[2007] All ER (D) 364 (Jun)

ASM Shipping Ltd v Harris and others

[2007] EWHC 1513 (Comm)

Queen's Bench Division (Commercial Court)

Andrew Smith J

28 June 2007

Arbitration – Arbitrator – Jurisdiction – Application for removal of arbitrators – Apparent bias – Arbitrator standing down following judgment of High Court – Whether two remaining arbitrators should also recuse themselves – Whether party losing right to object by accepting interim award and being aware of relevant circumstances – Arbitration Act 1996, s 24.

By a charterparty on an amended Exxonvoy '84 form concluded in December 2000 the owners chartered their vessel to the charterers for a single voyage. The voyage was from 1/2 safe ports/placed Arabian Gulf to 1/2 safe ports/places Red Sea or Egyptian Mediterranean to carry a cargo of gasoil. The charter contained a clause providing for arbitration 'before a board of three persons consisting of one arbitrator to be approved by owner, one by charterer and one by the two so chosen'. The clause contemplated arbitration in New York, but in the event the parties chose London instead. In March 2001, the arbitration began at the behest of the charterers. They claimed damages on the basis that the vessel arrived late at the load port in Kuwait, as a result of the owners' breach of contract. The owners claimed freight and demurrage. The parties appointed H and S as arbitrators. In April 2002, the arbitrators made an award in the owners' favour in respect of their freight claim in the sum of $US640,100 (plus interest and costs). It was agreed that $US707,500 should be paid into an escrow account pending resolution of the remaining claims. In October 2002, the panel dismissed the owners' application for immediate payment of demurrage. Other procedural orders were made. A third arbitrator had still not been appointed, and the two arbitrators continued to conduct the reference alone. In August 2004, they appointed M as the third arbitrator. In October 2004, the three arbitrators conducted a hearing essentially relating to liability for the charterers' claim. In the course of the hearing, the issue arose as to whether one of the arbitrators, M, should recuse himself, but he did not. The ensuing interim award was substantially in the charterers' favour. In January 2005, the owners challenged the award under s 68 of the Arbitration Act 1996, on the ground that M had been wrong not to recuse himself. While that application was pending, the owners asked the other two arbitrators to consider the demurrage claim without M. The arbitrators declined the invitation. In October 2005, the court rejected the s 68 application (see [2006] 2 All ER (Comm) 122). It held that although M should have recused himself from the reference, by 'taking up the award, at the very least' the owners had lost any right they might have had to object to the interim award. After the judgment M resigned. Subsequently, considerable amounts of correspondence were exchanged on the issue of whether or not the other two arbitrators should continue. The owners applied to the court for the removal of them, pursuant to s 24.

The issues were (i) whether circumstances that gave rise to justifiable doubts as to the impartiality of the two arbitrators; and (ii) whether the owners were precluded from raising complaints about the two arbitrators con-

tinuing or from having the two arbitrators removed because they took part in the proceedings or continued to do so without making their objection timeously.

It was contended, inter alia, that bias or an appearance of bias was established by the earlier findings of the High Court in the s 68 application, the fact that evidence would be given by the solicitor said to have had contact with M and the fact that the two arbitrators were party to or supported M's decision not to recuse himself, in submissions before the s 68 hearing and in M's subsequent actions. Further grounds included that the arbitrators had not been awarded costs of the s 68 hearing and that they refused to stand down despite the judgment in that hearing.

The application would be dismissed.

On the facts, the owners had lost the right to raise objections of bias. They were aware of the matters relied upon but continued with the case before the two arbitrators until after the judgment of the High Court on the s 68 application. A fair minded observer would not think that there was any realistic risk that the two arbitrators would be biased.

Sarosh Zaiwalla and Kumarlo Menns (instructed by Zaiwalla & Co) for the claimants.

Simon Croall (instructed by Waterston Hicks) for the defendants.

James Wilson Barrister (NZ).

Judgment

[2007] EWHC 1513 (Comm)

QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

28 JUNE 2007

MR. JUSTICE ANDREW SMITH

APPROVED JUDGMENT

I DIRECT THAT PURSUANT TO CPR PD 39A PARA 6.1 NO OFFICIAL SHORTHAND NOTE SHALL BE TAKEN OF THIS JUDGMENT AND THAT COPIES OF THIS VERSION AS HANDED DOWN MAY BE TREATED AS AUTHENTIC.

MR. JUSTICE ANDREW SMITH:

1. This is an application under section 24 of the Arbitration Act 1996 for an order for the removal of the two remaining arbitrators in a reference of a dispute between ASM Shipping Ltd of India, the owners, and TTMI Shipping Ltd of England, the charterers. The application is made by the owners. It is opposed by the charterers. The two arbitrators, Mr. Bruce Harris and Mr. A G Scott, are parties to the application. They have not appeared or been represented before me and have not presented evidence, but they have written a letter to the court to which I shall refer.

2. I should say at the outset that although the grounds of the application are (in the words of section 24(1)(a) of the 1996 Act) that “circumstances exist that are give rise to justifiable doubts about [their] impartiality”, no suggestions have been made that either Mr. Harris or Mr. Scott has been guilty of any sort of improper or unprofessional conduct or is to be the subject of any such criticism.

3. I must briefly describe the underlying dispute. By a charterparty on an amended Exxonvoy '84 form entered into on 11 December 2000 the owners chartered the vessel “Amer Energy” to the charterers for a single voyage from 1/2 safe ports/places Arabian Gulf to 1/2 safe ports/places Red Sea or Egyptian Mediterranean to carry a cargo of gasoil. The charterparty contained a clause providing for arbitration “before a board of three persons consisting of one arbitrator to be approved by owner, one by charterer and one by the two so chosen”. The clause contemplated arbitration in New York, but in the event the parties apparently chose London arbitration instead.

4. The charterers began the arbitration in March 2001 and the parties appointed Mr. Harris and Mr. Scott. In the reference the owners claimed freight and demurrage, and the charterers claimed damages alleging that the vessel arrived late at the loadport, Kuwait, as a result of the owners' various breaches of the charterparty. The charterers are members of the Sempra energy group and claim for their loss, calculated at something over US$1 million, resulting from an increase in market prices for the cargo and because the buyer cancelled the purchase contract and they (the charterers) are liable to Sempra Oil for whom the vessel was chartered.

5. On 26 April 2002 the arbitrators made an award in the owners' favour in respect of their freight claim in the sum of US$640,100 (plus interest and costs). The parties agreed that US$707,500 should be paid into an escrow account pending determination of the remaining claims on the arbitration.

6. On 23 October 2002 the arbitrators dismissed the owners' application for immediate payment of demurrage. Other procedural orders were made. A third arbitrator had not yet been appointed and the two arbitrators continued to conduct the reference alone, presumably without any objection from the parties that the full tribunal was not constituted. On 4 August 2004 Mr. Harris and Mr. Scott appointed Mr. Duncan Matthews Q.C. as the third arbitrator.

7. In October 2004 the three arbitrators conducted a hearing of what were called preliminary issues but effectively were the pleaded issues relating to liability for the charterers' claim. In the course of the hearing, in circumstances which are fully described in a judgment of Morison J. [2005] EWHC 2238 (Comm), a question arose whether Mr. Matthews should recuse himself, but he did not do so.

8. In October 2005, after the hearing was concluded but before the interim award was published, the owners notified the tribunal that they applied to amend their pleading to introduce an allegation that they made the charterparty because of an actionable misrepresentation made in the course of the negotiations by the charterers, in that the charterers had stated untruthfully that they intended that the vessel should load at Bahrain, rather than Kuwait. The application has not yet been determined.

9. On 23 December 2004 the tribunal of three arbitrators published their interim award on the preliminary issues. It was substantially in the charterers' favour.

10. In January 2005 the owners challenged the award under section 68 of the 1996 Act. Their only complaint relevant for present purposes was that Mr. Matthews should have recused himself from the reference because the owners' principal witness at the hearing of the preliminary issues was a broker called Mr. Petros Moustakas and on a previous occasion Mr. Matthews, instructed by Waterson Hicks, who act for the charterers on this application and in the arbitration that gives rise to it, had appeared as an advocate on an application under section 43 of the 1996 Act for disclosure of documents by Mr. Moustakas, who had apparently been involved in broking a charter the terms of which were in dispute. Mr. Matthews disclosed this matter at the hearing of preliminary issues after Mr. Moustakas had given evidence, but stated, “I am satisfied that there is no basis for any objection to my continuing and considerable basis for objecting to my ceasing to do so. I consider it would be wrong in principle for me to recuse myself and the Owners dealing fairly with the situation should now acknowledge the same”.

11. While the section 68 application was pending, on 29 April 2005 the owners wrote to the two arbitrators and asked whether they would consider determining the owners' demurrage claim without Mr. Matthews. The charterers responded on the same day that the tribunal comprised the three arbitrators, and the invitation to the two arbitrators was improper. In these circumstances, the two arbitrators, while saying that they had no objection in principle to trying to agree an award on the demurrage claim if the parties agreed, declined to proceed alone without the parties' agreement .

12. On 17 October 2005 Morison J. rejected the section 68 application. He held that Mr. Matthews should have recused himself from the reference but that “by taking up the award, at the very least” the owners had lost any right that they may have had to object to the interim award.

13. The grounds of this application as they were stated when the matter came before me were as follows:

> “On 17 October 2005 Morison J delivered a Judgment in which he upheld the claimants' allegation of apparent bias against the third arbitrator who has been removed by the Court. Because of this, other two arbitrators were/would have been infected also by apparent bias and consequently the applicants do not believe they are capable of determining the remaining dispute in a fair and impartial manner. At the hearing Mr. Justice Morison indicated to the remaining two arbitrators that they should also recuse themselves in that the court hoped that the two arbitrators could [not] continue.”

As I shall explain, the grounds have now been amended and much expanded.

14. After the judgment of Morison J., Mr. Matthews resigned from the reference on 24 November 2005. He was not removed by any order of the court, but at the end of his judgment Morison J. had said this (at paragraph 50):

> “In my view, given the facts and conclusions I have stated, Mr. Matthews Q.C. should not continue to act in this matter. I have not heard argument about the continuation of the other two arbitrators but would express the hope that they could continue.”

15. After representations about this observation had been made at a hearing on 17 November 2005 by Mr. Michael Beloff Q.C., who was then representing the owners, Morison J. explained and effectively withdrew it in so far as it concerned the two arbitrators. He made this statement:

> “In paragraph 50 of my judgment I expressed the hope that the parties could agree to the continuation of the two arbitrators in the future. That was an expression of hope based upon the court's perception that this arbitration should be concluded as soon as possible. I was not expressing a view as [to] what the parties would do or should do. In the light of what has been

> said this afternoon it may well be that the objective which underlay my previous statement could best be achieved by the appointment of a wholly new panel."

He also said that he thought it important that "nobody should think that I think that they should continue". I understand "the objective which underlay my previous statement" to be that the underlying dispute between the parties should be determined with the minimum of delay and expense through the arbitral process. I do not understand him to be making any statement in paragraph 50 of his judgment or subsequently about whether or not it was proper for the two arbitrators to continue with the reference or whether they should recuse themselves.

16. It is submitted by Mr. Zaiwalla, who appeared for the owners before me, that Morison J. "expressed the hope" that the two arbitrators would not continue with the reference. I disagree. In my judgment Morison J. made it clear on 18 November 2005 that he wished to express no view either way about that.

17. Mr. Zaiwalla relied upon what Mr. Beloff said to Morison J. because he said that thereby the owners "put down a marker" about their objection to the two arbitrators continuing with the reference. I should therefore set out what Mr. Beloff said about this. He said that:

> "We were obviously at the start, ... , prepared to continue with two arbitrators who at that stage could have been regarded as neutral. The position that is now reached, when they have chosen themselves to associate themselves with Mr. Matthews' position and indeed to do so in highly emphatic terms as your Lordship will recollect from the statements that they produced, obviously, in our respectful submission, undermines our confidence in them in particular now that your Lordship has said Mr. Matthews was wrong ergo they must have been wrong to support him."

After referring to the case of *R v Bow Street Metropolitan Stipendiary Magistrate ex p. Pinochet*, [2000] 1 AC 119, Mr. Beloff invited Morison J. to amend paragraph 50 of his judgment because:

> "...there is a danger ... - I put it no higher because I have no instructions on the point one way or the other - that a section 24 application will inevitably follow ... And a section 24 application will be based on this proposition: one arbitrator has been found to be guilty ... of apparent bias, this is a collegiate body, accordingly the other members of the panel share the same taint. Look at what happened in *Pinochet*. What is the option? ...of course your Lordship cannot make any order in relation to Mr. Matthews or to the other arbitrators. All we are asking is that your Lordship should either by way of amendment to the text of the judgment before it is finally for (unclear) or by saying something that needs to be recorded so that it can be drawn to the attention of the other arbitrators, avoid the possibility that there will be yet further and unnecessary interlocutory applications in this matter."

18. Thus, first Mr. Beloff referred to the fact that the two arbitrators had, as he put it, "aligned themselves with Mr. Matthews' position", and explained how the owners viewed the fact that they had done so. He then went on to state that he has no instructions as to whether the owners would apply to remove them, and the inference was, to my mind, that he did not go so far as to make on the owners' behalf an objection to them continuing as arbitrators.

19. Mr. Beloff also referred to the two arbitrators associating themselves to Mr. Matthews' position "in highly emphatic terms". This, I take it, is a reference to letters that the arbitrators wrote to the court in relation to the section 68 application. Mr. Matthews had written a letter to the court dated 21 March 2005. He had explained his understanding of the matters giving rise to the application, and in doing so had challenged the accuracy of certain statements made by Mr. Zaiwalla in evidence presented in support of it. Mr. Harris, in a letter to the court dated 29 March 2005 which Mr. Scott endorsed, confirmed what Mr. Matthews wrote so far as he knew

it, and said, “When Mr. Matthews first became aware of the potential difficulty ... he discussed it with us and it was agreed that he should raise it with the parties. As the point developed it was discussed further. At all relevant stages we were in total agreement that there was no reason for Mr. Matthews to recuse himself and I remain of that view”. Thus, the two arbitrators engaged in discussions with Mr. Matthews about the implications for his position of Mr. Moustakas being a witness, and took a view about Mr. Matthews' continued involvement in the arbitration that was rejected by Morison J.

20. At the same hearing on 17 November 2005 Morison J. considered the question whether he should make any order about the costs incurred by the arbitrators in relation to the application under section 68. At a Case Management Conference on 29 April 2005 Cresswell J had directed that their costs be dealt with by the judge hearing the application. Neither party offered themselves to pay those costs and neither party argued that the other party should pay them (although Mr. Simon Croall, who represented the charterers then as he did at the hearing before me, properly drew relevant considerations to the court's attention). Morison J. made no order for the payment of the arbitrators' costs.

21. The owners sought permission to appeal from the decision of Morison J. dismissing their section 68 application Morison J. refused the application and (despite section 68(4) of the 1996 Act) the owners applied to the Court of Appeal. The application was eventually dismissed on 16 October 2006.

22. On 21 November 2005 Waterson Hicks wrote to Zaiwalla & Co as the owners' solicitors, stating that they could not object to Mr. Matthews standing down from the reference in view of the judgment of Morison J. They said that if Mr. Matthews did so they believed it appropriate for the two arbitrators to continue with an umpire or third arbitrator. As I have said, Mr. Matthews resigned from the reference on 24 November 2005. After receiving the resignation, Waterson Hicks wrote to Zaiwalla & Co on 24 November 2005 stating that if they did not hear from them by 28 November 2005 they would take it that the owners agreed to the two arbitrators continuing and ask them to appoint a third arbitrator. On 24 November 2005 Zaiwalla & Co wrote, referring to Mr. Matthews' resignation and the statement made by Morison J. after his judgment, and stating “We believe that the two Arbitrators would consider it wise to also stand down”.

23. It appears that Waterson Hicks did not understand from this letter that the owners' objected to the two arbitrators continuing but that they thought that the two arbitrators should decide for themselves whether to stand down.

24. It is necessary to refer to an exchange of correspondence about what position the charterers had adopted during the hearing of the preliminary issues to Mr. Matthews continuing as an arbitrator. In their letter of 24 November 2005 to which I have referred and in a letter of 29 November 2005 Zaiwalla & Co wrote to Mr. Matthews and the other two arbitrators stating that they believed that the charterers might have misrepresented their position to the Morison J. when they said that “they were at all times prepared to Mr. Matthews recusing himself but it was Mr. Matthews who decided not to recuse himself”. In view of the arguments advanced by Mr. Zaiwalla, I must set out part of Mr. Matthews' reply:

> “I have resigned from this reference. I have wasted over £10,000 in fee hours (at my arbitrator, not my higher, Counsel, rate) dealing with Zaiwalla & Co's inquiries. It is not my intention to respond to any further inquiries in this matter.
>
> For the avoidance of doubt, the only misrepresentations that I am aware of in relation to the hearing of this case before Morison J are those committed on behalf of Zaiwalla & Co's clients to which I referred in my letter to the Court, copied to the parties, dated 26 September 2005, but which regrettably do not appear to have been borne home to the learned Judge and on which he appears unfortunately to have founded his judgment.

> As regards the other factual errors in the judgment which inclined him to the view that I should recuse myself, I do not know whether they were the result of error by or misrepresentation to the Judge."

25. Mr. Matthews sent copies of this letter to the two arbitrators. The two arbitrators apparently did not comment upon the inquiry made by Zaiwalla & Co or upon Mr. Matthews' response. Mr. Zaiwalla submits that they therefore "acquiesced" in what Mr. Matthews wrote.

26. On 29 December 2005 the owners, by their solicitors, expressed their view that the two arbitrators should not continue with the reference "as they were part of the tribunal of which one member was found by the court to have had apparent bias", saying that Morison J. had "indicated a strong hint of the Court's desire that the Arbitrators should resign". On 4 January 2006 Waterson Hicks expressed the view that the two arbitrators should not stand down pending determination of the owners' application for leave to appeal.

27. The exchanges continued, and on 9 March 2006 Mr. Harris, on behalf of both arbitrators, enquired whether if the owners' attempts to appeal against the decision of Morison J. were unsuccessful, the charterers would agree to them being replaced. Waterson Hicks' response was that it would be wrong for the two arbitrators to step down as things stood, with the owners' application to amend the pleadings in the arbitration pending, although they said that they would consider the position further if that application were dismissed so that the only outstanding issues in the reference were quantum and the owners' demurrage claim. Zaiwalla & Co reiterated that the arbitrators should stand down. On 16 March 2006 Mr. Harris wrote that he and Mr. Scott saw no reason to stand down, although they would reconsider their position if the charterers agreed that they should resign. On 16 May 2006 the owners made this application to remove the arbitrators. (They sought to make it by issuing an application notice and issued a claim form only on 25 April 2007, but that is not relevant to anything that I have to decide.) It was agreed by the owners, the charterers and the arbitrators that no steps be taken in relation to the application until after the Court of Appeal had decided the application for permission to appeal.

28. The Court of Appeal having refused permission to appeal against the judgment of Morison J. on 16 October 2006, on 27 October 2006 Zaiwalla & Co wrote to the arbitrators asking whether (if they still considered that they should not stand down) they would appoint as the new third arbitrator a retired High Court or Court of Appeal judge who was not connected with Mr. Matthews' chambers. They indicated that if the two arbitrators were minded to do so, they would recommend to the owners that the section 24 application was unnecessary. This led to a further exchange of correspondence between the solicitors and the arbitrators, which I can sufficiently summarise as follows. The arbitrators indicated that they intended to appoint Mr. Steven Berry Q.C. as the third arbitrator, and invited the parties to put forward any reason that they should not do so. Zaiwalla & Co reiterated their suggestion that a retired judge be appointed and suggested four names. Waterson Hicks said that they had no objection to the appointment of Mr. Berry and also raised no objection to the retired judges suggested by the owners. The arbitrators wrote that they were considering the suggestion of a retired judge, but they requested the owners' assurance that the owners would not pursue an application for removal of the two arbitrators under section 24 of the 1996 Act. Zaiwalla & Co, on behalf of the owners, agreed not to pursue the present application provided that no order for costs was made in relation to it. When Waterson Hacki Hicks sought the owners' confirmation that they would not raise again any allegation upon which their application was based, Zaiwalla & Co declined to give it although they made it clear that the owners would not abandon their application under section 24 and then renew it on the same grounds when a retired judge had been appointed as the third arbitrator. They wrote, "Our clients of course will raise these matters further before the third arbitrator and at any other forum if it is considered in their interests to do so". It became clear that the owners were going to pursue their application under section 24 and in those circumstances the two arbitrators decided to take no further action about the appointment of a third arbitrator for the time being.

29. In the course of this exchange of correspondence Zaiwalla & Co observed that the two arbitrators had given no reasons for not acceding to their suggestion of a retired judge. In response the arbitrators said only

that they regarded the choice of the third arbitrator being for them and them alone, writing, "...in the absence of agreement between the parties, we can see no reason that we should appoint an arbitrator who would not be our primary choice".

30. Mr. Zaiwalla submitted that reasonable arbitrators would have acceded to their suggestions about the appointment of a third arbitrator, and that the fact that the two arbitrators did not do so and did not explain their decision is evidence of unconscious bias on their part. I decline to draw this inference. I am (rightly) not privy to their thinking about what appointment they should make, no appointment has been made and nothing that I say should be taken to be an indication by me about what appointment they should make (for such an indication would be inappropriate). However, for the sake of illustration only, I could well understand them deciding in the circumstances of this case that they should appoint a third arbitrator with a broadly similar background to that of Mr. Matthews. They were not obliged to explain their decision. (I observe that all parties were proceeding, probably correctly, on the basis that it is for Mr. Harris and Mr. Scott to appoint a third arbitrator to replace Mr. Matthews.)

31. This correspondence also ventilated another matter upon which Mr. Zaiwalla relies in support of the section 24 application. In his letter to the arbitrators of 27 October 2006 Mr. Zaiwalla stated that in a telephone conversation that he had had with Mr. Martin Wisdom of Waterson Hicks, Mr. Wisdom had stated that "whatever the Owners' case, they are not going to succeed because Owners have upset the arbitrators. We are equally confident that this would not be so". In evidence, it is said that Mr. Wisdom said that "before these two arbitrators your clients did not have a chance", and that the arbitrators were "no doubt angry at the owners' conduct in challenging Mr. Matthews' impartiality". Mr. Wisdom of Waterson Hicks denies this conversation.

32. Section 24(1) of the 1996 Act allows a party to an arbitration to apply to the court for the removal of an arbitrator on four grounds, the relevant one of which in this case is stated in sub-section (a). The relevant wording of the statute is this:

> "A party to arbitral proceedings may ... apply to the court to remove an arbitrator on any of the following grounds - (a) that circumstances exist that give rise to justifiable doubts as to his impartiality; ... and that substantial injustice has been or will be caused to the applicant."

The concluding words that I have set out do not require me to consider a question of substantial injustice separately from the question of justifiable doubts about impartiality. Like Colman J. in *Norbrook Laboratories Ltd v A Tank* [2006] EWHC 1055 (Comm), I agree with paragraph 39(3) of the judgment of Morison J. [2005] EWHC 2238 (Comm), in which he said:

> "In my judgment, if the properly informed independent observer concluded that there was a real possibility of bias, then I would regard that as a species of "serious irregularity" which has caused substantial injustice to the applicant. I do not accept ...that even if that conclusion was reached the court must then inquire as to whether substantial injustice has been caused."

33. The essential questions that I have to consider are therefore these:

> i) Do circumstances exist that give rise to justifiable doubts as to the impartiality of the two arbitrators?
>
> ii) Are the owners precluded from raising complaints about the two arbitrators continuing or from having the two arbitrators removed because they took part in the proceedings or continued to do so without making their objection timeously.

I refer simply to “the two arbitrators” because there is no reason to distinguish the position of Mr. Harris and that of Mr. Scott. Either both are to be removed or neither or them is to be.

34. I have presented the first of these questions in the terms of the statute. However there is no doubt that an arbitrator may be removed for apparent as well as actual bias. Section 24 of the 1996 Act lays down an objective test that reflects the common law: see *Laker Airways Inc. v FLS Aerospace Ltd.*, [1999] 2 Lloyd's Reports 45 at p.48 and *Rustal Trading Ltd. v Gill & Duffus SA*, [2000] 1 Lloyd's Reports 14 at p.18. In his judgment in the latter case, Moore-Bick J. observed:

> “Perhaps the two most important principles to bear in mind in the present case are, first, that the court must make its judgment on the basis of the circumstances as it finds them to exist and is not concerned with the arbitrator did or did not in fact allow his mind to be affected by them; secondly, the circumstances must be such as objectively to justify doubts as to the arbitrator's impartiality”.

Those principles apply in this case.

35. In *Porter v Magill*, [2002] 2AC 357, 494 at para 103 Lord Hope expressed the test for apparent bias thus: “The question 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”. The application of the test was considered by the Court of Appeal in *Flaherty v National Greyhound Racing Club Ltd*, [2005] EWCA (Civ) 1117, and at para 27 Scott Baker L.J. observed that,

> “The test for apparent bias involves a two-stage process: the court must first ascertain all the circumstances which have a bearing on the suggestion that the tribunal was biased. Then it must ask itself whether the circumstance would lead a fair minded and informed observer to conclude that there was a real possibility that the tribunal was biased”.

36. Mr. Zaiwalla first put the owners' argument on this basis (in paragraph 16 of his skeleton argument):

> “Owners accept that in order to succeed in the present application, they must show: a. that by reason of forming part of an arbitration tribunal, one member of which was found to be tainted by apparent bias, that tribunal should have stood down in its entirety; and b. that owners have not waived the right to object to the future continuation of the other arbitrators. ...”

37. This appeared to reflect the grounds of the application originally set out in the claim form. However, as Mr. Zaiwalla developed his submissions orally before me, it became apparent that his argument was not confined to a submission that, because of Mr. Matthews' apparent bias, the other two arbitrators should have recused themselves and should be removed. He developed submissions by reference to the conduct of the two arbitrators themselves and, indeed, what they had done after Mr. Matthews had resigned.

38. The arbitrators had been served with the claim form and had decided not to present any evidence and not to appear before me. They had been served with the evidence of the owners and the charterers, but the witness statements did not foreshadow Mr. Zaiwalla's argument. In these circumstances, and in view of the fact that in any case the hearing could not be concluded in a single day, I indicated to Mr. Zaiwalla that if he wished to develop these points he should apply for permission to amend the claim form so that the amended form could be served on the arbitrators and they could be given notice of the allegations made about them. He did so apply in writing between the two days upon which I heard the application, and I granted the owners permission to amend. The two arbitrators have been given notice of the amended application, and on 4 June 2007 Mr. Harris wrote to the court on behalf of them both stating that, as for apparent bias, the evidence must speak for itself and denying any actual bias for or against any party.

39. Mr. Zaiwalla's first argument was that Morison J. has already found that the tribunal was tainted because of Mr. Matthews' previous involvement with Mr. Moustakas, and that cannot now be disputed upon this section 24 application that the two arbitrators are so tainted. (I need hardly explain that I use the conventional terminology about the tribunal being “tainted” without it carrying any connotation of impropriety.) This argument is advanced on the basis of paragraph 42 of the judgment of Morison J., in which, having referred to “the uncomfortable feeling which Mr. Moustakas had that Mr. Matthews Q.C. would or might have detected a “pattern” of misbehaviour in relation to disclosure based upon his knowledge acquired as a barrister in” relation to the previous matter, he continued, “in my judgement, the independent observer would share the feeling of discomfort expressed by Mr. Moustakas and [have] concluded that there was a real possibility that the tribunal was biased... . The question is whether Mr. Matthews Q.C. should have recused himself at the beginning of the third day, by which time the arbitration had not been completed and the other two arbitrators would have retained an open mind as to the results.”

40. I am unable to accept that these observations of Morison J. determine that the two arbitrators are tainted by Mr. Matthews' apparent bias. Morison J. was referring to what view the independent observer would have had, and what conclusion he would have reached, with regard to the tribunal as a body, comprising Mr. Harris, Mr. Matthews and Mr. Scott. He was not referring to the position of each individual member of the tribunal.

41. Moreover, as Scott Baker LJ said in Flaherty (loc cit) at para 27, “An allegation of apparent bias must be decided on the facts and circumstances of the individual case, including the nature of the issue to be decided”. Morison J. was considering the position upon an application under section 68 in relation to the interim award and the hearing that led to it. It is true that the source of the problem that he was considering - as Morison J. observed in paragraph 1 of his judgment - was that the owners' principal witness at the hearing was Mr. Moustakas and Mr. Moustakas is likely to give evidence in the remaining stages of the arbitration, but that does not mean that Morison J.'s conclusion can be applied to any hearing in which Mr. Moustakas is to give evidence.

42. However, Mr. Zaiwalla also argued, that, even leaving aside what Morison J. said at para 42 of his judgment, when one member of a tribunal is tainted by (actual or apparent) bias, the whole tribunal and each member of it is tainted. It follows, the argument runs, that there will be justifiable doubts about the impartiality of each member so that the matter must continue in front of a tribunal composed entirely of new members.

43. In support of this contention Mr. Zaiwalla cited *R v Sussex JJ ex. P McCarthy*, [1924] 1 KB 256 and *R v Bow Street Metropolitan Stipendiary Magistrate ex p. Pinochet Ugatre (No 2)*, [2000] AC 119, in both of which it was directed that there be a re-hearing in front of a freshly constituted panel. He also cited the judgment of the Court of Appeal given by Lord Phillips M.R. in *Re Medicaments and Related Classes of Goods (No 2)*, [2001] WLR 700, in which it was held that a lay member of the Restrictive Practices Court was tainted by apparent bias. Lord Phillips said (at paragraph 99 of his judgment) this:

> “Having reached this decision [that the lay member, Dr Rowlatt, should have recused herself] we then had to consider the position of the other two members of the court. The trial had reached an advanced stage by the time that it was disrupted by the appellant's application. Dr Rowlatt must have discussed the economic issues with the other members of the court. We concluded that it was inevitable that the decision that Dr Rowlatt should be disqualified carried with it the consequence that the other two members of the court should stand down”.

44. I am unable to accept that there is an invariable rule, or it is necessarily the case, that where one member of a tribunal is tainted by apparent bias the whole tribunal is affected second-hand by apparent bias, and therefore should recuse themselves, or should be excluded, from the proceedings. After all, it is common practice when a juror has to be discharged (for example, because he or she recognises a witness) for the judge to consider whether there is a risk of “contamination” or other jurors, and if there is no reason to think that there is, to continue the trial with the remaining jurors. In the *Sussex Justices* and the *Pinochet* cases

the tribunal had already reached a decision and in those circumstances it is not surprising that those who had committed themselves to the decision should not be on the tribunal who conducted a re-hearing. In the *Pinochet* case (cit sup) Lord Browne-Wilkinson said (at page 137D)

> "It was appropriate to direct a hearing of the appeal before a differently constituted committee, so that on the re-hearing the parties were not faced with a committee, 4 of whom had expressed their conclusions on the points in issue".

45. The position was rather different in the *Re Medicaments* case, but the passage that I have cited from the judgment of Lord Phillips makes clear the relevance of the fact that there had been discussions involving Dr Rowlatt about matters upon which there was to be a re-hearing. That is to say, the tribunal would be re-hearing matters issues which presumably they would have discussed with Dr Rowlatt.

46. This is not to say that it is irrelevant to the question that I have to decide that the two arbitrators will have had discussions with Mr. Matthews in relation to the preliminary hearing, and I shall refer to this later in my judgment. However, I reject the suggestion that it follows from the authorities cited by Mr. Zaiwalla or it follows as a matter of law from the finding of apparent bias on the part of Mr. Matthews that the whole of the original arbitral tribunal and each member of it are tainted by apparent bias. The enquiry depends upon the particular facts of the case.

47. I must therefore consider the matters that are said in this case to give rise to justifiable doubts as to the impartiality of the two arbitrators in relation to conducting, with a third arbitrator, the remaining stages of the reference.

48. The particular matters that are said to give rise to bias (or an appearance of bias) in this case are these:

> i) The findings of Morison J. in his judgment and his subsequent observations on 18 November 2005.
>
> ii) The fact that Mr. Moustakas will be giving evidence in the remaining stages of the arbitration.
>
> iii) The two arbitrators were party to or supported Mr. Matthews' decision not to recuse himself from determining the interim award.
>
> iv) The two arbitrators supported Mr. Matthews in submissions or representations before the hearing of the section 68 application.
>
> v) The two arbitrators "acquiesced in the inference of misrepresentation alleged against [the owners] by Mr. Matthews Q.C. in his letter of 29 November 2005..."
>
> vi) The two arbitrators applied for costs of the section 68 application and Morison J. refused to award them their costs.
>
> vii) The two arbitrators refused to stand down after, as it is said, "Morison J. had expressed an hope that they would do so, without giving any reasons for not standing down".
>
> viii) The two arbitrators refused to accept a "reasonable request" from the owners that the third arbitrator be a retired judge, did not give reasons for not doing so, and were willing to "toe the line suggested by the [charterers'] solicitors in correspondence concerning the appointment of a retired judge as a third arbitrator".
>
> ix) The owners have a perception that the two arbitrators will be biased against them because the court has found that one member of the "collegiate body" to be biased, particularly in light of

> the report to them of a conversation that is said to have taken place between their solicitor, Mr. Zaiwalla, and Mr. M J Wisdom of the charterers' solicitors.

49. It might have appeared from the statement that Mr. Matthews made in the course of the arbitration hearing to which I have referred, that the decision that he should not recuse himself was his own decision rather than, as his representations on the section 68 indicate, taken by the tribunal as a whole. However in his representations dated 21 March 2005, Mr. Matthews wrote that "the Tribunal was not of the view that there were grounds justifying my resignation" and that: "... it seemed to the Tribunal appropriate to consult about the objection [to him continuing as an arbitrator] and give its own ruling, which was that objectively speaking there were not good grounds for a reasonable party to object to doubt my impartiality or independence". It is clear that the two arbitrators shared Mr. Matthews' view that he could properly and should continue as an arbitrator. As I have said, they wrote to the court that they agreed with the representation made by Mr. Matthews in respect of the section 68 application in respect of his impartiality and independence.

50. It is convenient first to consider how far section 73 of the Arbitration Act 1996 restricts the grounds of complaint that the owners can advance. Section 73 provides as follows:

> "(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 -
>
> ...
>
> (b) that the proceedings have been improperly conducted,
>
> ...
>
> (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."

51. The effect of the section was described by Moore-Bick J in Rustal, (cit sup) at p.19:

> "The effect of this section is that a party to an arbitration must act promptly if he considers that there are grounds on which he could challenge the effectiveness of the proceedings. If he fails to do so and continues to take part in the proceedings, he will be precluded from making a challenge at a later date. Moreover, it is clear from the language of sub-s (1) itself that it is unnecessary for an applicant to have had actual knowledge of the grounds of objections in order for him to lose his right to challenge the award. If the respondent can show that the applicant took part or continued to take part in the proceedings without objection after the grounds of objection had arisen, the burden passes to the applicant to show that he did not know, and could not with reasonable diligence have discovered, those grounds at the time. It may often be necessary, therefore, to consider the applicant's conduct of the proceedings against the background of his developing state of knowledge."

52. Moore-Bick J also considered (cit sup at p.20) when a party "continues to take part in the proceedings" within the meaning of the section. He said:

> "The expression "continues to take part in the proceedings" is broadly worded and the sub-section as a whole is designed to ensure that a party who believes he had grounds for objecting to the constitution of the tribunal or the conduct of the proceedings raises that objection,

> if he wishes to do so, as soon as he is, or ought reasonably to be, aware of it. He is not entitled to allow the proceedings to continue without alerting the tribunal and the other party to a flaw which in his view renders the whole arbitral process invalid. That could often result in a considerable waste of time and expense which is no doubt something which the legislation seeks to avoid. There is, however, a more fundamental objection of principle to a party's continuing to take part in proceedings while at the same time keeping up his sleeve the right to challenge the award if he is dissatisfied with the outcome. The unfairness inherent in doing so is, of course, magnified if the defect is one which could have been remedied if a proper objection had been made at the time. Once arbitration proceedings have been commenced there may well be many periods during which no formal step is required of one or other party, but it would not be right as a matter of ordinary usage to say that during such periods either party is not taking part in the proceedings. I think the same can be said of the period between the conclusion of the hearing and the publication of the award. Nothing further may be required of either of them at that stage, but that does not mean that they have in any real sense ceased to take part in the proceedings. In my judgment, unless a party make it clear that he is withdrawing from the proceedings, he continues to take part in them until they reach their conclusion, normally in the publication of a final award."

53. The first question is when, for the purposes of section 73, the owners made their objection to Mr. Harris and Mr. Scott continuing as arbitrators. Mr. Zaiwalla submitted that at the hearing on 18 November 2005 the owners, as he put it, "put down a marker" as to their position. Mr. Beloff certainly warned that the owners might in the future object to the two arbitrators continuing with the reference, but I do not consider that he went further than that. It is not sufficient for the purpose of section 73 that a party indicates that an objection might be made. He must make his objection. Similarly, in my judgment it did not suffice for Zaiwalla & Co to write on 24 November 2005 that they believed that "the Arbitrators would consider it wise to ... step down". An objection under section 73 must be stated in properly specific terms. I do not consider that the owners made their objection to the two arbitrators continuing until 29 December 2005.

54. Mr. Zaiwalla argues that the owners did not continue to take part in the proceedings until that point because once Mr. Matthews had resigned, the tribunal was not properly constituted and there was no question of the arbitral proceedings being continued or the owners continuing to take part in them. I am unable to accept that submission. I consider that, for the reasons that Moore-Bick J explained in Rustal, the owners continued to take part in the proceedings simply because they did not withdraw from them.

55. I do not consider that, as I understand Mr. Zaiwalla to submit, Article 6 of the European Convention on Human Rights requires me to take a more stringent view of when section 73 deprives a party of his right to object In their judgment upon the application for permission to appeal from the judgment of Morison J., the Court of Appeal considered the effect of Article 6 upon the loss of rights to challenge an arbitrator for bias, and the considerations explained by Longmore LJ that led the court to dismiss the application apply to the loss of rights under section 73 as well as to common law waiver: see para 18 of his judgment.

56. As Mr. Zaiwalla made clear in his submissions, it is the owners' contention that in October 2004, when they first learned of the matters that Morison J. concluded gave rise to apparent bias on the part of Mr. Matthews, there were no grounds upon which they could properly challenge the impartiality of the other two arbitrators. However, they say that they are now entitled to do so because the position is changed by the very fact that Morison J. made the findings that he did.

57. I do not accept that argument. The findings of Morison J. to which the owners' refer are not findings of facts of which the owners can claim to have been unaware, still less which they can say they could not with reasonable diligence have discovered. Morison J. was acceding to the owners' own contentions in this part of his judgment.

58. Mr. Zaiwalla submits that Mr. Moustakas will be an important witness for the owners in the remaining stages of the reference. I am prepared to proceed on that assumption. I shall say nothing about the importance of his evidence about issues of quantum because there is dispute about this and the information before me is limited and because in these circumstances I would not wish to express views about something the tribunal will have to consider in due course. However, it is more clearly the case, I think, that his evidence would probably be necessary if the owners are given permission to amend their pleadings. It might be said that in these circumstances it is premature to regard him as a relevant witness before the application for permission to amend is determined, but if Mr. Moustakas would be a significant witness for determining the merits of the allegations which would be introduced by the proposed amendment and there would therefore be a proper objection to the two arbitrators continuing if the amendment were made, there would equally by proper grounds to object to the two arbitrators determining the application for permission to amend. They could not properly be party to deciding the application if their own position as arbitrators depended, or might depend, on their decision.

59. Any objection to the two arbitrators continuing with the reference because Mr. Moustakas will be a witness would not be on the basis of any involvement that they themselves have had with Mr. Moustakas. It could only be made on the basis that there was a risk that they would be other than impartial because they have been influenced by discussions that they had with Mr. Matthews. It seems to me that this suggestion would be fanciful. The question is one of apparent bias, not actual bias, but it is to be considered against the background that Mr. Matthews stated during the hearing that he recalled nothing relating to the previous case that gave rise to any doubt in his mind as to the propriety of Mr. Moustakas' conduct, and there is no suggestion that that was not the case. This being so, I cannot accept that a fair minded and informed observer would conclude that there was any real possibility that there have been discussions between Mr. Matthews and the two arbitrators that might improperly influence their assessment of Mr. Moustakas' evidence or detract from their impartiality.

60. However that may be, the owners were aware of these matters well before 29 December 2005. They have lost the right to raise any objection of bias on this basis.

61. Similarly it seems to me that the owners have lost the right to raise objections based upon the way that the section 68 application proceeded. They knew by the end of the hearing on 18 November 2005:

> i) That two arbitrators had taken the view in October 2004 that there was no good reason that Mr. Matthews should recuse himself.
>
> ii) What representations had been made by the two arbitrators to the Court.
>
> iii) The position taken by the parties with regard to paying the arbitrators' costs and the decision of Morison J.

I should add that to my mind the fair minded and informed observer would in any case not have seen here any reason to think that there is a real risk that the arbitrators might be improperly influenced by these matters.

62. The arbitrators did not comment on Mr. Matthews' letter of 29 November 2005. I am not able to see how this could, in any significant sense, indicate that they “acquiesced” or endorsed what Mr. Matthews wrote. On the contrary, I consider that a fair minded and informed observer would see this as the proper and sensible conduct of one who did not wish to become embroiled in the controversy. But again, the owners did not make their objection to the arbitrators continuing to act for another month, and they cannot be said to have raised this “forthwith” as a basis for objecting to the two arbitrators continuing.

63. Even if, contrary to my view, the matters that I have mentioned would otherwise give rise to justified doubts about the impartiality of the two arbitrators, I consider that section 73 of the 1996 Act prevents the owners from complaining about them. (Mr. Croall does not contend that any argument of common law waiver provides them with any additional argument of any significance, and I need say no more about that.)

64. The owners' application therefore depends upon developments since 29 December 2005, but the significance of those matters is to be assessed against the background of the owners' complaints to which I have referred. The real question is not whether any complaint by the owners taken in isolation gives rise to apparent bias, but whether, looking at the position overall and assign the owners' grounds for concern cumulatively, there are justifiable doubts about the impartiality of the two arbitrators. If therefore developments since 29 December 2005 significantly contribute to such doubts, it would be wrong to ignore the earlier history when assessing them.

65. However, I do not consider that the owners' remaining complaints could possibly contribute to a fair minded observer thinking that there is any realistic risk that the two arbitrators would be biased.

> i) As for the observation that they have not resigned the reference and have not given reasons to do so, this, as I see it, adds nothing to the owners' other complaints. If those other complaints properly require the two arbitrators to resign for apparent bias, they should have resigned and should be removed. Otherwise, they properly declined to stand down, and are not obliged to justify their decision.
>
> ii) As for the exchanges about who might be appointed as a third arbitrator to replace Mr. Matthews, I have already said that I see nothing improper or unreasonable in the position adopted by the two arbitrators, and nothing that begins to suggest bias on their part.
>
> iii) As for the conversation that Mr. Zaiwalla had, as the owners allege, with Mr. Wisdom, this in itself (as Mr. Zaiwalla properly and fairly acknowledged) cannot be a ground for removing the arbitrators or attributing to them actual or apparent bias. If the remarks were made by Mr. Wisdom, they are simply his views about how the two arbitrators might (or would) respond to the history of this reference and they are views which I do not share.

66. I therefore reject the contention that circumstances exist that give rise to justifiable doubts as to the impartiality of Mr. Harris and Mr. Scott or either of them, and conclude that the court has no jurisdiction on that or any other basis to remove either or both of them under section 24 of the 1996 Act. The application is therefore dismissed.