Removing an Arbitrator for Apparent Bias

Vincent Moran QC represented the successful Claimant in Cofely Ltd v Anthony Bingham and Knowles Ltd [2016] EWHC 240 (Comm), an application for the removal of an arbitrator on the ground of apparent bias. In this article he discusses the findings and implications of the case.

Background

In this case the Claimant (“Cofely”) sought an order that the First Defendant (“the Arbitrator”) be removed from an ongoing arbitration between Cofely and the Second Defendant (“Knowles”) pursuant to section 24(1)(a) of the Arbitration Act 1996 (“the Act”), on the grounds that circumstances existed which gave rise to justifiable doubts as to his impartiality. Knowles had acted as claims consultants for Cofely in relation to a concession agreement for energy services to the Olympic Park and Westfield Shopping Centre developments and in an adjudication of time and money disputes arising out of the same. Disputes also arose between Cofely and Knowles about the adequacy of the advice and services provided by Knowles and about fees provided by Knowles and about fees.

Knowles commenced arbitration proceedings against Cofely, applying to the Chartered Institute of Arbitrators (CIarb) for the appointment of an arbitrator and specifically requesting the Arbitrator – whose appointment was subsequently confirmed by the CIarb – despite Cofely’s objection to it at the time.

Following a Partial Award to Knowles of £1996 (“the Act”), on the grounds that circumstances existed which gave rise to justifiable doubts as to his impartiality.

The Arbitrator and, in particular, details of the proportion of his income resulting from Knowles-related appointments in the previous 3 years, or an indication that no answers would be forthcoming. The Arbitrator did not provide the requested information at the hearing. Subsequently, but only in response to a request from Knowles, the Arbitrator did provide details of the amount and proportion of his income that was generated from Knowles-related appointments.

Circumstances which engage s24(1)(a) are an irregularity within the meaning of s73(1)(b) and therefore the right to object may be lost if the conditions referred to in that section are satisfied.

As to s73 of the Act:

a. The Common law test for apparent bias is reflected in s24.

b. The test under section 24 is whether there is a real possibility of bias (see Lake Airways v FLS Aerospace [1993] 2 Lloyd’s Rep 55, per Mr. J at paragraph 21-23, and Sierra Fishing Co & Others v Parran & Others [2015] EWHTC 140 (Comm), [2015] Lloyd’s Law Reports per Popplewell J at paragraph 5).

c. More particularly, it 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” (see Porter v Mags [2002] AC 357, per Lord Hope at paragraph 103, Helves v Secretary of State for the Home Department [2008] UKHL 62, [2008] 1 WLR 246, per Lord Hope at paragraph 13).


“What disqualifies the judge is the presence of some factor which could prevent the bringing of an objective judgment to bear, which could distort the judge’s judgment.”


g. A party does not take part in an arbitration for the purposes of s173 unless and until he invokes the jurisdiction of the tribunal in respect of the merits of the dispute.

If there is a real ground for doubt this should be resolved in favour of recusal (see Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QBD 92 (CA) at 25).

As to s173 of the Act:

a. “Forthwith” means “as soon as reasonably possible”.

b. It is necessary to address the sets of circumstances relied upon by a claimant separately.

c. Different circumstances may engage s24(1)(a) individually or in combination.

d. In the former case the right to object is not lost unless s173 is satisfied in relation to each set of circumstances.

e. In the latter case the right to object cannot be lost unless s173 applies to sufficient of the circumstances to that what is left is cumulative insufficient to engage s24(1)(a).

f. In the case of cumulative grounds, it is only at the point that the separate matters, considered together, generated the required grounds for a s24 application that s173 should be applied.

g. A party may “continue to take part” by silence or inactivity in the face of a right to object which subsequently becomes available to him.
It is suggested that the disclosure obligation should be followed where there is any doubt as to the relevance of the information and the manner in which an arbitrator discharges this obligation can be relevant to the issue of apparent bias.

The decision

The Court held that five of Cofely’s seven grounds provided evidence of apparent bias for the purposes of s 22(2)(a)(ii). Over the last three years, 18 per cent of the Arbitrator’s arbiual and adjudication appointments and 25 per cent of his income was derived from cases involving Knowles, either as a party (3 occasions) or as party representative (22).
The Chartered Institute of Arbitrators’ “acceptance of remuneration” form required disclosure of “any involvement, however remote” with either party over the last five years. It was found that acting as arbitrator or adjudicator in previous cases involving one of the parties was “involvement” for the purposes of the Code of Practice. It was immaterial that the appointments might have been made by an appointing body rather than by the party itself.

The decision concluded that, if Mr Bingham’s resignation was not forthcoming, an order for his removal would therefore be made. Therefore, the key concerns of the Court appear to have been (i) the proportion of income derived from Knowles related referrals, (ii) the implications of the decision in Eurocom and (iii) the way the Arbitrator reacted to Cofely’s questions of him – and, in particular, the way a “hearing” and “ruling” was made and conducted.

As to the proportion of income point, the Court did not consider it relevant that most were from third party appointments. “On this logic even if all his income derived from cases involving Knowles there would still be no cause for concern”.

The Arbitrator discharges this obligation can be relevant to the issue of apparent bias.

a. Until becoming aware of this decision, Cofely were unaware of any reason to question the potential degree, nature and significance of the Arbitrator’s relationship with Knowles.

b. It was held there was a “very strong prima facie case” that fraudulent misrepresentations had been made by Knowles to assist in getting the Arbitrator appointed as the (adjudicator) tribunal in previous disputes involving Knowles as claimant or representative of a claimant.

c. Evidence in the case in fact suggested that this was a general practice of Knowles (and in particular Mr Giles who is the individual acting on behalf of Knowles in the current dispute) – see paragraph 50 of the decision.

d. The objective observer would therefore discern a risk that the Arbitrator may be influenced by the risk of going on the Knowles “black list” if he fell out of favour with them.

As to the Arbitrator’s reaction to being questioned about his relationship with Knowles, it was highlighted that the Arbitrator still did not recognise the relevance of the relationship of information or the need for any disclosure and that his lack of awareness itself “demonstrated a lack of objectivity and an increased risk of unconscious bias”. Finally it was held that s73 was not engaged, as the relevant conduct did not occur until after March 2015 and because Cofely was not in a position to decide whether there were grounds for objection until that information gathering was complete.

Implications of the decision

Although such cases are obviously fact specific, it is suggested that there are issues of more general concern and interest arising out of the decision.

a. The relevance to the issue of apparent bias of a tribunal’s prior history of referrals from or involving one or other of the parties.

b. The irrelevance of the fact that some or all appointments may be through appointing bodies (rather than direct appointments).

c. The irrelevance of the distinction between a party itself acting as a claimant/referring party in prior referrals and merely acting as a legal representative of the claimant.

d. The possible threshold for when previous involvement becomes disclosable: although no general guidance was provided, the existing authorities suggest that as little as 5% of income over previous 3 years might trigger a disclosure obligation and that 10% or more generally will.

e. The importance when considering this question of any wider disclosure obligation that may be assumed during the appointment process itself (under relevant institutional rules or a declaration).

f. The importance of how the tribunal reacts to and deals with enquiries made of its existing or historic involvement or relationship with one of the parties or its legal representative.

g. The appropriateness of the (apparently common) practice of seeking to influence (both positively and negatively) the appointment process, both in arbitration and adjudication.

h. The danger that robust tribunal conduct, that might seek to keep their panels under review.

i. The need for a tribunal to be fair to keep their panels under review.

j. The possible need for appointing bodies to review their procedures – especially where a referring party names a preferred tribunal or a name is objected to by the defendant.

k. The possible need for appointing bodies to keep their panels under review.

Finally, in a (to date) unreported part of the decision, the Court also found in relation to the existing Partial Award in the case that, in spite of the fact that no criticism was made of it or the Arbitrator’s conduct at the relevant time, the Court did not have jurisdiction under s52 of the Act to confirm that the Partial Award should necessarily stand in light of the removal of the Arbitrator – and that this matter would be for any replacement arbitrator to consider under the apparently wide powers conferred by s27(3) of the Act.

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