

CHARTERED INSTITUTE OF ARBITRATORS

LONDON BRANCH

WEDNESDAY 22 JUNE 2005 @ 6.00pm

PROPERTY ARBITRATION

JIM COTTER

CONFLICTS OF INTEREST

The Arbitration Act 1996

Section 1 of the 1996 Arbitration Act sets out the principles on which the provisions of Part 1 of the Arbitration Act are founded and the first of those principles is that

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

So not surprisingly, impartiality, the lack of any bias, and the lack of any conflict of interest are vital attributes of any arbitrator.

You may well have read on to section 24 of the Act which sets out grounds upon which a party is entitled to apply to the Court for an order removing the arbitrator. The first of these grounds in Subsection 1(a) is that

“circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality”.

Natural Justice

We hardly need the Arbitration Act to tell us all this. It is one of the cardinal rules of natural justice that everyone is entitled to a fair hearing by an impartial tribunal. That right is also guaranteed by the European Convention on Human Rights.

What this means is that the Judge in any case must decide the case without fear or favour, affection or ill will, and in short without partiality or prejudice.

Pinochet

The whole area of conflicts of interest has been a hot topic in recent years.

Perhaps most famously we had the Pinochet case in the House of Lords. You will recall that senator Pinochet had been the Chilean head of state for 17 years or so, and that while he was in the UK for medical treatment Spain issued international warrants for his arrest, so that he could be extradited to stand trial on various abuse of human rights charges, including murder, torture and hostage-taking.

Pinochet applied to have those warrants quashed in the UK Courts, and one of the grounds he relied on was that, under international law, he was immune from arrest on charges relating to acts committed whilst he was the head of state - a sort of diplomatic immunity.

Pinochet ended up before the House of Lords, but before the main hearing the human rights group, Amnesty International, successfully applied for permission to intervene in the proceedings - essentially to argue against Pinochet and in favour of his arrest and extradition.

Among the five Lords of Appeal who dealt with the main hearing was Lord Hoffmann. By a 3-2 majority the House of Lords dismissed Pinochet’s appeal. One of the three Law Lords who contributed to the majority decision was Lord Hoffmann.

Shortly afterwards Pinochet’s advisers discovered that Lord Hoffmann, while not a member of Amnesty International, was a director, indeed the Chairman, of Amnesty International Charity Limited - which had obvious close associations with Amnesty International.

So Pinochet then made a highly unusual application to the House of Lords, asking the House of Lords to set aside the earlier decision to which Lord Hoffmann had been a party on the grounds that, while there was no suggestion that there had been any actual bias on Lord Hoffmann's part, his connection with Amnesty International, effectively a party to the proceedings, was enough to create the impression of possible bias. I think for today's purposes we can loosely at least equate bias with a conflict of interest.

As I have said

- (1) it is one of the cardinal rules of natural justice that everyone is entitled to a fair hearing by an impartial tribunal;
- (2) this means that the Judge in any case must decide the case without fear or favour, affection or ill will, and without partiality or prejudice.

In the Pinochet case there was no suggestion that there had been any actual bias on the part of Lord Hoffmann, but the majority decision to which he had been a party was in fact set aside - and this was on the basis that the case fell within the category of cases where the Judge is automatically disqualified, by reason of his interest in the outcome of the case.

First rule – automatic disqualification if directly interested

So rule no. 1 is that where the Judge is shown to have an interest in the outcome of a case, he is automatically disqualified from deciding that case. The most extreme example is a case where a Judge decides a case to which he is a party - obviously quite ludicrous. The rule also extends though to cases where the Judge has a financial or proprietary interest in the outcome of the case - for example if he owns shares in a company which is a party to a case which he is called upon to decide.

The Pinochet case established that the Judge need not necessarily have a financial or proprietary interest in order to be disqualified - it was enough in the Pinochet case that the House of Lords' decision would lead to the promotion of a cause in which Lord Hoffmann was involved along with Amnesty International - a party to the proceedings which he decided.

It all boils down to the old maxim that "justice must not only be done, it must be seen to be done".

Second rule – possibility of bias

A little while later the Court of Appeal decided several cases at the same time concerning bias or conflict of interest. The lead case was called *Locabail (UK) limited v Bayfield Properties Limited*.

I will not burden you with the detailed facts of any of those cases but the Court of Appeal's judgment as a whole provided very useful guidance on situations where a Judge or other tribunal could be required to stand down, or its judgment or decision could be set aside, where it is shown, not that the Judge has any financial or similar interest in the outcome of the case, but that there is a real danger - by which is meant a real possibility, as opposed to probability - of bias.

This second category of cases we are now considering is not those in which the Judge (or arbitrator) is automatically disqualified from deciding, but cases where it proved that there is a real possibility that a reasonable person - in whose shoes the Court stands - would harbour doubts that the Judge is impartial, because for example the Judge has a personal friendship with, or animosity towards, one of the parties to the case; or if it can be proved that the Judge is a personal friend of, or has got it in for, any member of the public who is involved in the case; or it is proved that, on a particular issue in the case, the Judge has some prejudice or predisposition which results in there being a real possibility that

he will decide that issue in accordance with that prejudice or predisposition, and not in accordance with the merits of the case.

There are some further principles which emerge from the cases which are particularly relevant for today's purposes.

Tribunal's own views are irrelevant

The first is that the Judge's or tribunal's own views as to whether or not he or she is biased are irrelevant. What this means is that the Judge or arbitrator as the case may cannot say to the parties "well I'm quite satisfied that I'm capable of deciding this case impartially" - and just press on. That question has to be answered by another Judge who stands in the shoes of, and reflects the views of an ordinary reasonable person.

Tenuous or frivolous allegations

Secondly it is clear that while this rule of natural justice that every party is entitled to an impartial Judge or tribunal is quite sacrosanct, and that if there is any reasonable doubt as to whether or not the Judge in question might be biased, that doubt will be resolved in favour of the Judge standing down, it is also clear that tenuous or frivolous allegations that the Judge is not impartial will not get very far - say, for example, it is shown that a Judge who is deciding a case to which, say, ICI is a party, has a beneficial interest under a trust, and that the trust holds just 10 shares in ICI. Any suggestion that a reasonable person would consider that there is a real possibility that the Judge would be biased in favour of ICI is likely to get very short shrift.

Waiver of right to object

Thirdly and quite importantly it is clear that if the parties to the dispute in question are aware of the facts which would otherwise give them a right to have the Judge removed on the grounds of bias, and they expressly consent to the Judge carrying on with the case nonetheless, or if they otherwise waive their right to make any objection, there is no problem about the Judge carrying on in those circumstances.

Save & Prosper v Homebase

The last case to mention is Save & Prosper Pensions v Homebase Limited and I am particularly happy to mention this case because my firm acted for Save & Prosper.

The Save & Prosper case concerned a rent review, and the rent review clause provided for the open market rent to be determined by an arbitrator in the absence of agreement. The review clause also provided for the arbitrator to be appointed by the president of the RICS if the parties could not agree upon an arbitrator.

The parties were unable to agree upon an arbitrator so an application was duly made to the president of the RICS.

The arbitrator eventually appointed was a Mr. Clark. Before appointing Mr. Clark the RICS, in accordance with their standard practice wrote to Mr. Clark asking him, in effect, to disclose any matter which might call his impartiality into question and in particular to disclose any involvement which he or his firm presently had - or had had in the last five years - with the property in question, a nearby property, or a party to the dispute - the parties to the dispute of course being Save & Prosper and Homebase.

The RICS also asked Mr. Clark to confirm that he had made appropriate enquiries in his firm as to these matters.

Mr. Clark wrote back saying that he had made enquiries within his firm and as far as he could reasonably establish he/his firm had had no involvement with the subject property or a nearby property during the past five years. Mr. Clark also quite properly told the RICS that his firm had negotiated the surrender of a lease on behalf of Homebase about six months earlier but added that his firm had only acted infrequently for Homebase and held no current instructions. Mr. Clark also expressed the view that this involvement could not reasonably be considered to create a conflict of interest.

Mr. Clark was duly appointed as arbitrator but subsequently it was discovered that his firm did a significant amount of work for J. Sainsbury Developments Limited. Unfortunately, as it turned out, J. Sainsbury Developments Limited and Homebase had a common parent company.

It has to be said that Mr. Clark himself was not handling any instructions from J. Sainsbury Developments but he was one of three people in his firm's Bristol office. One of his partners in Bristol was dealing with instructions from J. Sainsbury Developments Limited, and the Judge found that those instructions represented a very substantial contribution to the potential turnover of fees in the Bristol office.

When Save & Prosper discovered these facts they invited Mr. Clark to stand down but he refused to do so maintaining that there was no question of him not being impartial and in particular that there was a big difference between acting for one of the parties to the dispute and acting for an associated company.

Save & Prosper then made an application to the Court under Section 24 of the Arbitration Act seeking an order removing Mr. Clark on the basis that the circumstances gave rise to justifiable doubts as to his partiality. Well, to cut a long story short, an order removing Mr. Clark from the arbitration was made.

There are a few particularly important points which emerged from the judgment.

Partners acting for companies associated with a party

The first, is that the Judge of course decided that the fact that Mr. Clark's partner was acting in a big way for a company within the same group of companies, was enough to entitle a reasonable person to conclude that there was a real possibility that Mr. Clark was not impartial.

Conflict search

Secondly the Judge said, in terms, that before accepting an appointment as arbitrator, a partner in a firm of surveyors should conduct a careful conflict search within his firm to establish, not only if his firm has acted for one of the parties to the particular dispute, but also if his firm has acted for any closely associated parties.

Risks inherent in limiting conflict search

Thirdly you might feel a degree of sympathy for Mr. Clark in that he did answer the precise question put to him by the RICS, which was whether or not he or his firm had had any involvement with a party to the dispute - and as I have emphasised already the parties were Save & Prosper and Homebase - but the Judge said that to limit the scope of the conflict search in this way was a dangerous thing to do, as was in fact demonstrated by the outcome of this case.

No answer that it's a small world

Finally, it was recognised that the property world in general is a small world, and that a particular area of practice for example sales and lettings of retail warehouses, is an even smaller world, so that if you want to appoint an arbitrator who has experience and expertise in that area of practice, its going to be unsurprising if some of the candidates for the appointment have acted over the years for parties who are associated with the parties to the present dispute, or with properties near to the subject property. The gist of the discussion before the Court on this point was that if you are going to disqualify everybody who has had experience of that kind you're going to have the devil's own job finding anybody who is actually suitable to deal with the case.

But the answer to that, quite simply, is that it is up to the candidates to make a full and frank disclosure of all dealings with parties or properties which might raise doubts in the mind of a reasonable man as to that candidate's partiality. The chances are - and I hope this was not too much wishful thinking on the part of the Court - that in many cases the parties will take the view that they can be confident that the candidate in question will not in fact have any bias and give their informed consent to his or her appointment.

JIM COTTER
NABARRO NATHANSON
22 JUNE 2005

USEFUL REFERENCES:

1. Dimes v The Proprietors of the Grand Junction Canal (1852) 3HL Cas. 759
2. R v Gough [1993] AC 647.
3. R v Bow Street Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No. 2) [1999] 1 ALL ER 577.
4. Laker Airways Inc. v FLS Aerospace Ltd and Burton [1999] 2 Lloyds Rep 45.
5. Andrew v Bradshaw [2000] BLR 6.
6. Locabail (UK) Ltd v Bayfield Properties Ltd [2000] 1 ALL ER 65.
7. Save & Prosper Pensions Ltd v Homebase Ltd and Peter J.F. Clark [2000] (Chancery Division, 2 March 2000, Unreported).
8. AT & T Corporation v Saudi Cable Co. [2000] 2 Lloyds Rep 127.
9. Arbitration Act: Sections 1(a) and 24(1)(a).

Detailed specialist advice should be sought before taking or refraining from taking any action based on the comments made above, which are only intended to provide a general guide to the subject.