

# H v L [2017] and maritime arbitration

## New developments in 3<sup>rd</sup> party funding

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## H v L [2017] EWHC 137 (Comm) - THE FACTS

- Underlying incident – liability of H & R settled
- H commenced arbitration against insurers L
- Mike appointed by court as chair of tribunal
- Shortly before hearing H discovers Mike appointed in two other references about same incident involving R. L was party to one reference

## H APPLIES FOR REMOVAL OF ARBITRATOR UNDER s24 1996 ACT

- Breach of s33 of Arbitration Act 1996
- *“Whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased” (Porter v Magill [2002])*
- Objective test
- IBA Guidelines provide assistance but are not legal provisions

# ALLEGED GROUNDS FOR BIAS

Mike's

- Acceptance of appointment in other references
  - Gave him secret financial benefit
  - He acquired information from other references
- Failure to disclose appointment to H
- Conduct following challenge

## ARBITRATOR'S KNOWLEDGE OF OTHER REFERENCE ACCEPTABLE

- Limited pool of specialist arbitrators
- Efficient to have arbitrators familiar with background
- Arbitrators can put out of their mind material encountered in another reference

## WHAT KNOWLEDGE MATTERS?

- M's knowledge acquired from other arbitrations was everyday experience of international arbitrators
- *Amec v Whitefriars* [2004] – adjudicating same dispute twice – OK
- *Beumer v Vinci* [2017]– adjudicator appointed in two related disputes (A v B plus B v C). NOT OK.
- Also *The Capricorn I* [1998] chain of charters NOT OK

## M's FAILURE TO DISCLOSE

- If non-disclosed matter does not give rise to concerns as to independence then non-disclosure will not, without more, give rise to such concerns
- Otherwise bootstraps.

# M's FAILURE TO DISCLOSE

- IBA Guidelines not decisive
- Advisory requirement to disclose orange list imports no presumption of bias

## M'S RESPONSE TO THE CHALLENGE

- H alleged that Mike biased because
  - misunderstood the overlap in issues
  - showed allegiances by offering to resign
  - said he was offended
  - of "unpleasantness" of challenge

ALL THESE GROUNDS REJECTED

*Cf Cofely v Bingham* [2016]

## APPEAL?

- Popplewell J granted permission to appeal noting that the question of bias in arbitration process was one "*on which various arbitration communities*" might welcome authoritative guidance

## GENERAL SIGNIFICANCE OF CASE

- Court will be robust to challenges
- Resignation to be avoided – undue challenge should not succeed.
- Discourages excessive disclosure

## SIGNIFICANCE TO SHIPPING

- Pragmatic on multiple disputes
- IBA Guidelines are only guidance

## OTHER REGULATION?

- IBA Guidelines

*“custom and practice” of no disclosure of repeat appointments in “certain types of arbitration, such as maritime, sports or commodities arbitration”*

- LMAA Advice on Ethics

# MORE REGULATION?

- ICCA taskforce on 3<sup>rd</sup> party funding – reports Sydney April 2018
- Maritime arbitration carve out

## NEW CASE on 3<sup>rd</sup> party funding - PROGAS v PAKISTAN [2018] EWHC 290 (Comm)

- Security for costs of challenging award in court can be appropriate where claimant funded by 3<sup>rd</sup> party funders
- Order for security for costs awarded under s70(7) not easier to obtain where costs are funded

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