance disputes covering issues such as misrepresentation and non-disclosure, contract terms, underwriting procedures, claims handling and other matters.
4. C understands his duty here is to act fairly and impartially, regardless of the fact he has been appointed by one of the parties. He believes he has a reputation in the insurance market as someone who will act fairly and impartially. His fairness and impartiality has not previously been called into question.
5. In relation to a point that will arise hereafter, I think it is worth mentioning paragraphs 9 and 10. He says long-tail claims are not unusual. They can cover events occurring years or even decades ago, which take a long time before they become claims. It can often be important to a party to appoint an expert who has had a personal understanding of underwriting claims handling as it was at the time, rather than what it is necessarily now. Due to his experience going back to 1970, or 1978, in the London market, he had that, but the pool of arbitrators able and willing to take on such appointments is small. That is a general point which is also made in evidence by Equitas.
6. C also says some arbitrations require that the appointee is still actively participating in the Lloyds market. That can diminish the pool, as many of them retire. He says this is a case involving long-tail reinsurance business covering contracts covering the 1977-1984 years of account.
7. The next matter to which I turn is the arbitration clause in this case: paragraph 4 of Article 12 of the relevant contract of reinsurance. Paragraph 2 says:

“Unless the parties agree upon a single arbitrator, within 30 days of one receiving a written request from the other of arbitration, the claimant shall appoint his arbitrator and give written notice to the respondent. Within 30 days the respondent shall appoint his arbitrator and give written notice, failing which the claimant may apply to the appointor named to nominate an arbitrator on behalf of the respondent. Should the arbitrators fail to agree, they can [refer it to an umpire].”

Paragraph 4 states:

“Unless the parties otherwise agree, the arbitration tribunal shall consist of persons employed or engaged in senior positions in insurance or reinsurance underwriting.”

1. What follows from that is not a contractual requirement that the arbitrator must have been employed at the time of the contracts in question, or the events to which they gave rise under the policy, but it must be someone who is currently employed or engaged. There is no reason for me not to accept the evidence of C to the effect that it would be usual for parties seeking to appoint an arbitrator to find someone who has knowledge and experience of the relevant contracts as they were back at the relevant times; here, 1977-1984. It is true that the clause does not specify that they must have been employed at that time, but it seems to me, as a matter of practice, that is likely to be the case if, as the evidence shows, it is going to be helpful to have an arbitrator who has some knowledge of the reinsurance market at that time.
2. It follows from what C himself has said, and there is really no evidence to contradict it, that in this particular context the pool of available and suitable arbitrators is likely to be small. Apart from C’s evidence, I have had, in support of this application, first of all a witness statement from Ms Sultana, dated 22 March 2018. There is then a witness statement on behalf of Equitas from Mr Everiss, dated 8 May. C’s witness statement is dated 9 May.
3. The core reasons why PRL alleges that C should be removed on the basis of apparent bias are as follows. Firstly, at around the same time when there was to be an initial appointment in respect of this arbitration, although in fact it did not happen until later, he had, in around April 2016, been appointed in eight other arbitrations, commenced by Equitas, although not against PRL, but which were further separate claims concerning contracts of reinsurance with a long-tail. There is no actual overlap between those arbitrations and this one, in the sense of the particular matter of the dispute. There is some argument as to whether the relevant contracts might have been the same and I deal with that below. That is the first ground.
4. The second ground is that C was appointed to act for Equitas in what is accepted to be an entirely unrelated claim brought in the USA. The period for which he was in fact instructed as an expert, earning some $20,000, was about one month.
5. Thirdly, and in relation to both of those matters, there are elements of non-disclosure which are relied upon. First of all, in respect of what I shall simply refer to as the “other arbitrations”, it is said that, whilst he disclosed them on 24 May 2017, he received notices of appointment back in April 2016 and, therefore, delayed in disclosing those matters for up to one year. Secondly, it is said that while he did, at the first opportunity, disclose the fact of a possible appointment as an expert on the same date, and referred to a meeting to take place shortly afterwards, he did not thereafter supplement that disclosure by telling PRL that there had been a meeting, that he had been instructed and that he had done some work and received some payment.
6. The non-disclosure points, say PRL, feed into and support their overall case on apparent bias.
7. All of that said, there is an important qualification helpfully made clear by Mr Killen, appearing for PRL in argument today. He accepts that if the claim of apparent bias, by reference to the expert appointment, is not made out then the arguments based on other arbitrations, whether supplemented or not by non-disclosure, cannot succeed. Accordingly, if the expert point fails, that is fatal to this claim.
8. As to the expert point, it is contended, first, that, if it is correct, it does not need to be supplemented by the other points and would be sufficient to establish apparent bias and removal. Alternatively, the expert point, supplemented by the other points, will be sufficient.
9. Before looking at the law, it is helpful to give a chronological review of the evidence, which is almost entirely to be found in the documents. I will take as my guide, although it is not exhaustive, the chronology which has appeared in Mr Killen’s skeleton argument. The original pre-action letter of claim against PRL from Equitas’ solicitors, Cooley LLP, was sent on 23 February. Equitas also had acting for it a company called Resolute, which is not a firm of solicitors, but which managed its business. There was an apparent appointment of C in what are eight other arbitrations (he said nine, but it was clear that he was including this one) in April 2016.
10. There was a notice of arbitration in this case on 26 April 2016, but nothing else of note happened in that year. Matters only really started to develop in early 2017. PRL have been represented by a variety of different lawyers and different internal representatives. On 7 February, the newly appointed CFO of PRL asked for background documents in relation to this matter. Having given notice of the intention to appoint C as sole arbitrator if PRL did not wish to appoint its own arbitrator as well, Cooley followed that up on 17 March, chasing it, saying that as PRL had failed to appoint an arbitrator, or give any notice of any appointment, they were appointing C as sole arbitrator. That notice itself is set out at page 46 of volume 1.
11. On 18 March, C, having acknowledged the appointment of himself as sole arbitrator, noted that PRL had failed to respond to the arbitration demand, but went on to say that in the interests of fairness and openness he will “address any communications between us also to PRL”. Further down in that letter he says:

“I have no disclosures of any conflicts of interest to make concerning this matter.”

1. Points of claim were served on 21 March. Then, on 27 March, Mr Zarkoon of PRL asked for a large number of documents, while asserting that there was no liability to Equitas. There is a reference there to rejecting any such one-sided arbitration. It seems to me that what that must have referred to was the fact that Equitas, in the light of any response from PRL as to appointing a second arbitrator, were able to have C as the sole arbitrator, but because that came from the PRL end it was perceived by Mr Zarkoon to be one-sided.
2. What then happened fairly swiftly was that on 31 March a four week stay of the arbitration was agreed, which would run until 28 April. On 28 April, PRL wrote a lengthy letter to Mr Tacey of Equitas’ solicitors, Cooley, setting out a large number of points as to why there was no valid claim. It cannot be in any doubt that there was at least an engagement on the merits of the claim with Mr Tacey.
3. Somehow, that letter made its way to C. It is not clear how and there is no actual evidence that PRL sent it to C. I suspect, although I cannot be sure, that what happened was that when Mr Tacey sent to C Cooley’s response to the letter of 28 April, he forwarded the earlier email, including the letter of 28 April, sent to him, onto C (see the exchange at page 275 of the bundle).
4. On 4 May, one of the points made back to PRL, copied to C, was whether the validity of C’s appointment is going to be in dispute and it seemed to Cooley that they were now agreeing to engage in the arbitral process. They said that they had provided copies of all relevant documents and it was not clear what the issues were really going to be.
5. C responded by an email of 10 May, saying that he was not clear whether PRL were denying the claim, or whether PRL was also alleging that his appointment was not correctly made. He wanted clarification. If it was the intention to contest the validity, then PRL should make an application to the High Court and, therefore, PRL should advise within seven days.
6. On 16 May, Mr Ahmed, a barrister at law working in Karachi, wrote to C as a newly appointed counsel asking for more time until 24 May. On 24 May, Mr Ahmed wrote again to C to say this:

“In response to whether PRCL will be contesting your appointment, there is no contention or issue with the same and hence we accept your good self as sole arbitrator in the current matter. Furthermore, there are no objections to the proposed timetable as submitted by the claimant, but, in the light of the circumstances, I would suggest that the submission dates for the respondents’ points of defence and subsequently reply be extended for a period of two weeks. I invite Mr Tacey to provide his acceptance or objections to my proposal, if any.”

I will come back to the significance or otherwise of that letter later on.

1. On the same day, C wrote back, thanking Mr Ahmed for reply and waiting to hear from Mr Tacey on the timetable. Then he said as follows:

“I appreciate your acceptance of my appointment. I am attaching to this email a copy of my CV for the parties. Now that I am appointed as sole arbitrator, the correct procedure is for you and Mr Tacey to review my CV and satisfy yourselves there are no conflicts apparent that would compromise my impartiality. For the sake of good order, I confirm I have no further disclosure, save that I was appointed by Resolute as arbitrator in nine further arbitrations in April 2016 when I was first appointed by them in this case. All of those other cases involved small sums of claimed indebtedness. None of the other arbitrations has progressed concerning involvement by me. I have taken no action in any of them. I am not aware if they are resolved or continuing, but absence of activity during the last year would suggest they are no longer active. I have recently been asked by a representative of Resolute to discuss my potential appointment as an expert witness in an arbitration venued in the USA. This meeting will take place on 6 June.”

1. The response to all of that from Mr Ahmed was a letter dated 8 June. This was copied to C, but it was addressed principally to Mr Tacey. He would like to bring to his attention Article 12, which referred to the arbitration clause. Then he said:

“In accordance with such clause and in consideration of C’s CV and past experiences, and for reasons relating to a potential conflict of interest, PRCL does not agreed nor consent to the appointment of a sole arbitrator and would therefore move to appoint an arbitrator of their own to form part of this arbitration tribunal. A contention is raised that you or your client have skipped a step whereby PRL was to be consulted whether it is agreed to move forward with a single arbitrator or not.”

1. That, as a matter of fact, is clearly incorrect. PRL had been asked about whether they wanted to appoint their own arbitrator or not and, in the light of continued lack of response to that, Equitas proceeded, as it was entitled to do, to appoint its own arbitrator, being C.
2. Mr Ahmed goes on to say that it would be presided by a panel of two arbitrators. Then it says the matter should be deferred until PRL is able to appoint an arbitrator.
3. Mr Tacey writes back the same day saying C was not improperly appointed and PRL had been given ample opportunity to agree (see letters dated 26 April, 1 February, 21 February and 17 March) and failed to do so. There is no issue about that. He went on to say that, because of the email of the 24th, when they accepted C’s appointment, that is an end of the matter and it is now too late to object.
4. What then happened was Mr Ahmed wrote back on 12 June to say that his client was reluctant to accept C as sole arbitrator on account of a perceived conflict of interest, and then maintained the point that there should be an additional arbitrator. At the end, he said there were two options which the claimant could agree to: set aside C’s appointment and have a new consensual sole arbitrator, or permit a second arbitrator to be appointed by PRL.
5. Meanwhile, C had written on 8 June also, reviewing both the letters from PRL and Equitas, to say that the validity of his appointment should be resolved. He thought at that stage it was not for him to do that, but an application should be made to the High Court. He said that Mr Ahmed should take instructions as quickly as possible, and by 12 June. I have referred to what he wrote on 12 June. If they decide not to continue with any objections then it is a question of how long would be needed.
6. There was then a further stay of the arbitration agreed on 19 June, terminable on 14 days’ notice. In the meantime, on 26 June, C was instructed as an expert witness in the US arbitration and, between around June or July and August 2017, C carried out work pursuant to that instruction, for which he was paid a little over $20,000. Subsequent to the termination of his work as an expert, on 16 October the stay in the arbitration ended.
7. Then Thompson & Co., who were now instructed on behalf of PRL, wrote on 16 October. They said now that they wished to progress the arbitration and appoint an arbitrator. They requested that the claimants agree that the tribunal does not need to consist of persons employed or engaged in senior positions in arbitration or reinsurance underwriting, but that was not in fact agreed.
8. That is responded to by Cooley’s letter dated 20 October, making reference to suggestions made earlier that C had been invalidly appointed and/or there was a conflict of interest, but there was nothing in those points, asking for the defence.
9. On 27 October, a letter was written by Thompson & Co. to Cooley, referring again to the right to appoint a second arbitrator and stating that:

“C’s current role as an independent underwriting peer reviewer to five Lloyds syndicates raises a potential affiliation with the claimants, who were assigned the rights of Lloyds syndicates under the retrocession agreement of 1996. The claimants have clearly not complied with the process set out in the arbitration clause and there are genuine concerns over the independence and impartiality of the proposed arbitrator. Please clarify how the arbitration is well advanced.”

They then put forward the name of their arbitrator.

1. Leaving aside the point that what they were pursuing procedurally was the appointment of the second arbitrator, we can only understand objectively this letter, where it refers to genuine concerns over the independence and impartiality of the arbitrator, as being a reference to his role as a peer reviewer. There is nothing in that letter which makes a reference to other arbitrations or the expert role which had been disclosed back in May 2017.
2. All of that is rejected by Cooley, who engage with the conflict of interest point as it was then made on the peer reviewing point. They reject it and ask for their defence.
3. On 9 December, C took a different stance from earlier and said that he did in fact have jurisdiction to rule on his own appointment.
4. On 19 April, Thompson note that, whilst they had agreed his appointment on 24 May, that was without the benefit of the disclosure made subsequently. That could only be a reference, it seems to me, to the letter from C of the same date, as indeed the letter goes on to say:

“… disclose possible links to the claimant, invited the parties to review your CV and satisfy themselves there are no conflicts. In the circumstances, our client has withdrawn its consent for you to act the sole arbitrator. We are therefore of the opinion there is no valid appointment.”

At that point they are making a specific reference back to the conflict of interest, as contained in the 24 May letter, and now contesting that there is any valid appointment at all for C.

1. Matters then move a little more quickly, because, on 15 January, C ruled that he does have jurisdiction. He considered this matter and said that he was properly appointed without conflict. He said that he would produce an award in respect of that. He then goes on to raise questions on the merits, which consist, in particular, of a number of very detailed points that he is asking of Equitas to justify elements of their claim by reference to documents and further information, and also that he would like responses to particular objections which had been raised in the letter sent back on 28 April 2017.
2. On 9 February, Equitas provided substantive submissions. There were none from PRL, but on 12 February PRL ask for some more time to make a response. That is clearly a response to the particulars of claim; in other words, on the merits of the claim. That was a letter from C to Mr Faulkes of Thompson, saying:

“You have remained silent since my email of 15 January. It is your prerogative. It would be convenient for me to consider all the papers in this case in their entirety in the near future. If you wish to have time to prepare a submission, or respond, or request a hearing, let me know, I will delay my review. Otherwise, depending on your advice, I would be prepared to defer my review to allow you sufficient time to prepare your submission in response, should you make that request.”

1. On 19 February, Mr Malik of Thompson and Co. comes back to say they are seeking instructions. On 1 March, C chases Mr Malik, saying:

“You should be able to advise on your instructions by the end of this week, which is two weeks after those instructions were sought. If you do not wish to engage further, I will proceed to make my final deliberations. If you do wish to engage, please advise a proposed timetable.”

1. On 5 March, there is a chaser:

“I would appreciate your immediate advice as to whether your client wishes to provide any submission before me.”

1. On 8 March, PRL reply:

“Apologies for the delay. Due to our client’s geographical location, time zone and language differences, we are striving to obtain further instructions.”

1. C responds on 9 March:

“While I wish to afford your clients every opportunity to engage, it is a fact that the matter has already been overly extended. I will allow a further 14 days, so that will be 23 March.”

What in fact happened was the making of the instant application.

1. Before I turn to the law, let me make one further point. Equitas resist the application based on apparent bias. They say on an examination of the materials there is no apparent bias at all. Secondly, and in the alternative, they say that, even if there were, by reason of section 73 of the Act PRL has now lost the right to make that challenge. That is a separate matter that I will deal with hereafter.
2. Turning to the question of apparent bias, it is important first of all simply to note that the words of section 24(1) are on the grounds that:

“circumstances exist that give rise to justifiable doubts as to [the] impartiality [of the arbitrator];”

That must mean circumstances existing as at the date of the challenge. As I have already said, it is common ground that section 24 simply reflects the common law test for apparent bias, namely whether the fair-minded, informed observed, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. It is common ground between the parties today that this is an objective test.

1. Secondly, so far as the particular attributes of the fair-minded and impartial observer are concerned, and again and I did not believe this to be in dispute, referring to paragraph 20 of the decision of the Privy Council in *Almazeedi v Penner* [2018] UKPC 3, they are:

‘…a person who reserves judgment until both sides of any argument are apparent, who is not unduly sensitive or suspicious, and who is not to be confused with the person raising the complaint of apparent bias … She or he is not, on the other hand complacent, knows that justice must not only be, but must be seen to be, unbiased and knows that judges, like anybody else, have their weaknesses - an observation with perhaps particular relevance in relation to unconscious predisposition. She or he “will not shrink from the conclusion, if it can be justified objectively, that things that they have done or said or associations that they have formed may make it difficult for them to judge the case before them impartially” … She or he will also take the trouble to inform themselves on all matters that are relevant, and see it in “its overall social, political and geographical context”’.

There is no distinction between cases where there is a foreign party and one where there is not.

1. Finally, a point made by **Russell on Arbitration**, which I did not understand to be in dispute (although I do not regard it to be of critical importance here), is that a highly experienced arbitrator with impeccable credentials is assumed to have a lower propensity to bias than someone who is less experienced. That is the first point.
2. Secondly, I turn to the question of what I will call the “small pool”, which I have adverted to on the facts. I have already referred to the arbitration clause here. The decision of Moore-Bick J in *Rustal Trading Ltd v Gill & Duffus S.A.* [2000] 1 Lloyds Rep 14 is important. He says this:

“In such cases it can fairly be assumed that one of the reasons why the parties have agreed to trade arbitration is that they wish to have their dispute decided by people who are themselves active traders and so have direct knowledge of how the trade works. However, if the arbitrators are themselves to be active traders there is every likelihood that at least one member of the tribunal will at some time have had commercial dealings with one or both of the parties to the dispute. That is something which the parties must be taken to have had in mind ... there are many well established features of commercial arbitration which find no parallel in the more formal procedures adopted in Courts of law. They are known to and accepted by the parties and many people number them among the advantages of arbitration over litigation as a means of resolving commercial disputes. In the case of a trade tribunal the fact that an arbitrator has previously had commercial dealings with one or both parties has never been regarded as sufficient of itself to raise a doubt about his ability to act impartially.”

1. As an adjunct to that point, and as it was put in argument before me, there are pros and cons to the arbitration clause here. On the one hand, the requirement of being involved in the industry means that the arbitrator is more likely to have the relevant knowledge and the background knowledge to decide the dispute, but, on the other hand, the con, if it can be put that way, which the parties must be taken to know, is that there may have been dealings between that person and one of the parties previously.
2. I accept that one has to be careful about the context of this, because there can be a difference between the fact that someone has acted for one of the parties in some capacity previously and whether they are, at the time of the present arbitration, acting for them in some way or other. It does seem to me that the observations of Moore-Bick J still have a general resonance, because what it means is that the mere fact that there may be a prospect of knowing something about one of the other parties is not necessarily something which is as objectionable as it might be in other contexts.
3. I also refer at this point to the decision of Flaux J (as he then was) in the case of A v B and X [2011] EWHC 2345. There are a number of passages in that judgment which are important. I will refer to them all in one go. First of all, in paragraph 23, he makes the point that:

“the test is an objective one and not dependent upon the characteristics of the parties, for example their nationality, so that it is nothing to the point that the claimant companies are registered in foreign jurisdictions or that the individuals who control or manage them are foreign nationals who might, for example, regard as odd the way in which a member of the English Bar can be instructed in one case by a firm of solicitors whilst acting as arbitrator in another case ... The issue is whether the impartial objective observer, irrespective of nationality, would conclude from those facts that there was a real possibility that the arbitrator was biased.”

1. That seems to me to show that the fact that subjectively there might be a concern or a view by one of the parties, because they do not understand some aspect of procedure, particularly if it is all about the instruction of a barrister and the rules here, that is not to the point, because one has to look at it objectively from the point of view of the impartial observer. It therefore seems to me that if there is a case where one of the parties has simply misunderstood the position subjectively, that does not go very far to assist the claimant, when one has to look at what the position objectively is from the point of view of the impartial objective observer. Flaux J then backs that up in paragraph 24. In paragraph 25, he says:

‘… the impartial observer [must be] in possession of all the facts which bear on the question whether there was a real possibility that the arbitrator was biased …

“… all the circumstances which have a bearing [must be ascertained by the court] … It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility ...”.’

1. Flaux J then expands upon what is meant by the reference to the judgment of Lord Hope in *Helow v Secretary of State for the Home Department* [2008] UKHL 62; [2008] 1 WLR 2416. However, I do not need to refer to that any further, save to say that, in paragraph 3:

“[It is the person who will have taken] the trouble to inform herself on all matters that are relevant ... who takes the trouble to read the text of an article as well as the headlines ... She is fair-minded, so she will appreciate that the context forms an important part of the material …”

1. I read paragraph 27, because it is important in relation to another matter that I will refer to later. In paragraph 27, Flaux J says:

‘The importance of the Court looking at all the facts was also emphasised by Richards LJ in *National Assembly for Wales v Condron* [2006] EWCA Civ 1573; [2007] P & CR 38 at [50]:

“The court must look at all the circumstances as they appear from the material before it, not just at the facts known to the objectors or available to the hypothetical observer at the time of the decision.”’

1. In paragraph 28, he said:

“[Whilst] the fair-minded and informed observer is not to be regarded as a lawyer, he or she is expected to be aware of the way in which the legal profession in this country operates in practice.”

1. In my judgment, that means that the fair minded and objective observer must be taken to know about the facts of the small pool point, as I have already expressed them. I do not need to repeat them here, but it also includes the adjunct to that, which is that there is the possibility of prior dealings between the arbitrator and one of the parties. It must also follow that they should be aware of the possibility that the arbitrator might have been or is already appointed in other arbitrations at the instance of the same party.
2. I should add, in relation to this point about foreign nationality and what the fair-minded observer is said should assume, that in relation to the stream of correspondence, where for a period of time those acting for PRL were not requiring the removal of C, but rather their own additional arbitrator, and where it was submitted in that regard that all this might have been a misconception on the part of PRL thinking that arbitrators appointed here were not independent in some way and so the only answer was to appoint another arbitrator, there is actually no evidence to support that at all. There is no evidence from PRL dealing with why they wrote in the terms that they did, to which I have referred, where they were, for a long time, going down the route not of objecting to C staying, but wanting another arbitrator as well.
3. The next point is what I will call the “factual timing point”. That is to say, when a court is considering an application under section 24, what facts is it entitled to look at? At one stage in the argument, it seemed that Mr Killen was saying that the court is limited to the facts as they were at some previous time, which could only relate to a question of disclosure, so that if it appeared at some earlier stage there was apparent bias then that was the end of the matter.
4. I do not agree with that proposition, although I do not think that it is of critical importance in this case. The question is, as the defendants submit, to be judged at the time of the application. That follows from the language of section 24: are there circumstances which exist? A case is cited there, AT&T Corporation *& Anr* v Saudi Cable *Company* [2000] EWCA Civ 154, where the offer to resign a directorship, which was said to give rise to a conflict, was something of which the Court of Appeal could take account.
5. It seems to me the court has to look at the facts as they are or how they have been established and the situation as it is at the time of the application. That may or may not make any difference to what the facts were at an earlier stage. That all depends on the facts of the case.
6. There is one question as to whether the arbitrator in this case should have made disclosure of the relevant facts at a particular point, on the basis of what they knew then. In so far as lack of disclosure is an element, then obviously if there was a lack of disclosure, on a proper analysis, then what happens subsequently cannot really alter this. However, that is all about when the matter should be disclosed, which is not the same as what is required to show apparent bias at the time of hearing the application.
7. If, for example, non-disclosure does not necessarily lead to apparent bias, then the fact of disclosure does not necessarily remove it. They are simply each factors which might weigh in the balance one way or the other. That is the thrust of what is said in *Almazeedi* at paragraph 34, where the Privy Council said that the fact of disclosure at the right time can be something which can weigh in favour of the arbitrator, or the relevant person. Whereas, on the other hand, the lack of disclosure at the proper time can weigh in the balance the other way (see paragraph 76 of Halliburton v Chubb [2018] EWCA Civ 817).
8. However, that is as far as that goes. Indeed, the notion that the court can look at everything that is relevant at the date of the application must be right. For example, if one takes this case, if one is only to look at what happened at an earlier stage then you might say that since C here only revealed the fact that there was to be a meeting discussing his appointment, the fact that he was later appointed is not relevant, or the fact that he might still have been acting up until today is not relevant. That cannot possibly be right, so it seems to me that the need to look at all of the facts as they are cuts both ways.
9. I now turn to *Halliburton* itself, which is now a leading authority and a recent one from the Court of Appeal. The core issue in *Halliburton* was whether disclosure should have been made by the arbitrator, who had in fact accepted an appointment as arbitrator from the same defendants in another arbitration against a different party from Halliburton, but which all arose out of the same matter, namely the Deepwater Horizon oil spill. Therefore, there was a clear overlap in terms of the subject matter of the two arbitrations.
10. Another important factor was that it appeared that the common party was advancing inconsistent cases between the two, but that fact was not known to Halliburton, because the arbitrator had not disclosed it. That was clearly material to the way Halliburton might have disclosed the instant arbitration. Therefore, one has a section in the judgment of the court, given by Hamblen LJ. The rubric reads thus:

“Whether and to what extent an arbitrator may accept appointments in multiple references concerning the same or overlapping subject matter with only one common party without thereby giving rise to an appearance of bias.”

1. The context here, unsurprisingly, is where there is a real overlap between the arbitrations. Paragraph 43 says:

“The essence of [the] unfairness is said to be information and knowledge which the common party acquires, unknown to the other party. The common party may obtain the advantage of, for example, making submissions and adducing evidence that influence the common arbitrator without the participation or knowledge of the other party; sharing with the common arbitrator relevant information that is not shared with the other party; and the opportunity to assess the views of the common arbitrator in one arbitration and to tailor its submissions and evidence accordingly in the other.”

1. That makes plain that the mischief here is the fact that one party can obtain a tactical advantage, because, after all, both arbitrations are dealing with the same subject matter, but the complaining party does not know about it. That advantage, as he says, is likely to be unknown to the other party.
2. Then he refers to two cases, which I too have been referred to: one a decision of Leggatt J called *Guidant LLC v Swiss Re International SE* [2016] EWHC 1201 and, secondly, a decision of Fraser J in *Beumer Group UK Ltd v Vinci Construction UK Ltd* [2016] EWHC 2283. In *Beumer*:

“two construction adjudications were heard by the same adjudicator arising from the same underlying dispute, with one party appearing in both. That party advanced mutually inconsistent cases in the two adjudications. All of this was unknown to the other party.”

1. It is not necessary for me to go to those first instance decisions in any detail, because the upshot is that, at paragraph 48, in *Halliburton* it is said:

‘The legitimate concern identified by Leggatt J and Fraser J was addressed in a recent talk given by Jeffrey Gruder QC … in which he described the problem as being one of “inside information” or “inside knowledge”. It is to be noted, however, that he said that his resulting “sense of unease” did not relate to justifiable doubts as to the arbitrators’ impartiality.’

1. At paragraph 49, the court said that:

“inside information and knowledge may be a legitimate concern for the parties to have in overlapping arbitrations involving a common arbitrator but only one common party. We agree … that, in itself … does not justify an inference of apparent bias.”

1. The issue of a legitimate concern is different from a finding of apparent bias, which is, no doubt, why Mr Killen has made plain in his submissions that he requires the expert evidence point to succeed as well. At paragraph 51, Hamblen LJ says:

“these comments are equally applicable to arbitrators and to references involving a common party. Arbitrators are assumed to be trustworthy and to [have] an open mind. The mere fact of appointment and decision making in overlapping references does not give rise to justifiable doubts as to the arbitrator’s impartiality. [They can be trusted].”

1. Paragraph 53 is the conclusion of all of that:

‘We accordingly agree with the judge that the mere fact that an arbitrator accepts appointments in multiple references concerning the same or overlapping subject matter with only one common party does not of itself give rise to an appearance of bias. As Dyson LJ said, “[s]omething more is required” and that must be “something of substance”.’

1. The next point concerns disclosure or non-disclosure. I have already made the point that the fact that there is disclosure, or the fact that there is non-disclosure, can be taken into account, but what impact that has depends on the particular circumstances of the case.
2. Considerable emphasis in relation to the expert point was placed by Mr Killen on the facts of the *Almazeedi* case. The facts were, in some respects, quite unusual. The position was that the relevant judge, Sir Peter Cresswell, had been sitting in the financial services division of the Grand Court of the Cayman Islands and had conducted the trial. However, at some point while that dispute was going on, he had been appointed in late 2011 a supplementary judge of the Civil and Commercial Court of the Qatar financial centre, although not sworn in until 8 May 2012. He did not in fact ever do so and never actually got any remuneration.
3. However, the case in the Grand Cayman involved a number of Qatari interests and personalities, in particular Mr Al-Emadi, who in fact became the finance minister in Qatar. It was his department or body which had been responsible for appointing Sir Peter Cresswell in the Qatari court. Sir Peter did not give any disclosure of the fact of his appointment in 2011 in the context of the Grand Cayman litigation. The complaint was that the judge had an undisclosed involvement in Qatar, of which no one else engaged in the proceedings was aware, between mid-2014, when his judicial activity in the Grand Court proceedings was almost over.
4. Therefore, he had a connection with a court where one of the individuals who was responsible for his appointment, or at least would have been responsible for his ongoing appointment, was an individual against whom serious allegations were being made in the Grand Cayman proceedings. Indeed, as the Court of Appeal said, in Cayman:

“It must be entirely exceptional, if not unique, for a senior government minister, with power over the appointment and removal of judges, to be involved personally in litigation being conducted overseas by a judge who is also a judge of a court, however distinguished, in the country where that minister exercises power.”

In the light of that, the board had to decide whether there is:

‘… a real possibility that the judgment of an experienced judge near the end of his career would be influenced, albeit sub-consciously, by his concurrent appointment which was at the outset still awaiting its completion by swearing in. The fair-minded and informed observer is in this context a figure on the Cayman Islands legal scene. But she or he is a person who will see the whole position in “its overall social, political and geographical context” … She or he must therefore be taken to be aware of the Qatari background, including the personalities involved, their important positions … and their relationships with each other as well as the opacity of the position relating to the appointment and renewal of members of the relatively recently created Civil and Commercial Court …

In the result, the Board, with some reluctance, [concluded] [that it] was right to regard it as inappropriate for the judge to sit without disclosure … as regards the period after 26 June 2013 and that this represented a flaw in his apparent independence … The judge [should] have disclosed his involvement … before determining the winding-up petition ... at least in the absence of any such disclosure, a fair-minded and informed observer would regard him as unsuitable to hear the proceedings from … 2012 on.”

Then the point I have adverted to:

“The fact of disclosure can itself serve as the sign of transparency which dispels concern, and may mean that no objection is even raised. An alternative to disclosure might have been to ask the Chief Justice to deploy another member of the Grand Court …”

1. For reasons which I shall explain later on, I consider that the facts in this case are very different indeed from the facts in *Almazeedi*.
2. The next point to deal with is the question of the International Bar Association (“IBA”) Guidelines on Conflicts of Interest in International Arbitration. I will deal with their content later on, but the question at this stage is what their status is with regard to a section 24 application on apparent bias.
3. This is another point which is taken up in *Halliburton*. At paragraph 67, Hamblen LJ said this:

‘Many arbitration institutional rules impose a stricter test of disclosure, importing a subjective test. The IBA Guidelines, for example, require disclosure of facts or circumstances “that may, in the eyes of the parties, give rise to doubts as to the arbitrator’s impartiality or independence” … The ICC Rules require disclosure of facts or circumstances which “might be of such a nature as to call into question the arbitrator’s independence in the eyes of the parties …”’

Then he refers to the LCIA rules. He says, in paragraph 68:

“Whilst this may reflect good practice in international commercial arbitration, the authorities make it clear that the more certain standards of an objective observer apply to the issue of disclosure under English law.”

So it is not that they have no relevance at all, but they are very far indeed from being determinative. I will deal with their application on the facts hereafter.

1. That then leads to one final legal point, which is the significance or otherwise of where the impugned arbitrator then appears to be taking sides or conducting himself or herself in a particular way in relation to the challenge itself. It is clear that if the arbitrator appears to be taking sides or responds inappropriately to the challenge, that in itself can be taken into account.
2. For example, in the case of *Cofely Ltd v Bingham* [2016] EWHC 240, a decision of Hamblen J (as he then was) there were a number of reasons why he concluded that the arbitrator should be removed, but one of the grounds that he agreed with was set out in this way, that:

“(1) Rather than stay neutral, Mr Bingham has seen fit to make positive statements … (regarding the relevance of the information …, the behaviour aimed at him and possible application of section 73 …).

(2) [He] wholly inappropriately suggested that [the claimant’s] requests for information amounted to aggressive and/or bullying behaviour.

(3) This response illustrates a complete failure (even now) of [the arbitrator] to appreciate (at the very least) the *possible* relevance of the information that was sought and his obligation to err on the side of caution [because obviously he had refused to provide it]. It also shows that [he] descended inappropriately into the arena of the dispute. In essence, his statement is aggressive and unapologetic.

(4) [He] appears to have interpreted a process whereby [the claimant] reasonably sought information regarding, in particular, the proportion of his earnings derived from [the] related referrals, as an unwarranted attack on him – rather than a justified attempt to obtain a full picture …

(5) On any view [he] [had] taken sides in this application.”

1. Whether the facts show that the relevant party has taken sides is fundamentally and obviously a question of fact in each case.
2. Against that background, I then analyse the application. I am going to deal, first of all, with the expert issue, since that is fundamental to it. Having regard to the documents which I have already read, it is plain that there is no question of late disclosure. C disclosed the fact that there was a forthcoming initial meeting on 6 June prospectively, before it had happened. Per *Almazeedi*, that early disclosure can be taken to be a factor which weighs somewhat in favour of his position.
3. It is quite right that thereafter he did not reveal the fact that he was appointed, that he did some work for about a month and that he was paid $20,000, but that does not seem to me to be important for two reasons. First of all, nothing really happened in the arbitration over that point. Indeed, there was a stay and by the end of the stay in fact the expert involvement had been completed. Secondly, he was entitled to expect PRL to say whether it wished to take what he had said any further. It was open to PRL then to chase up what had happened on the expert appointment. He was not hiding anything and PRL manifestly decided not to do anything about it. There is no suggestion at all that if he had been asked to give a progress report on his expert instruction he would have done so. On an objective basis, it appears to me that, at the time, PRL simply did not think that it was an issue.
4. Next, one looks at the facts as they in fact were. It was an appointment in respect of an entirely different matter in a different jurisdiction. The actual involvement was small. I do not suggest that $20,000 is peanuts, but it does not follow from that that this is something which would, in the eyes of the impartial observer, give rise to the appreciation of a risk of apparent bias. I say that also because we know that in fact there had not been a history of professional relationships between C and Equitas, either before or after, so far as acting as an expert was concerned. This was a one-off.
5. It has been suggested that maybe, had there not been this challenge six months later, C might in fact have gone on to work again as an expert for Equitas. That is complete speculation in my view and can be disregarded.
6. What is also suggested on behalf of PRL is that somehow, in the course of what turned out to be a brief instruction of C, when dealing with the representatives (that is Resolute, not these solicitors who were not involved in that arbitration), there would have been some conversation about the subject matter of this arbitration. I simply find that completely impossible to understand and, at best, it is pure speculation.
7. There is no question here of some form of inside knowledge which could be to the tactical advantage of Equitas in this arbitration and any fair minded observer in possession objectively of all the relevant facts would not conclude otherwise.
8. I agree with Mr Killen that the mere fact that the expert has a duty to the court or the arbitral tribunal to act fairly and impartially is not a complete answer, because, if that was right, then that would have applied to Sir Peter Cresswell in the *Almazeedi* case. However, that does not seem to me to be an important factor relied upon by Equitas here in any event.
9. The mere fact that the observer might conclude that, as expert, the arbitrator has some contact or other with a common party is simply not enough to give rise to an appreciation of apparent bias.
10. However, one then has to consider the IBA guidelines. First of all, at page 17 on the Red List, it is said that:

“These lists are non-exhaustive and detail specific situations that, depending on the facts of a given case, give rise to justifiable doubts as to the arbitrator’s impartiality and independence.”

1. Then, dealing with the Red List first of all, 2.3.1 says:

“2.3.1 The arbitrator currently represents or advises one of the parties, or an affiliate of one of the parties.

2.3.2 The arbitrator currently represents or advises the lawyer or law firm acting as counsel for one of the parties.”

1. In relation to the expert matter, there is a question as to whether currently representing or advising one of the parties, or the lawyer of one of the parties, actually includes acting as an expert witness, which is essentially providing evidence, rather than advising the party; although, of course, one accepts that what the expert is doing is proffering an opinion.
2. I am not sure that 2.3.1 even applies, but, if it does, even though it assumes the status of “Red List”, where it is said that the situations do give rise to justifiable concerns, I do not consider that that is a factor which tips the balance so far as the expert issue is concerned here.
3. I have emphasised the point that the arbitration with which the expert was concerned here was entirely different, involving what is known as “clash reinsurance”. There is no evidence to contradict that.
4. In all those circumstances, I conclude that the fair-minded, impartial observer would not conclude that there was a real risk of bias so that there was apparent bias. On that basis, that is in fact the end of this application.
5. However, it is right that I should say something about the other grounds. First of all, the fact of the other arbitrations. The court has to take into account, as indeed was apparent to C at the time, that none of the other arbitrations went anywhere, as far as he was concerned. Two of them, as it turns out, had settled and the others were dormant and remain dormant. Of course, it is possible, in 2018, that something may revive, but there is no evidence that they are at the moment and C was in fact quite right to infer, in May 2017, that he was not likely to get involved with them. He was not and he did not receive any consideration for them.
6. Some weight should also be given to the fact that the prospect of acting in other arbitrations is more likely where you have a small pool of arbitrators, for all the reasons that I have given. All of the other disputes were modest in terms of their size.
7. He did, of course, disclose these matters on 24 May 2017. However, it is said on behalf of PRL that he should have disclosed them significantly earlier. That is to say, in April 2016. His own witness statement suggests he had some awareness in April 2016 of this case, but in fact his appointment only came through in about March 2017.
8. There was a point, which I thought was a strong one, made on behalf of Equitas, which is to ask, to whom was he meant to disclose the fact of his appointment in other arbitrations, since it would appear that he only became aware of the identity of PRL as the defendant to this arbitration when he had received his formal notice of appointment in March 2017? It is wrong, in my judgment, to say that this was a matter that should have been disclosed a year earlier, or anything like it.
9. Therefore, the only point that could be made was that he should have disclosed this immediately following his appointment in March, rather than in May 2017. I can understand that it can be said that it might have been more prudent for him to do so before, rather than after, his appointment. However, there is no suggestion that this was a deliberate course of action.
10. It is correct to say that on 18 March, in initial communications with the parties, he said that there was no disclosure which needed to be made. However, on the evidence, all that happened was, having been formally appointed, he revisited that and thought that in fact it was right, as it was, to disclose the matters when he did. If he was really trying to pull the wool over the eyes of PRL, which at one point seems to have been suggested, I think in Ms Sultana’s evidence, and which would be a serious allegation, it is clearly not right, because if that is the case he would not have said anything to them at all about it.
11. Thus, although it could be said that the disclosure could have been made at an earlier stage, it is not, in the circumstances of this case, a big point. It certainly does not make the fact of acting in other arbitrations a real point, if there was otherwise no real point.
12. It is also clear from the facts that, apart from those appointments, he has not had any other appointments at the instance of Equitas and those other appointments, in the event, did not involve him doing anything at all.
13. I take Mr Killen’s point, which is that if he has only been appointed in 36 arbitrations, and if the reference to the 36 is meant to include these nine appointments (it is not clear to me whether they do or not, but assuming they do) then that could be a significant number of arbitral appointments. I do not think, having regard to what actually happened here, that that point is of any real significance.
14. The next question is whether these arbitral appointments were in fact overlapping at all. I do not accept that they were. There is something of a debate as to whether the reinsurance policies that were relevant in the other arbitrations were on the same terms as the policies here. So far as that is concerned, there is no direct evidence on the terms. There is evidence from Equitas, from Mr Everiss, that they were different contracts. I cannot assume that they were on the same terms. In any event, since the arbitrations did not go anywhere, or at least have not for the time being, it is quite impossible to conclude that the potential issues for the dispute would have overlapped. They obviously did not in relation to the actual subject matter of the policies of reinsurance and there is no argument about that. It is quite speculative to suggest that the issues, or the real issues, might have turned on interpretations of terms which also appeared in this contract of insurance.
15. Therefore, strictly speaking, this scenario is outwith the observations of Hamblen J in the *Halliburton* case altogether, because the premise is that there are other arbitrations with the same overlapping subject matter. That simply is not the case, but, even if it were, for the reasons I have already given, something more is needed.
16. The next point is whether C has taken sides in a way which could add to the case of apparent bias. It was not perhaps at the forefront of Mr Killen’s submissions, but he did refer to the fact that a position had been taken by C, in the sense that he expressed his concern as to the damage to his reputation which this challenge might have. I do not regard that as taking a position. He did raise the point about there having been delay in the effect of section 73. Part of that was to explain the fact that in the period he had done some work, which is obviously evidenced. He does refer to the effect of section 73, but then says that is up to the parties and the court, so I do not think that he is taking sides there.
17. It is also worth noting that all of this would have been avoided if PRL had agreed to a perfectly sensible proposal earlier on, which was that C would not get involved in this hearing at all and would not appear today, provided only that no one would seek a costs order against him. Equitas agreed to that pretty quickly. PRL, despite several chases, simply failed to respond at all, making it inevitable, in my judgment, that C should make an appearance today, to the limited extent that he has.
18. When one looks at those facts, they are utterly different from the facts of *Cofely* that I have already referred to. They are also quite different from the facts in the case of *Sierra Fishing Co. & Others v Farran & Others* [2015] EWHC 140 (Comm). At page 526 on the facts, Popplewell J made these observations:

“[The arbitrator] is a respondent to … an application, with a potential independent interest in its outcome in relation to his incurred and future fees. There is nothing wrong with him putting before the Court his evidence on the course of the proceedings, and his evidence in relation to that which is said to raise justifiable doubts about his impartiality; and he is entitled to put before the Court his view as to why he should not be removed. Should he wish to do so, the proper course is to acknowledge service of the arbitration claim ... But in doing so, he must be careful not to appear to take sides, so as to be unable subsequently to judge impartially the rival arguments in the case. The content and tone of Mr Ali Zbeeb’s communications is in my view clearly on the wrong side of this line. They involve detailed and vehement argument, not merely as to whether there are grounds for apparent bias, but also, and indeed predominantly, why the Claimants have lost the right to object. They advance arguments … which [the parties] had not advanced for themselves, supported by detailed exposition and citation of authority ... also [advancing] the case of [the parties] as to the tribunal’s jurisdiction over a claim for transfer of the shares … not … articulated or advanced by [the parties] themselves. [He] disparages the … s.24 application in intemperate language. He questions the good faith of the Claimants in advancing it. He gives the appearance of having descended into the arena and taken up the battle on behalf of [the parties]. He has become too personally involved in the issue of impartiality, and the issue of his jurisdiction …”

That is entirely different from the facts of this case.

1. A further point on these other matters then concerns the Orange List within the IBA guidelines. I repeat the note of caution about the extent to which they are relevant, but then the guidelines refer to having previously served as counsel or an affiliate or previously advised or been consulted by the parties. Again, this is all about serving as counsel, which did not actually arise here, but it is worth noting that footnote 5 says:

“It may be the practice in certain types of arbitration, such as maritime … to draw arbitrators from a smaller or specialised pool of individuals. If in such fields it is the custom and practice for parties to frequently appoint the same arbitrator in different cases …”

That does not really take the matter any further.

1. It is also noteworthy, although not a determinative point, that the reality was that PRL itself did not react to the 24 May 2017 letter by saying that this person should be removed. They made some reference to conflict of interest at some point, but they did not descend into any detail until they made an allegation which was completely wrong about peer review. The fact of acting as an expert, which they knew was prospective, so it could have been going on a long time, or the fact of acting in nine other arbitrations did not cause them to react immediately to challenge the appointment of C. That is perhaps some indication which goes towards the admittedly objective question of how a fair-minded observer would have reacted in these circumstances.
2. Therefore, in my judgment, leaving aside the expert point and disclosure in relation to it, all the other points in relation to the other arbitrations and disclosure in relation to them and the taking of sides are quite insubstantial. They would not cause, as is accepted, the fair-minded observer to perceive the real risk of bias, nor do they come anywhere close to providing sufficient support to revive the expert point or assist it, if there had been anything in that.
3. For all those reasons, the allegation of apparent bias must fail.
4. That renders academic the alternative point taken, which is that section 73 has been engaged here. Simply in deference to the arguments that have been made, I will nonetheless say something about it. Section 73 says:

“If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection [that there is an irregularity affecting the tribunal] - …

he may not raise that objection later …”

1. The critical point, looking at when they first became aware of these matters, is whether there was an objection which could and should have been made at an earlier stage forthwith. That is the test.
2. Going back to the decision in *Sierra*, Popplewell J put it in this way at paragraph 73:

‘A party does not take part in an arbitration for the purposes of section 73 unless and until he invokes the jurisdiction of the tribunal in respect of the merits of the dispute or invokes the jurisdiction of the tribunal to determine its own jurisdiction … However once a party has taken part in proceedings, he may “continue to take part” by silence or inactivity in the face of a right to object which subsequently becomes available to him … If the status quo is that a party has already taken part, and is therefore participating in an arbitration … he may have to do something positive to change the status quo … But in the absence of a prior taking part, mere silence and inactivity will not be sufficient; nor will any activity which is neutral or equivocal as to whether the party invokes or accepts the exercise by the tribunal of jurisdiction over him.”

1. The first question is whether there was, prior to the disclosure of 24 May 2017, a taking part in the arbitration. I accept that the fact of the 28 April letter, which did discuss the merits as between PRL and Equitas, is not itself engaging in the merits in the arbitration. Mere correspondence between parties, taken on its own, does not do so. However, I am persuaded that when PRL then wrote, on 24 May, saying that they accepted the arbitrator and now wished to agree the timetable for the substantive submissions, save that they sought an extension of time, that is taking part in the arbitration. The fact that they did not know the disclosures that were to come later on the same day is a separate matter. It does not go to whether they have taken part in the arbitration. Therefore, one is in that part of Popplewell J’s judgment, which says that if you are already taking part then mere silence or inactivity afterwards will not do for the purpose of making a challenge.
2. There was silence and inactivity afterwards. The fact that there were generalised references to conflicts of interest, which in fact only gave rise to a suggestion that there be a second arbitrator, is not a sufficient challenge, in my judgment. The fact that much later there was a challenge where the specific matter complained of was the peer review point, which was a bad point, is not sufficient either. The fact that there is a reference to past associations and language of that kind, without being specific, is not relevant either.
3. In a case of this kind, it seems to me that the challenge has to be specific. It has to be specific in the way that the challenge ultimately made is specific; something along the lines of the challenge which has been made under section 24 now. The truth of the matter was that that challenge could have been made much earlier and it could have been made at any time after 24 May. If PRL’s lawyers did not understand the legal procedure, that is not a matter, objectively, which can help them.
4. Therefore, the challenge could and should have been made specifically and made forthwith after 24 May. It was not so made and, in those circumstances, had it been relevant, I would have found that they would have lost the right to object. However, that is academic because this application fails as a matter of substance.

\_\_\_\_\_\_\_\_\_

|  |
| --- |
| **CERTIFICATE**Opus 2 International Ltd. Hereby certifies that the above is an accurate and complete record of the judgment or part thereof.*Transcribed by* ***Opus 2 International Ltd.******(Incorporating Beverley F. Nunnery & Co.)****Official Court Reporters and Audio Transcribers****5 New Street Square, London EC4A 3BFTel: 020 7831 5627 Fax: 020 7831 7737******civil@opus2.digital***This transcript has been approved by the Judge |