Neutral Citation Number: [2020] EWHC 1373 (Ch)

Case No: BL-2020-000070

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

BUSINESS AND PROPERTY LIST (ChD)

AND IN THE MATTER OF AN ARBITRATION

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28/05/2020

Before:

DEPUTY HIGH COURT JUDGE BRIGGS
(CHIEF ICC JUDGE)

- -

Between:

(1) B **Claimants**
(2) A
and

(1) J
(2) R
(3) A NIGERIAN COMPANY
(4) AN ENGLISH COMPANY
(5) A BVI COMPANY
(6) F

Defendants

- -
- -

MR GIDEON ROSEMAN (instructed by **FOX WILLIAMS LLP**) for the **CLAIMANTS**
MR PAUL SINCLAIR QC (instructed by **BURGESS OKOH SAUNDERS**) for the **FIRST AND SECOND DEFENDANTS**

Hearing dates: 18 May 2020

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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.

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 14.00 on 28 May 2020

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DEPUTY HIGH COURT JUDGE BRIGGS (CHIEF ICC JUDGE)

Deputy High Court Judge Briggs:

Introduction

1. This application arises out of a family dispute. The members of the family are shareholders in several companies. Those companies played no active part in the application although they comprise the third to fifth defendants. The claimants are B (husband of R) and A (their daughter). The participating defendants are J (the son of B and R and sister to A) and R.

2. An agreement was entered into on 24 September 2009 that intended to regulate the affairs of the family members in connection with the third to fifth defendants (the "Agreement"). The family disagrees as to its interpretation and effect.

3. On 6 September 2019 J and R served notice pursuant to section 14(3) of the Arbitration Act 1996 (the "1996 Act") appointing Mr F as arbitrator.

4. The application before the court is that Mr F be removed as arbitrator. It is argued that he will not conduct the arbitration with impartiality. The claimants have nominated several alternative arbitrators. It is accepted that all alternatives are well qualified and independent.

The factual background

5. I am informed that the following is not in dispute. At some point in the last century B and his brothers established a business in Punjab trading in jute, textiles and rice, which later expanded into transportation of various products including wheat, sugar and oil. He moved to London in 1956 and incorporated one of the defendant companies (the "London Company") on 3 July 1968. The business thrived and by the 1970s it had expanded into owning or chartering ships in Nigeria for the transportation of oil. A major change occurred in 1983 when there was an agreement to separate different aspects of the established business. This led to B having control and ownership of the London and Nigerian businesses.

6. On 10 January 1985 a Nigerian company ("the Company") was incorporated for the purpose of the Nigerian business. There are now two Nigerian companies, but nothing turns on that for present purposes. This dispute relates, in most part, to the Company.

B and J were appointed directors and were the only members of the Company. In 1989 B introduced A into the London Company. In 2009 J, by then solely responsible for the Company's trade, threatened to leave the family business. The threatened rupture was followed by an attempt to agree a way forward which in turn resulted in the Agreement. The Agreement is made between the family members and 5 companies. It is signed by each member of the family and witnessed by Mr F and Mr Y and expressed to be governed by English law. It contains a dispute resolution clause naming Mr Y as arbitrator and in the event of his unavailability Mr F.

7. Mr Y had been the Inspector General of the Nigerian Police. He became a friend of the family. After his retirement in 1989 he was appointed chairman of the Company. I infer from his position in the Company, that he worked closely, or at least, with J. J had lived in Nigeria for 12 years in the period 1987 to 1999 and "ran the Nigerian side of the family business". He continued to visit Nigeria on a regular basis thereafter. Mr Y died in 2015.

8. Mr F worked as the family accountant from about 1985. Over time his influence within the family and in the companies was more ubiquitous. He acted in an operational and management capacity in the rice trade, in the supply of fuels to vessels for their consumption by ship to ship transfer and was involved in the Nigerian operations. The evidence of J is that the family businesses did not use written employment contracts. Mr F had worked full-time for the London Company until 2002; in the period 2002 to 2010 he worked part-time. It is not said which entity he was employed by during his part-time employment. The evidence of R is that Mr F "had conduct over the financial aspect of the family business" for over 20 years. J states in his statement that in 2010 Mr F "returned to work" for the London Company and agreed to report directly to J.

9. A letter from solicitors acting for J and R written in September 2019 explains:

"We are instructed that [Mr F] left his initial employment with the family sometime in 2002. We are further instructed that after a number of years away from the business and after several entreaties by both [J] and [B] for his return to the service of the family, he agreed to do so on the basis that unlike the previous circumstances of his

employment, where there was a lack of structure in his reporting obligations, he would only report to the chief executive officer."

10. The status of Mr F's employment in the period 2002 to 2010 is in dispute. Mr Foggo, solicitor instructed by B and A, states in his first witness statement that at the time of the Agreement Mr F was not employed by the family. His evidence carries less weight than that provided by Mr F, J and R. This is because his first witness statement states that "the facts stated in this witness statement are within my own knowledge and are true. Where the facts are based on information or documentation supplied to me, I state the source of my knowledge and believe they are true". This is subject to "where indicated to the contrary or is apparent from the context." Mr Foggo provides no documentation to support his assertion that Mr F was not employed by any of the family entities in 2009. He fails to provide the source of any information or explain what information was supplied to him. His second witness statement seeks to shore-up the first by stating that the source of the factual matters "is obviously the claimants", but that fails to provide a specific source for the truth of the statement under consideration.

11. The evidence given by Mr Foggo and the letter of September 2019 written by solicitors acting for J and R, concerning the status of Mr F's employment during the 8 year period in question, is not easy to reconcile with the witness evidence I have mentioned. It may not be necessary to resolve for all purposes the conflict of evidence. The September 2019 letter did not mention part-time work at all. It may be that if further thought had been given to the issue it could have been less opaque. The best evidence before the court is that Mr F was working part-time at the time of the Agreement as it comes first-hand from J, Mr F and R. Furthermore, there is no denial in the statements of Mr Foggo, that Mr F worked part-time in the period 2002 and 2010. Accordingly, I shall read the expression used by Mr F "returned to work" as meaning "returned to full-time employment" from 2010.

12. Mr F states that in 2009 "issues within the family…started to surface. In this connection [B] requested my help in resolving the issues. I gladly agreed and the 2009 family Agreement came into force. This Agreement was essentially drawn to keep the family together and promote peace and harmony within the family members." J

explains in his first statement that the Agreement was "intended to be legally binding" but "it was not a formal legal agreement drafted carefully with lawyers."

13. It is not for this court to interpret the terms and effect of the Agreement, but I make the following, I hope uncontroversial, observations for the purpose of resolving the removal application. On one reading, the businesses comprising the five companies is referred to as the "group". It is argued that the companies do not comprise a group in the legal sense. That may be correct. The word "group" appears to be used as shorthand: a collective noun. Each family member was to have a 25% holding in each company but the Agreement provided for restrictions on the transfer of shares. There are some internally inconsistent terms, for example B is said to be chairman of the companies, but as noted above Mr Y was chairman of the Company at the time of the Agreement. B was not an appointed director. Another example is that B was to control the finances in each of the family businesses and J was to "exclusively manage and run the affairs of" the Company. It is not in dispute that the family members acted on the Agreement, receiving monthly drawings and sharing profits.

14. B is now in his senior years. There has been some dispute about his mental capacity but for the purpose of this matter it is not in issue. Mr Foggo says that "the current position is that J is in charge… of the partnership's finances, information and staff…"

15. In accordance with the letter referred to in paragraph 9 above J explains in his evidence that the reporting agreement was "essential to establish a hierarchy and reporting structure".

16. It is said that the Agreement was varied in a way material to the outcome of this application, on 4 December 2014. The variation is not a ground relied upon in the part 8 claim form or in the evidence in support, and there has been no application for amendment. Reliance for the variation is placed on a minute of meeting. It is unsigned, does not include representation from any of the group companies and J denies he agreed its content. As there has been no amendment to the application and it is conceded that it cannot bind all the parties, the issue has properly not been advanced. I pass an observation about the purported variation in paragraph 17 below.

17. In 2017 the relationships became strained again and in particular J and A fell out. I need not go into the reasons for the break-down, but animosity spread through the family like fire on dry bracken. J wrote to B by e-mail in July 2017 (copying-in Mr F) stating that he was content with the Agreement (he makes a mistake about the date), insisting B procure an apology from A about things said of him by A, that without an apology he would not "discuss any arbitration with my Chairman" and "given the above it is meaningless who the arbitrator is, although surprising you have changed your mind after agreeing to [Mr F]". The e-mail included the following paragraph: "To put it mildly Mr Chairman, I am disappointed in the discharging of your duties. You are clearly too biased. I regret you have failed the Group as Chairman because you are no longer capable of thinking of the betterment of the Group, only selectively some of its individuals." The date of the e-mail, several years after the purported variation of the Agreement mentioned in paragraph 16 above, and the reference to the change of mind about Mr F as arbitrator, is an indicator that the purported variation in 2014 was not concluded. The agreement to nominate Mr F is likely to be a reference to the Agreement. There is no reference to the variation. An objective reading, taking account of the syntax, is that the change of mind was not several years prior to the e-mail but recent in time because it was "surprising".

18. It is said that by repeatedly referring to B as "chairman" in the July 17 e-mail, J was acknowledging that B was then and remains chairman of the family businesses. This is not a disputed fact for the purpose of this application.

19. In July 2019 solicitors acting for B and A wrote to J:

> "B remains the Chairman of the Group. In 2015 he offered his resignation but, after discussion with other family members, it was not accepted, and the offer of resignation was withdrawn by consent. As Chairman B is entitled to be involved in the running and management of all the Group's business activities. He is entitled to control the Group's finances, and to see all the financial information, in particular, the cashflows and profit and loss statements. In addition, B and A are entitled to information regarding all Group companies as beneficial owners.
>
> We are instructed that in recent years J has failed to provide the requisite information ... Despite several requests from B to J and to Mr F (the Group's accountant)

requesting account information for the quarters ending 31 March 2019 and 30 June 2019, especially in relation to [the Company] … the information has not been provided. This failure to provide the required information is a clear breach of the terms of the 2009 Agreement.

"We enclose a copy of a recent email response from Mr F to B, following a request for information from B. As you will see from the email, Mr F claims that there was a change in the terms of his employment, and he has been instructed not to divulge any company account information to anyone other than to J."

20. The use of the phrase "change in the terms of his employment" is not, and has never been explained in the context of a claim that Mr F was not employed in the period 2002 to 2010. Be that as it may, the letter sought accounting information and the employment contract of Mr F. The e-mail referred to was sent by Mr F on his mobile phone (I shall refer to it as the request e-mail). It reads:

"As per verbal agreement with the CEO, the terms of my return to employment with [the London Company] was that I report directly to the CEO and not the Chairman or any other director. This was the line of command very clearly agreed and the basis of my rejoining the company. Accordingly, for good order's sake and in line with the agreed terms of my employment, I would request you to kindly direct all your queries and requests for information to the CEO for his action."

21. The notice of arbitration was served dated 6 September 2019:

"Disputes have arisen between the parties in relation to the interpretation of various provisions within the Contract and the validity of the same… [J] hereby require those disputes and/or differences to be referred to arbitration pursuant to clause 14 of the Contract…Mr [F] is the only other person entitled to sit as arbitrator."

22. Solicitors acting for B and A wrote on 23 September 2019:

"The arbitration notice is defective in that it identifies Mr [F] as the arbitrator. As you know, Mr [F] is currently employed as the accountant to the partnership / group of companies. By your own admission, he reports only to J. He is also potentially a witness in the dispute. In these circumstances, he is quite clearly unable to act as an

arbitrator. An arbitrator must be genuinely independent of the parties, impartial and not involved in the facts of the dispute in any way. In these circumstances, it is patently obvious that Mr [F] is conflicted and, accordingly, will be unable to discharge his duty to "act fairly and impartially" pursuant to section 33(1)(a) of the Arbitration Act 1996. In addition, Mr [F]'s position necessarily means a fair minded and informed observer would conclude that there is a real possibility of bias (see AT&T v Saudi Cable Co [2000] 2 All ER (Comm) 625). Unless your clients accept this by return, our clients shall make the appropriate application (pursuant to section 24 of the Arbitration Act 1996) to the court to remove Mr [F] and to appoint an independent arbitrator. Given that his unsuitability is so obvious, if our clients have to make such an application, they will seek their costs on an indemnity basis against your clients. Any arbitrator appointed must be a third party who is totally independent of the parties."

23. On 1 November 2019 Mr F sent a resignation letter. I set it out in full as it is said to give rise to a ground for removal:

"The family feud between the directors is getting nastier by the day and the employees unfortunately, and against their wishes, have been drawn into their disagreements, vendettas and personal agendas. Employees have been subjected to constant bullying, fabricated lies and allegations by some directors, for some time now. There has been a history of bullying and intimidation in the company by some directors and still exists to date. This has been a reason for many employees leaving the company in tears in the past. There is also a complete breakdown of hierarchy and reporting structure in the company. The fallout between the directors and the growing discontent and mistrust between them, has left the staff extremely distressed and demoralised. This in turn is having an adverse effect on our mental health and wellbeing. The politics of power and greed between the shareholders is imposing a heavy price on family and personal lives of all members of staff. Some of the staff members have served the company for well over 35 years with honesty, loyalty and sincerity and have discharged their duties and responsibilities diligently, conscientiously and to the best of their abilities. I have never acted on my own but followed orders and instructions of the directors to the letter. After a lot of thought

and deliberation I, no longer wish to be dragged into this family dispute and with great regret, hereby submit my resignation with immediate effect."

24. Shortly after B and A served their notice of arbitration seeking (amongst other things) the removal of F as arbitrator:

"[Mr F] is also unsuitable to be arbitrator because he is or has been until very recently employed by the Third Respondent and/or the Fifth Respondent as an accountant to the Partnership and/or the Corporate Vehicles and/or reports or reported to the First Respondent and is also likely be a witness in the arbitration. Therefore, he will be unable to act as an arbitrator and/or there exists a clear risk that he will be unable to discharge his statutory duty pursuant to section 33(1)(a) of the Arbitration Act 1996 to act fairly and impartially as between the parties."

The legal framework

25. The starting point is that the parties to the Agreement were free to agree on the procedure, number and identity of arbitrators to form the tribunal. They are also free to agree revocation of an appointed arbitrator.

26. The agreement to appoint an arbitrator or arbitrators may nevertheless be challenged on the grounds that the appointed person lacks impartiality. Section 24 of the 1996 Act provides that a removal application is to be made to the court:

" (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

…

and that substantial injustice has been or will be caused to the applicant.

…

(5) The arbitrator concerned is entitled to appear and be heard by the court before it makes any order under this section."

27. The principle of impartiality is clearly stated in the 1996 Act. Section 1(a) provides: "the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expenses".

28. Section 33 of the 1996 Act imposes a general duty on the tribunal:

"(1) The tribunal shall—

(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and

(b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

(2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it."

29. The test for apparent bias was considered in the House of Lords in *R v Gough* [1993] AC 646, where Lord Goff said [640]:

"I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily have been available to an observer in court at the relevant time. Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him . . ."

30. In *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, there was an examination of the question whether the "real danger" test propounded in *R v Gough* might lead to a different result from that which the informed observer would reach on the same facts, and concluded that in the overwhelming majority of cases the application of the two tests would lead to the same outcome.

31. In *re Medicaments and Related Classes of Goods (No 2)* [2001] 1WLR 700 the Master of the Rolls, having taken into account Strasburg jurisprudence, modified the "real danger" finding, on the facts of that case, that a lay judge should be disqualified from adjudicating on the matter in hand. The case required expert evidence and one of the firms that was providing the evidence had offered the lay judge employment. Although the lay judge took steps to reduce "real danger" of bias, the prospect of future employment by a firm providing expert evidence at the trial would lead a fair-minded and informed observer to conclude that there was a real possibility that the judge was biased. The modification of the test was approved by the House of Lords in *Porter v Magill* [2002] 2 AC 357, 494: the court "must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased."

32. Some of the cases I have been taken to illustrate how the courts have dealt with applications of this nature. Perhaps it goes without saying that there will be justifiable doubts as to an arbitrator's impartiality if there is evidence of some form of animosity between a judge and one of the parties to the action: *Howell v Lees-Millais* [2007] EWCA 720 Civ; or if an arbitrator has an interest in the outcome: *Watson v Prager* [1991] 3All ER 487.

33. One issue which is evident in this matter arises because it is claimed that Mr F may be a witness in the arbitration. In *Freeman & Sons v Chester Rural District Council* [1911] 1KB 711 the court found that where the arbitrator was likely to be a witness there was a real possibility or danger that the tribunal would be biased. The dispute that had to be resolved was whether works had been completed to the satisfaction of the engineer (the nominated arbitrator) and whether the period of maintenance had expired. One of the allegations was that part of the sewer constructed by the

contractor was defective. There had been a meeting between the engineer and the contractor when, it was alleged, the engineer had informed them that the whole of the sewer work was defective, and his mind was made up. The engineer denied the material facts. The Master of the Rolls found that the dispute would have to be settled following cross-examination and "it is obviously impossible to allow the arbitrator to be cross-examined by one of the parties to the arbitration."

34. It is probably too simplistic to interpret *Freeman & Sons* as authority for a rule that prohibits, on the ground of apparent bias, an arbitrator from being a witness in the action that he is asked to adjudicate upon. It may be that this is likely to be the case in the majority of cases, but it is not an absolute rule. This is because to remove an arbitrator by court order when the identity of an arbitrator is named in the contract constitutes a clear intrusion into the freedom of contract.

35. The court has, since the 19th Century, adopted a different approach to cases where the parties agree to nominate an identified arbitrator (category 1) and those cases where an arbitrator is not nominated by agreement (category 2). The obvious example of a category 1 case is Freeman & Sons, and category 2 *Howell v Lees-Millais*. The freedom of contract and holding parties to their bargain are features of the first category but the test for apparent or unconscious bias is the same for categories 1 and 2: *AT & T Corp & Anor v Saudi Cable Co* [2000] CLC 1309.

36. This dispute falls within category 1. It is appropriate to visit some of the authorities that deal with this category rather than category 2. The impartiality of an arbitrator was in question in *Jackson v Barry* [1893] 1 Ch 238. The contract was for the construction of a dock and the engineer was named as arbitrator. The dispute resolution clause provided that a dispute between the contractor and the company should be referred to the engineer. The headnote reads that a "dispute arose whether the contract required the interior of a certain embankment to be made of stone, or whether rocky marl was allowable, so that, if the contractor by the direction of the engineer used stone, he would be entitled to be paid for it as an extra. A correspondence took place between the contractor and the engineer, in which the engineer stated his view to be that the contract bound the contractor to use stone, and that it was not an extra. The company then referred the dispute to the arbitration of the engineer. After this reference, and on the day for which the first appointment had been

made, the engineer wrote to the contractor a letter in which he repeated his former view". The matter reached the Court of Appeal where Lindley and Bowen LJJ gave the majority judgment. Lindley LJ explained [245]:

"Now, it is contended by Mr. Jackson, and the learned Judge has acceded to that contention, that the true inference to be drawn from this letter is that Mr. Barry, who was then about to enter upon his duties as arbitrator, had not left his mind open, but had, before hearing the case and before being advised by his legal assessor, so tied himself down by this letter as not to leave it reasonably open to him to depart from the view which he had previously taken and previously expressed."

37. The case was put on the basis that the court should draw an inference from the letter, that the engineer had made up his mind and as a result the arbitration was pre-decided. Lindley LJ proceeded [246]:

"Unless that is so, unless we can draw the inference that the engineer has precluded himself by this letter from keeping his mind open, and from deciding according to the evidence and according to the advice which might be given him, we ought not, in my opinion, to stop this arbitration."

And found that an adverse inference could not be drawn.

38. Bowen LJ recognised the primacy of freedom of contract. He observed [246]:

"It was an essential feature in the contract between the Plaintiff and the railway company that a dispute such as that which has arisen between the Plaintiff and the company's engineer should be finally decided not by a stranger or a wholly unbiassed person but by the company's engineer himself. Technically, the controversy is one between the Plaintiff and the railway company; but, virtually, the engineer, on such an occasion, must be the judge, so to speak, in his own quarrel. Employers find it necessary in their own interests, it seems, to impose such terms on the contractors whose tenders they accept, and the contractors are willing, in order that their tenders should be accepted, to be bound by such terms. It is no part of our duty to approach such curiously-coloured contracts with a desire to upset them or to emancipate the contractor from the burden of a stipulation which, however onerous, it was worth his while to agree to bear. To do so, would be to attempt to dictate to the commercial

world the conditions under which it should carry on its business. To an adjudication in such a peculiar reference, the engineer cannot be expected, nor was it intended, that he should come with a mind free from the human weakness of a preconceived opinion. The perfectly open judgment, the absence of all previously formed or pronounced views, which in an ordinary arbitrator are natural and to be looked for, neither party to the contract proposed to exact from the arbitrator of their choice. They knew well that he possibly or probably must be committed to a prior view of his own, and that he might not be impartial in the ordinary sense of the word. What they relied on was his professional honour, his position, his intelligence; and the contractor certainly had a right to demand that whatever views the engineer might have formed, he would be ready to listen to argument, and, at the last moment, to determine as fairly as he could, after all had been said and heard. The question in the present appeal is, whether the engineer of the company has done anything to unfit himself to act, or render himself incapable of acting, not as an arbitrator without previously formed or even strong views, but as an honest judge of this very special and exceptional kind."

39. Smith LJ, delivering the dissenting judgment, concluded that an adverse inference could be drawn from the letter and the engineer could not be viewed as impartial [251]:

"This letter, in my judgment, enables Mr. Jackson to demonstrate to the Court the real state of mind of Mr. Barry as arbitrator, and it shews that he was not doing his duty—viz., keeping an open mind upon the matters in dispute—and in these circumstances Mr. Jackson is entitled to come to the court for relief."

40. In *Eckersley v The Mersey Docks and Harbour Board* [1894] 2 QB 667 concerned another construction project. The construction contract also contained an arbitration clause naming the engineer as arbitrator. One of the arguments was that there was a probability of bias on the part of the engineer, in favour of the defendants. It was not argued that there was actual bias but an inference should be drawn as the son of the engineer had hoped to succeed his father as engineer to the defendant board, in circumstances where the engineer's son's conduct was an issue in the arbitration. Dealing with the issue of apparent bias Lord Esher, agreeing with the decision in *Jackson v Barry*, said [670]:

> "It is not a sufficient reason to say that he might be biassed, if the Court should be of opinion that there is no ground for supposing that he would be biassed. When the proposition sought to be established on behalf of the plaintiffs is examined, it comes to this, that the disputes ought not to be referred to the engineer because he might be suspected of being biassed, although in truth he would not be biassed. It is an attempt to apply the doctrine which is applied to judges, not merely of the Superior Courts, but to all judges - that, not only must they be not biassed, but that, even though it be demonstrated that they would not be biassed, they ought not to act as judges in a matter where the circumstances are such that people - not necessarily reasonable people, but many people - would suspect them of being biassed. Is that a rule which can be applied to such contracts as this, where, as between the contractor and his principal, both parties agree that the chief servant of one of them shall be the arbitrator? If it was not for the agreement of the parties - if the rule applicable to judges were to be applied - it is obvious that it would be impossible to say that the engineer, under whose superintendence the work has to be done, could act as arbitrator, because some persons would suspect him of being biassed in favour of the parties whose servant he was. But that cannot be the case here, because both parties have agreed that the engineer, though he might be so suspected, shall be the arbitrator. A stronger case than that must, therefore, be shewn. It must, in my opinion, be shewn, if not that he would be biassed, that at least there is a probability that he would be biassed."

41. Lopes LJ said [673] that: "where the parties choose their own tribunal" they are accepting the arbitrator's "own competency, care and caution" and that the arbitrator is to adjudicate on matters in which he has an interest. Agreeing Davey L.J. acknowledged that there was a tension between freedom of contract and a failure of apparent impartiality. Giving primacy to freedom of contract he said [673]: "No doubt in a certain sense the engineer will be the judge of his own conduct, and no doubt that is a position which, prima facie, raises some surprise in a judicial mind; but that is the contract of the parties."

42. The House of Lords considered a category 1 case in *Bristol Corporation v John Aird* [1913] AC 241 which concerned a dispute during the construction of the Avonmouth docks near Bristol. It is an important case for the purpose of this dispute. In June 1902

a verbal agreement was made between the named arbitrator (the engineer) and John Aird relating to payments for rubble required to fill certain embankments at the docks. The stone used to fill the embankments needed to be calculated for the purpose of pricing and they agreed a mechanism for conversion of weight into volume. The volume of rubble should be calculated from the weight and payments made in accordance with the weight.

43. In July 1902 there was an agreement was reached about the measure of stone. These were known as factors of conversion. In July 1903 the contractors were authorised by the engineer to use quarry rubbish from the same approved quarries, in addition to the agreed stone measures. In 1909 the engineer refused to allow payment based on the agreed measures owing to the unreliability of volume calculations due to the introduction of the quarry rubbish. Two issues arose. The second issue was whether the measures agreed in 1902 applied. It was argued that the engineer decided to increase the space to be filled (increasing the space between monoliths) and in 1905 had verbally agreed to allow a price per cube yard which would be fixed later.

44. The case is the highest authority for the proposition that an arbitrator cannot be "a judge and witness". Lord Atkinson found that the real contention between the parties was the measure to be applied to the different "kinds of stuff" and that in order to resolve the dispute the engineer would have to give evidence "on an important point". Lord Shaw explained that the contract relied upon by the engineer was verbal and there was a dispute about its very existence that only cross examination would resolve. This would inevitably lead to the judge appearing as his own witness [254]: "be examined and cross-examined, and pronounce judgment upon his own memory, credibility and evidence. Such a thing is a traverse of all ideas of judicial decorum." Lord Parker agreed finding that an arbitrator in category 1 would be disqualified where [260] "if there be a bona fide dispute involving substantial sums and a probable conflict of evidence on matters as to which the arbitrator himself will in the normal course be the principal witness on one side."

45. That does not detract from a more general proposition spoken of by Lord Atkinson that [247]: "if a contractor chooses to enter into a contract binding him to submit the disputes which necessarily arise, to a great extent between him and the engineer of the persons with whom he contracts, to the arbitrament of that engineer, then he must be

held to his contract." Lord Moulton explained [258]: "There may be something in the arbitrator which makes him an unfit person to be judge in the matter. It may be his personal conduct; it may be the position in which his actions have placed him. The court is bound to consider all these things; but in considering them it ought to hold that nothing known at the time of the contract, nothing fairly to be expected from the position of the engineer when he becomes arbitrator, can be alleged as a ground why it should not keep the parties to the bargain, because those things must be supposed to have been in their contemplation at the time when they entered into the contract." Lord Parker did not disagree saying [260] "It will certainly not be enough to allege that the arbitrator is not an independent person if the parties with knowledge that this is so have nevertheless agreed to accept him as arbitrator."

46. A few years later the same outcome was reached in *McLean v Workers Union* [1929] 1 Ch 602 giving primacy to the freedom of contract. Having said that a tribunal is bound to act strictly according to its rules and under an obligation to act honestly and in good faith, Maugham J observed [623]: "it seems to me reasonably clear that the matter can only depend on contract express or implied".

Discussion and conclusion

47. The letter written by solicitors acting on behalf of B and A dated 23 September 2019 followed by their notice of arbitration in November 2019 objects to the appointment of Mr F. No distinction is drawn between a category 1 and category 2 case. No actual bias is claimed. It is not claimed that Mr F has a personal interest in the outcome of the arbitration. It has not been argued that he has an indirect interest.

48. The witness statement in support (the first witness statement of Mr Foggo) provides eight grounds for claiming that if Mr F is arbitrator, his clients will be unable to obtain a fair resolution of disputes by an impartial tribunal. Many of the grounds overlap. They are all aimed at the conduct of Mr F and include:

    i) The terms upon of his employment from 2010 are not transparent;

    ii) That he has demonstrated partiality because he refused to provide financial information directly to B and A when requested (by the e-mail request);

iii) If an account of profits is ordered the employees (including Mr F) will be witnesses of fact; and

iv) He will be a witness in connection with the alleged breaches by J of the Agreement.

49. In his second witness statement Mr Foggo candidly states "Ultimately, the content of [Mr F's] resignation letter in itself justifies his removal as arbitrator". The reason for this, he says, is that the letter provides evidence of bias: "[Mr F] cannot accuse the Claimants of dishonesty, for staff leaving the business, the breakdown of the working relationships and of causing harm to his mental health and well being and yet contend he is not conflicted and able to act fairly and impartially."

50. In his skeleton argument Mr Roseman for the defendants, repeats the grounds advanced by Mr Foggo in his witness statements, and breaks new ground. He argues that there are justifiable doubts as to the impartiality of Mr F because he was recently an employee and there is reason to believe his resignation is merely a sham designed to enhance J's resistance to the removal application. It does not seem to acknowledge that the nomination of Mr F in the Agreement was made knowing of his intimate knowledge of the family and the various businesses.

51. This new ground does not form part of the application. A further ground is added in the skeleton argument. It is said that the letter of resignation raises a real prospect that Mr F will bring a claim for constructive dismissal. It is said that the letter has the hallmarks for such a claim and if made he would have a direct conflict between his own interests and the interests of parties to the arbitration, in which he would be the arbitrator.

52. I observe that over 6 months has now passed since the letter of resignation and Mr F has not made a claim for constructive dismissal in the employment tribunal. He has not intimated a claim of any nature whatsoever.

53. The essence of the argument is that the letter of resignation makes a series of allegations, and the timing of the letter, within 2 weeks of solicitors acting for J and R refusing to provide information about Mr F's employment, raises the alarm that the resignation has more to it than meets the eye. In many ways the submission is

astonishing, for it lacks any supporting evidence and relies on mere timing and the content of the letter.

54. As to the meaning of "sham" reference should be made to *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786, where Diplock LJ said at 802:

"But one thing, I think, is clear in legal principle, morality and the authorities, that for acts or documents to be a "sham", with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating."

55. I have used the term astonishing because there is no suggestion of a common intention and the argument does not sit well with the argument that Mr F is setting himself up for a claim for constructive dismissal. The constructive dismissal argument has the curious effect of neutralising the argument that Mr F's resignation was a sham. Despite the apparent inconsistencies of the arguments advanced there is no evidence that the letter of resignation was intended to give to third parties or to the court the appearance of resignation when in fact there was no resignation. In my judgment the arguments of sham and constructive dismissal lacked conviction and have the appearance of having been concocted to raise a suspicion of unconscious bias.

56. The court must look at the circumstances in the round and objectively assess whether there is any substance to the claims or arguments advanced. In my judgment there is no substance. In my judgment the prospect of a late claim for constructive dismissal and the limp argument of a sham based on the letter of resignation, do not lead to an inference that Mr F has precluded himself from keeping his mind open. His witness statement in this proceeding points in the opposite direction.

57. The argument that the terms of Mr F's employment from 2010 are important because they form part of the arbitration dispute is not convincing. This is perhaps because the terms of his employment have nothing obvious to do with the family dispute. A manufactured problem has been advanced in an attempt to connect the terms of employment of Mr F to the Agreement: whether J, in breach of the Agreement, entered into a contract with Mr F, which had the effect of disregarding B's status as

chairman and permitting Mr F to ignore B's requests for financial information and to only report to J.

58. There is no express term in the Agreement that requires any employee of any family business to report direct to B. There is no term in the Agreement that prohibits J from entering into contracts as agent of the Company without approval of B, and no term that forbids the Company employing personnel without obtaining in advance the approval of B as to the terms of such employment. It is hard to understand the argument that by reason of the Company employing Mr F full-time since 2010, by agreeing with Mr F a chain of reporting command (neither of which appears to breach the terms of the Agreement), Mr F is disqualified from acting as arbitrator having been nominated by B in 2009. The failure to comply with any request to disclose employment contract details rests with Company and not an employee of the Company. Ultimately any fault lies with the managing director, J. These incidents provide no reason to infer doubt as to Mr F's impartiality. Mr Sinclair QC described the grounds advanced by B and A as "trivial". I agree with this description, or to use the term used by the Master of the Rolls in *AT & T Corp & Anor*, it is no more than "incidental".

59. I have mentioned that many of the grounds for removal overlap. The overlap concerns Mr F's employment contract. Mr Roseman argues that there is a real dispute between Mr F on one side and B and A on the other concerning his contract of employment, how he communicated with B when a request for financial information was made and how B terminated his employment. I have touched upon the alleged dispute above, but in deference to Mr Roseman I deal with it in more detail now since it formed the focus of argument. First there is little doubt that if a dispute arises between one of the parties and the proposed arbitrator, reasonable doubt will generally (but not always) be cast on his ability to be impartial.

60. The alleged dispute concerns the failure of Mr F to provide financial information of the Company requested by B. In support of the dispute is the e-mail request. The task for the court is to ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, that the tribunal will be biased.

61. Mr Roseman argues that this gives rise to a dispute that is more obvious, more extreme and of greater significance than the one considered by the courts in *Howell v Lees-Millais*. He argues that Mr F will have to be a witness in the arbitration. He will need to give evidence as to the terms of his employment. In my judgment this is putting the matter too high.

62. The facts in *Howell v Lees-Millais* were somewhat unusual. A series of e-mail exchanges demonstrated that the judge was disappointed with the outcome of discussion between a partner of a law firm and himself about future employment. Soon after the law firm represented a party in a Beddoe application. A transcript of the hearing demonstrated that the judge had taken it upon himself to cross-examine a witness. An exchange with counsel was described by the Master of the Rolls to be "intemperate". The combination of cross-examining the witness, the intemperate manner and things said in the exchange provided evidence that there was a real possibility that the judge was biased against the law firm.

63. In common with many of the arguments in this matter it has not been explained how the e-mail request sent by Mr F provides a more extreme example of apparent bias. In my judgment the opposite is true. The e-mail is well tempered and merely asks that any inquiry be directed to the Company's management and not an employee. It provides transparency by giving the reason for the referral to J. The exchange is short. I have mentioned that the Agreement does not contain a provision that Mr F or any employee of the Company should report directly to B. As Mr F has been transparent about the reason why he referred B to J for the financial information, it is not clear why Mr F would have to give evidence about his employment contract. Neither is it clear why J could not give the evidence if it turns out to be an issue, but given that the arbitration is about the terms and effect of the Agreement this is highly unlikely.

64. In order to demonstrate a danger of bias B and A have argued that the failure of Mr F to provide the financial information raises a dispute. It is not easy to understand where the parties disagree. It is not B's case that Mr F must report to him. There is no disagreement between Mr F and B regarding entitlement to the Company's financial information. If J has refused to provide the information there may be a dispute as to entitlement, or the reason why the request was denied on this occasion. That dispute

will be resolved by interpreting the terms of the Agreement. The conduct of Mr F is not the issue in dispute.

65. Reliance is made on the letter of resignation. It is hard to identify any reason why the letter raises a dispute between Mr F and B and A. It is argued that certain passages in the letter should be read as if referring to B and A exclusively. Intemperate is a description that could be used to describe the letter or e-mail sent by J to B in July 2017, but such a description does not apply to the letter of resignation. The letter does not level any allegation at any one director or shareholder. It describes disagreement between the "directors" and disappointment at the "family feud".

66. It is said that the letter is "obviously" about B and A. It is not obvious. The letter speaks for itself. There is, in my judgment, no need to read into the letter things not said. The use of the noun "directors" in the letter, I take as deliberate. If Mr F had wanted to name individuals he could have done so. He did not. I am asked to infer that a combination of the letter of resignation and the request e-mail discussed (followed by a letter from the solicitor acting for J) would lead a fair-minded and informed observer to conclude that there was a real possibility that Mr F will be biased. Taken individually or together the communications from Mr F cannot be described in the manner contended for by Mr Roseman. There is no reason or good reason why an inference of bias or a real possibility of bias should be drawn from these communications. I do not make that inference.

67. It is said that J's reason for issuing the notice of arbitration was the request by Mr F that B ask J for financial information. This is a "clutching at straws" assertion. There is no evidence to support it. J does not state in his evidence that the request made by Mr F led him to issue the arbitration notice

68. Given the family history, and the capacity for disagreement between J and B, it is highly improbable that the e-mail request would lead to arbitration. It is accepted that one of the reasons for the Agreement was to reduce friction in the family and the e-mail from J to B in July 2017 is evidence of conflict stretching back in time. The letter dated July 2019 from solicitors acting for B and A to J lends further support for a conclusion that Mr F was not the catalyst for the notice of arbitration. Not only is it

highly improbable that the request made by Mr F was the catalyst for the arbitration, but an analysis of the available evidence strongly supports a different conclusion.

69. In any event the claim that there is a justifiable doubt as to Mr F's impartiality because his actions triggered the arbitration notice is unsustainable. Even if J had decided to issue the notice of arbitration because of the e-mail request, there is no connection between that event and apparent bias. In all the circumstances, this ground does not give rise to justifiable doubt and I reject the attempt to connect the e-mail request as a reason to find a real possibility of bias.

70. It is said that there have been secret conversations between Mr F and J. I detect the fallacy of the argument was recognised by Mr Roseman once he received the skeleton argument of Mr Sinclair. The matter was not advanced with any conviction. The only conversations relied on appear to be in respect of Mr F providing evidence for this hearing. This is entirely proper and appropriate. It is not argued otherwise.

71. In so far as there are other arguments that Mr F should be disqualified as he is likely to be a witness in the arbitration, I comment that there is no rule that Mr F, in a category 1 arbitration, cannot give evidence. There is no suggestion that any evidence (that I have not specifically dealt with) he may give will be on an important point or in his own cause. The fact that he has an intimate knowledge of the parties' conduct and financial matters is one of the reasons for his nomination in the Agreement. It was why Mr Y was chosen as arbitrator. It is not part of this application that the nominated arbitrators did not have an intimate understanding of the family businesses at the time of the Agreement; that Mr F's intimate knowledge was not to be expected. It must be fairly supposed that his long relationship with the family, his connection with the Agreement, knowledge of the dispute between family members prior to 2009, knowledge of the various businesses by reason of his full-time and part-time employment must have been in their contemplation at the time when they entered into the Agreement. The parties were able to nominate an independent arbitrator with no knowledge of the businesses, but chose not to do so.

72. In reaching my conclusions I am mindful that there is no evidence that Mr F would in fact be biased. The claim form, evidence in support, skeleton argument and oral argument focused on apparent bias asking the court to make inferences. I agree with

the submission of Mr Sinclair that it is insufficient to raise general observations or allegations concerning appearances. These may have had more salience if this was a category 2 matter: where Mr F had not been expressly nominated by the parties.

73. The failure to succeed on this application will not prevent B and A making an application to court if Mr F in fact acts in such a way that demonstrates that he is biased but at present there are no grounds for reaching a conclusion that there is a real danger that he will be biased or that there is doubt as to his impartiality.

74. The parties are invited to agree an order.