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# CASE AND COMMENT

## WHO KNOWS WHAT WHEN? APPARENT BIAS AND ARBITRATION

THE growth of alternative dispute resolution, and arbitration in particular, has changed the legal industry and shifted the focus of disputes, at least to some extent, away from the courts. Yet the courts retain a role in guarding the arbitral process. That role could scarcely be more important than in ensuring that an arbitrator is untainted by bias, whether apparent or real.

The Supreme Court, in *Halliburton Company v Chubb Bermuda Insurance Ltd. (formerly known as Ace Bermuda Insurance Ltd.)* [2020] UKSC 48 ("*Halliburton*"), has given guidance on bias and arbitration, which proves illuminating from the perspective of both arbitration and broader public law concerns regarding *nemo iudex in causa sua*.

BP Exploration and Production Inc ("BP") leased the Deepwater Horizon drilling rig from the owners, Transocean Holdings LLC ("Transocean"). Halliburton Company ("Halliburton") provided cementing and well-monitoring services to BP. Halliburton had entered into a liability insurance policy with Chubb Bermuda Insurance Co. ("Chubb"). Transocean also had a policy of insurance with Chubb.

There was an explosion and fire on the Deepwater Horizon drilling rig. Numerous claims were made against BP, Halliburton and Transocean; the private claims were pursued through a Plaintiffs' Steering Committee ("PSC") in the US. Halliburton settled the PSC claims before judgment on liability; following the liability judgment, Transocean also settled the PSC claims. Both Halliburton and Transocean sought indemnification from Chubb, which refused cover broadly on the basis that the settlements were not reasonable.

Both insurance policies contained arbitration clauses, which provided for arbitration in London by a tribunal of three arbitrators (one chosen by each party and the third by the two party-appointed arbitrators, with the High Court in London to appoint the third arbitrator in the eventuality the



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party-appointed arbitrators could not agree). Halliburton invoked the arbitration clause. The party-appointed arbitrators could not agree on a third arbitrator, so Flaux J., on 12 June 2015, appointed Mr. Rokison Q.C. Halliburton served its statement of claim on 18 September 2015 and Chubb served its statement of defence on 11 December 2015.

Both the Halliburton and Transocean arbitrations concerned similar substantive issues regarding the reasonableness of the settlements. Separately, in December 2015, Mr. Rokison accepted an appointment as an arbitrator by Chubb in relation to an arbitration pursued by Transocean against Chubb. Mr. Rokison disclosed to Transocean his appointment in the Halliburton arbitration, who did not object. However, Mr. Rokison did not disclose his proposed appointment by Chubb in the Transocean arbitration to Halliburton.

Halliburton discovered Mr. Rokison's appointment in the Transocean arbitration (and in a further arbitration involving Transocean arising out of the Deepwater Horizon disaster), and called upon Mr. Rokison to resign. Chubb did not agree that Mr. Rokison should resign. Halliburton issued a claim form on 21 December 2016 seeking an order from the High Court under section 24(1)(a) of the Arbitration Act 1996 ("the 1996 Act") to remove Mr. Rokison as arbitrator on the basis of section 33(1)(a) of the 1996 Act, which provides that the arbitral tribunal shall "*act fairly and impartially as between the parties*" to the arbitration.

The arbitral tribunal in the Transocean arbitration found, on 1 March 2017, on a preliminary issue that was not raised in the Halliburton arbitration, that Chubb was not on cover. This brought the Transocean arbitration to an end without the arbitral tribunal having to consider the reasonableness of Transocean's settlement of the PSC claims. On 5 December 2017 the arbitral tribunal in the Halliburton arbitration decided the merits in Chubb's favour.

On 3 February 2017, Popplewell J. dismissed Halliburton's application: [2017] EWHC 137 (Comm), [2017] 1 W.L.R. 2280. The Court of Appeal dismissed Halliburton's appeal on 19 April 2018: [2018] EWCA Civ 817, [2018] 1 W.L.R. 3361. Halliburton proceeded to the Supreme Court.

The Supreme Court unanimously found against Halliburton, with judgments by Lord Hodge (with whom Lord Reed, Lady Black, and Lord Lloyd-Jones agreed) and Lady Arden.

Actual bias was not alleged, and so Lord Hodge focused on apparent bias. Lord Hodge noted that the duty of impartiality is cardinal in both arbitral and judicial proceedings (at [49], [55] and [63]). Citing the famous speech of Lord Hope of Craighead in *Porter v Magill* [2001] UKHL 67, [2002] 2 A.C. 357, at [103], Lord Hodge said the relevant test 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*" and that, when making their assessment, the objective observer will focus on the

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context of the allegation of bias (citing *Helow v Secretary of State for the Home Department* [2008] UKHL 62, [2008] 1 W.L.R. 2416, at [1]–[3] (Lord Hope)) (at [52]). Such contextual knowledge of international arbitration was dealt with in-depth at [56]–[68].

Of particular importance in *Halliburton* was the fact Mr. Rokison did not disclose his proposed appointment in the Transocean arbitration to Halliburton. Lord Hodge found there was a duty to disclose matters that both would and could cause the informed observer to conclude that there "*was a real possibility of a lack of impartiality*" (at [116]), with such a disclosure duty being part of the statutory obligation of fairness and "*an essential corollary of the statutory obligation of impartiality*" (at [78]). A failure to disclose such information "*may demonstrate a lack of regard to the interests of the non-common party and may in certain circumstances amount to apparent bias*" (at [118]). In failing to disclose to Halliburton his proposed appointment in the Transocean arbitration, Mr. Rokison was said to have breached his duty of disclosure (at [147]).

Pivotally, Lord Hodge held that the objective observer, when assessing whether there is a real possibility that the arbitrator is biased, should have regard to the facts and circumstances known at the time of the hearing to remove the arbitrator (in this case, 12 January 2017) and not at the point of complaint: at [121]–[123], citing, inter alia, *R. (Condron) v National Assembly for Wales* [2006] EWCA Civ 1573, at [50]. Lord Hodge held that an objective observer would not infer from the failure to disclose that there was a real possibility of bias on Mr. Rokison's part. In summary, Lord Hodge said there had been unclarity about whether there was a duty to disclose until the Supreme Court had given judgment; the Transocean arbitration was initiated months after the Halliburton arbitration; the fact that the Transocean arbitration was subject to a preliminary issue that determined the matter meant that Chubb was unlikely to gain an advantage from the overlapping arbitrations; Mr. Rokison did not receive any "*secret financial benefit*"; and, finally, there was no basis for inferring any hostility against Halliburton. As such, an objective observer looking at matters in January 2017 would not conclude there was a real possibility of bias (at [149]–[150]).

Lord Hodge's rigorous analysis of the facts and the law (including a summary of the law at [151]–[157]) has helped make more certain an arbitrator's duty of disclosure and, more pertinently for this short case note, the law pertaining to apparent bias in the arbitral context. Legal certainty is welcome. However, the judgment raises issues of fundamental principle and demonstrates, *par excellence*, the competing considerations in bias challenges. The arbitrator (or decision maker) must be free from apparent bias, yet the courts are alive to opportunistic challenges (at [68]) and are accordingly somewhat censorious of any application to remove the arbitrator. The arbitrator is under a legal duty to disclose matters that could give

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rise to grounds for recusal, yet the failure to do so does not necessarily mean that an objective observer would consider there to be a real possibility of bias.

The Supreme Court focused, in its assessment of apparent bias, on the facts as known at the hearing, rather than focusing on the facts when the aggrieved party first raised their complaint. In doing so, the Supreme Court preferred an instrumental to a dignitarian approach to natural justice, focusing on whether the risk of bias would in fact be likely to affect the outcome of the arbitration. The Supreme Court, in assessing the allegation of apparent bias, gave particular weight to the fact that the Transocean arbitration was likely to be, and in fact was, resolved by determination of a preliminary issue and so Mr. Rokison did not, in the end, have to consider the same substantive issue (i.e. reasonableness of settlement) in both the Halliburton and Transocean arbitrations. The potential difficulty with such a view is that it side-lines the reasonable concerns of a party who discovers an arbitrator (or, more broadly, an administrative decision maker) may have a conflict of interest or may have separate dealings with a related party on a related issue; such concerns were legitimate when Halliburton discovered Mr. Rokison had accepted an appointment by Chubb in an arbitration (from which, like all arbitrators, Mr. Rokison would financially benefit) which, at that point in time, would involve overlapping issues.

The fact that the arbitral panel in the Transocean arbitration were able to dispose of the matter without determining such overlapping issues does not neutralise the justifiable sense of unfairness that a party could feel in such a situation. By assessing apparent bias on facts occurring after the legitimate complaint of bias was made, the courts risk allowing steps to be taken after the complaint is made to affect whether the complaint was legitimate or not. Whilst perhaps correct in the context of *Halliburton* (involving, as it did, commercial parties and commercial arbitration), the courts should be cautious of applying such an approach too widely, as the same would risk the objective observer too readily side-lining reasonable views of the aggrieved party and instead focusing on facts arising after the complaint was raised as a reason to dismiss the validity of the complaint itself. Such an approach, seemingly endorsed in *Halliburton*, does not sit easily with the foundations of the rule against apparent bias, which is not to stop the decision maker *in fact* being biased against a party, but to protect public confidence in a decision-making system, which ought to have special concern for the legitimate feelings of an aggrieved party.

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