

Justifiable doubts – Arbitrator removal under s.24(1)(a) of the Arbitration Act 1996*

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Justice must “*not only be done, but should manifestly and undoubtedly be seen to be done*”¹. The recent English case of *Sierra Fishing Company & Ors v Farran & Ors* [2015] EWHC 140 (Comm) illustrates the judicial reasoning applicable to applications to remove an arbitrator under s. 24 of the Arbitration Act 1996 (the “Act”) on the basis of justifiable doubts in respect of impartiality.

Grounds to challenge

In *Sierra Fishing Company*, the Court considered whether connections between an arbitrator and one of the parties to the proceedings were such that his removal was justified. The claimants, whose challenge on the basis of lack of impartiality had been rejected by the Arbitrator, sought his removal on the basis that “*circumstances exist that give rise to justifiable doubts as to his impartiality*”, in accordance with s. 24(1)(a) of the Act.

The claimants relied on connections of a legal and business nature between the arbitrator and the First Defendant, involvement by the arbitrator in the drafting and negotiation of agreements that formed the subject matter of the arbitration, concerns about the connection between the arbitrator and counsel to one of the parties and the manner in which the arbitrator conducted the reference. In particular, the claimants considered that the arbitrator’s conduct of the reference indicated that he was too personally involved in the issue of his impartiality and the determination of his jurisdiction to guarantee the objectivity necessarily required to determine the merits.

The Court was also tasked with determining whether the claimants had lost the right to object to an irregularity (it being common ground that the circumstances leading to the s.24 application were an irregularity affecting the proceedings or the tribunal) under s. 73(1) of the Act, on the basis that they continued to participate in the arbitration without objecting forthwith, in circumstances where they knew or could with reasonable diligence have discovered the grounds for the objection raised.

Determining bias

Applying the common law test identified in *Porter v Magill* [2002] AC 357, the Court determined that “*the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased*”². In so deciding, the Court was assisted by the IBA Guidelines on Conflicts of Interest in International Arbitration (the “IBA Guidelines”). A number of the connections identified were listed in the Waivable Red List.

Addressing each set of circumstances that had been determined to give rise to justifiable doubts, the Court considered the steps taken by the claimants, finding that they had not failed to object.

Disclosing connections

With reference to General Principle 3 of the IBA Guidelines, the Court recognised that it was the arbitrator’s duty to voluntarily disclose connections known to him that may raise justifiable doubts in respect of his impartiality – a duty that was not obviated by due diligence that the parties could have taken to identify such connections. The position of the English courts in this regard is clear.

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¹ Lord Hewart CJ in *R v Sussex Justices ex parte McCarthy* [1924] 1 K.B. 256

² Per Lord Hope at 103