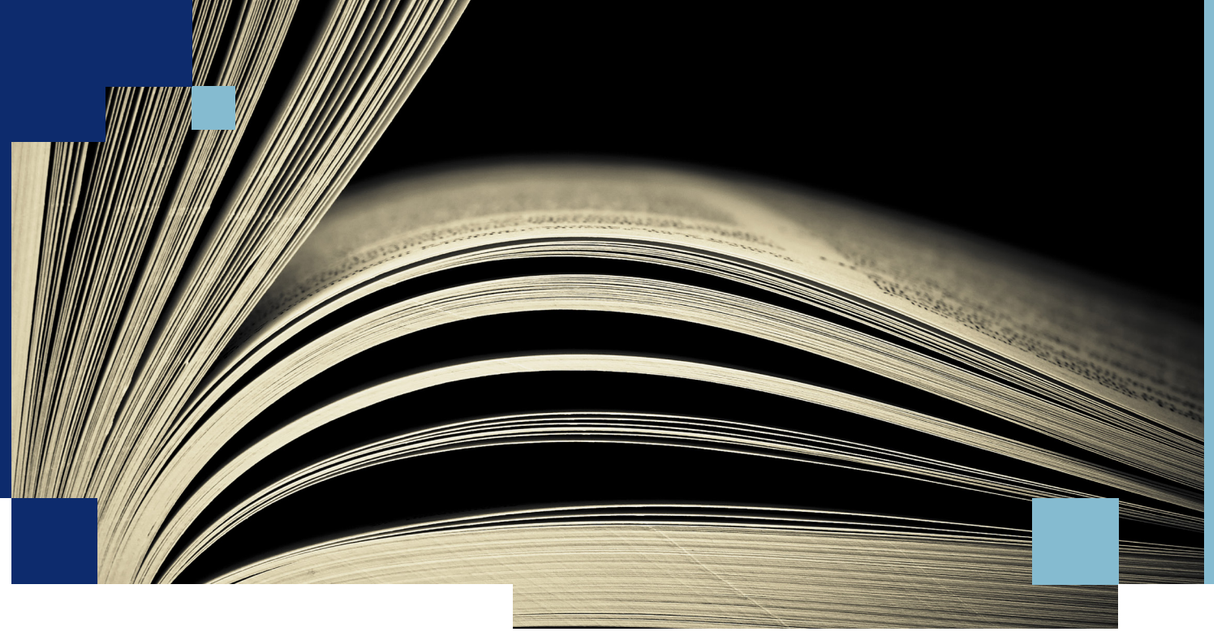
Removing an Arbitrator for Apparent Bias



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 alleged by Knowles to be due from Cofely.

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 £1 million, Cofely made its own application for a Partial Award on procedural issues; but then, in the light of the decision in *Eurocom Ltd v Siemens Plc*, Cofely's solicitors sought information from Knowles and the Arbitrator regarding the Arbitrator's prior record of appointment as adjudicator and arbitrator by Knowles/its clients.

In *Eurocom*, Ramsey J. held, of course, that there was a "*very strong prima facie case*" that Knowles had manipulated the process for the appointment of RICS adjudicators, which had resulted in the appointment of the Arbitrator.

After Knowles provided some of the requested information, but before the Arbitrator had provided any, a hearing was called by the Arbitrator on an issue that had not been raised by either party, namely 'whether the tribunal was properly constituted'.

At the hearing, leading counsel for Cofely sought to obtain answers to the outstanding request for information from 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.

The law

Section 24(1)(a) of the Act provides as follows:

> "*(1) A party to arbitral proceedings may (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) 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*;"

Section 73 of the Act states:

> "*(1) 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—*
> .....
> *(d) that there has been any other irregularity affecting the tribunal or the proceedings, he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection*"

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

As to s24 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 *Laker Airways v FLS Aerospace* [199] 2 Lloyds Rep 45, per Rix J at 48; *A v B* [2011] 2 Lloyds Rep 591 per Flaux J at paragraphs 21-29; and *Sierra Fishing Co & Others v Farran & Others* [2015] EWHC 140 (Comm), [2015] Lloyds Law Reports per Popplewell J at paragraph 51);

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 Magill* [2002] AC 357 per Lord Hope at paragraph 103; *Helow v Secretary of State for the Home Department* [2008] UKHL 62, [2008] 1 WLR 2416, per Lord Hope at paragraphs 1-3);

d. Such a fair minded and informed observer, although not a lawyer, is assumed to be in possession of all the facts which bear on the question and expected to be aware of the way in which the legal profession operates in practice (see *Rustell v Gill & Dufus* [2001] 1 Lloyd's Law Reports 14; *Taylor v Lawrence* [2002] EWCA Civ 90, [2003] QB 528; A v B [2011] 2 Lloyds Rep 591 per Flaux J at paragraphs 21-29);

> ***"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."***

e. In the context of alleged apparent bias on the part of a Court, Lord Bingham summarised the question as follows in *Davidson v Scottish Ministers* [2004] UKHL 34 at paragraph 6: "*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.*";

f. The fact that an arbitrator is regularly appointed or nominated by the same party/legal representative may be relevant to the issue of apparent bias (see *A v B* [2011] 2 Lloyds Rep 591 per Flaux J at paragraph 62; Arbitration International, Volume 27, Issue 3, page 442; *Fileturn Ltd v Royal Garden Hotel* [2010] TCC 1736, [2010] BLR 512 at paragraph 20(7)];

g. The Arbitrator's explanations as to his knowledge or appreciation of the relevant circumstances are also a factor which the fair minded observer would need to consider when reaching a view as to apparent bias (see *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700; *Woods Hardwick Ltd v Chiltern Air Conditioning Ltd* [2001] BLR 23; *Paice v Harding* [2015] EWHC 661, [2015] BLR 345, per Coulson J at paragraphs 46-51);

h. 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] QB 451 (CA) at 25).

As to s73 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;

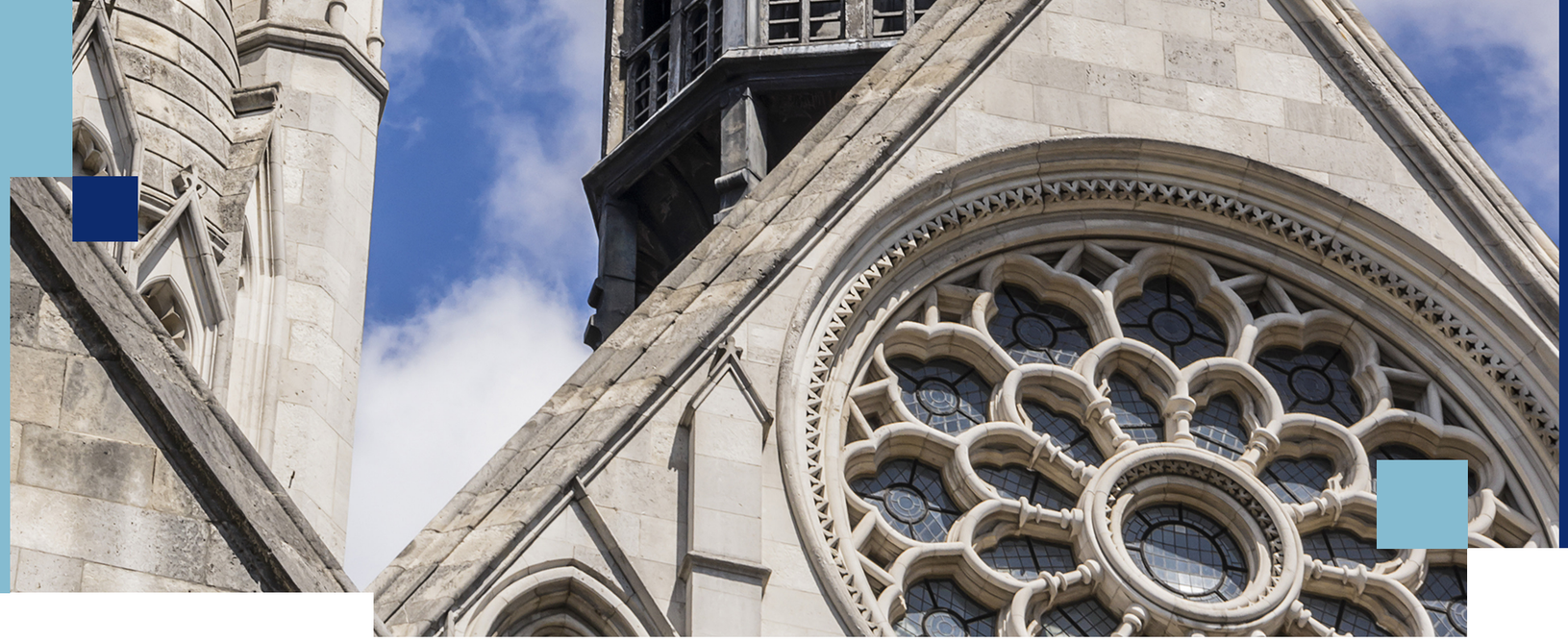
d. In the former case the right to object is not lost unless s73 is satisfied in relation to each set of circumstances;

e. In the latter case the right to object cannot be lost unless s73 applies to sufficient of the circumstances so that what is left is cumulatively 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 s73 should be applied;

g. A party does not take part in an arbitration for the purposes of s73 unless and until he invokes the jurisdiction of the tribunal in respect of the merits of the dispute;

h. 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;



"In effect, the Arbitrator had sought to pre-empt the information-gathering process by pressurising Cofely into accepting that there was no issue to be explored. This conduct demonstrated a lack of objectivity and an increased risk of bias by reason of unconscious bias toward favouring Knowles."

i. See generally *Margulead Ltd v Exide Technologies* [2004] EWHC 1019 (Comm), [2005] Lloyds Law Reports, Vol 1, 324; *Sierra Fishing Co & Others v Farran & Others* per Popplewell J at paragraph 66 and 73; *Rusal v Gill & Duffus* [2000] 1 Lloyds Rep 14 at paragraphs 20-21.

Guidelines

Rule 3 of the CIArb Code of Professional and Ethical Conduct for Members (October 2000) (at page 10 of Exhibit PAT2) states:

> "*Both before and throughout the dispute resolution process, a member shall disclose all interests, relationships and matters likely to affect the member's independence or impartiality or which might reasonably be perceived as likely to do so.*"

The IBA Guidelines on Conflicts of Interest in International Arbitration (at pages 11-40 of Exhibit PAT2) also provide relevant guidance applicable to domestic arbitration at General Standard 2 – Conflicts of Interest (page 19); General Standard 3 – Disclosure by the Arbitrator (pages 20-21); 'Orange list' definition (page 32); Orange list 3.1.3 (page 36); and Orange list 3.1.5 (page 37).

The recently amended ICC "Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration" (22 February 2016) also emphasise the need to consider whether "*The prospective arbitrator or arbitrator has in the past been appointed as arbitrator by one of the parties or one of its affiliates, or by counsel to one of the parties or the counsel's law firm*" (see new and amended paragraphs 17-24).

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.24(1)(a). Over the last three years, 18 per cent of the Arbitrator's arbitral 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 nomination*" 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 evidence also suggested that Knowles influenced appointments positively or negatively as a matter of general practice..."

The evidence also suggested that Knowles influenced appointments positively or negatively as a matter of general practice by putting forward the name of its chosen representative or a list of potential appointees whom it considered inappropriate, or by identifying required characteristics that would only be shared by a small pool of people – such as in this case "*QS and barrister*". It was particularly significant that it had an appointment "blacklist" whereby arbitrators could fall out of favour depending on their conduct. It was also held that it had been reasonable for Cofely to enquire into the nature of the relationship between the Arbitrator and Knowles and that it had done so courteously and appropriately; but that the Arbitrator had responded evasively. In avoiding addressing these requests and "*effectively cross-examining Cofely's counsel ... aggressively and in a hostile manner" the Arbitrator was "descending into the arena in an inappropriate manner*".

In effect, the Arbitrator had sought to pre-empt the information-gathering process by pressurising Cofely into accepting that there was no issue to be explored. This conduct demonstrated a lack of objectivity and an increased risk of bias by reason of unconscious bias toward favouring Knowles.

The Court 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 appointment processes: "*On this logic even if all his income derived from cases involving Knowles there would still be no cause for concern*". As to *Eurocom*, the key points were that:

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 40 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 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 tribunalreacts toand 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 seem appropriate in the context of adjudication, undermines the apparent fairness of the arbitral process.

i. The need for a tribunal to veer on the side of caution in providing early disclosure of all matters, however remote, which could have a bearing on the issue of apparent bias.

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 s24 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(4) of the Act.