Neutral Citation Number: [2025] EWHC 1523 (Comm)

Case No: CL-2024-000510

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 19/06/2025

Before :

MR JUSTICE CALVER

- -

IN THE MATTER OF THE ARBITRATION ACT 1996

AND IN THE MATTER OF AN ARBITRATION CLAIM

Between:

(1) V
(2) N

Claimants

– and –

K

Defendant

AND IN THE MATTER OF AN ARBITRATION UNDER THE LMAA RULES

Between:

K

Claimant

– and –

(1) V
(2) N

Respondents

- -
- -

Chirag Karia KC and Jacob Turner (instructed by **Zaiwalla & Co**) for the **Claimants**
Marcus Mander and James Bailey (instructed by **Reed Smith**) for the **Defendant**

Hearing dates: 22/05/2025

- -

Judgment Approved by the court for handing down

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on Thursday 19 June 2025.

MR JUSTICE CALVER :

A. Introduction

1. The Claimants ("**V**" and "**N**" respectively) bring an arbitration claim challenging a Partial Final Award made by LMAA arbitrators dated 12 August 2024 (the "**Award**") under sections 68(2)(a) and 67 of the Arbitration Act 1996 ("**the Act**"). There are also a number of related applications:

    (1) The Defendant ("**K**") applies to set aside purported service of the Amended Arbitration Claim Form (the "**Claim Form**") on the ground that it was not validly served in time. In response, the Claimants apply to validate service retrospectively under CPR 6.15 and purport to seek relief from sanctions.

    (2) K applies to set aside the order of Bright J. of 10 September 2024 (the "**Bright J. Order**") by which the Claimants were granted an extension of time to bring their claim and to serve the Claim Form. As K's application was itself served late (although filed on time), K also apply for an extension of time and relief from sanctions.

2. I agree with K that the resulting issues for the Court logically arise in the following order:

    (1) Should the Claimants' service of the Arbitration Claim Form be retrospectively validated pursuant to CPR 6.15(2) or CPR 3.9?

    (2) If so, should K be granted a retrospective extension of time to serve its application to set aside the Bright J. Order?

    (3) If so, should the Bright J. Order extending time for challenging the Award and serving the Claim Form be set aside either (i) because it was not appropriate to extend time; or (ii) for breach of the duty of full and frank disclosure?

    (4) Have the Claimants waived their rights to pursue their ss. 67 and/or 68 challenges under s. 73(1) of the Act?

    (5) If not, should the Claimants have permission to amend the Claim Form to include a challenge to the Award under s. 67 of the Act? If so, was the Award made without jurisdiction because the Claimants terminated the arbitration agreement?

    (6) If the Tribunal had jurisdiction, should the Award be set aside pursuant to s. 68?

3. However, I propose to address the substantive merits of the challenge under sections 67 and 68 first for reasons which shall become apparent.

B. Overview of claim

4. The factual background to this challenge is informative. It is as follows.

5. On 14 February 2023, K commenced an LMAA arbitration, seated in London (the "**Arbitration**"). On 27 April 2023 it served Claim Submissions in the arbitration, together with a bundle of supporting documents. K's case was that, as seller of a MT vessel ("**the Vessel**") to V or their guaranteed Nominee, N, in the sum of US$13,100,000 under a Memorandum of Agreement dated 14 July 2022 ("**the MOA**"), it had been entitled to terminate the MOA under clause 19 thereof, which K had purported to do on

30 September 2022. That was because on 29 September 2022, being after 22 September 2022 on which date V had nominated N under clause 22 of the MOA for the purpose of accepting and taking delivery of title to the Vessel, the US Office of Foreign Assets Control ("**OFAC**") had imposed sanctions on V. K claims that as a result it was lawfully entitled to terminate the MOA, which also entitled it to the release of a US$1,965,000 Deposit ("**the Deposit**") which had been paid into escrow with the Defendant's solicitors Reed Smith LLP ("**Reed Smith**") under the terms of the MOA.

6. The Claimants served Defence and Counterclaim Submissions on 22 June 2023. Their primary pleaded defence (amongst other defences) was that as a result of V's nomination of N, the MOA had been novated to N. The Claimants maintained that N was not itself subject to any sanctions; that V had thereby ceased to be a party to the MOA, instead guaranteeing the performance of N as Buyer; and that as a result K had not been entitled to terminate the MOA, such termination being a repudiatory breach, which N accepted. N, which has not been subject to any sanctions, counterclaimed that as a result it (or V) was entitled to release of the Deposit, and damages, calculated by reference to an alleged increase in the market value of the Vessel.

7. So far as the composition of the arbitral tribunal is concerned ("**the Tribunal**"), on 14 February 2023 K appointed Mr. H as arbitrator. On 21 February 2023 the Claimants appointed Mr. B. Later, on 21 September 2023 Mr. B and Mr. H jointly nominated Mr. S as the presiding arbitrator ("**the members of the Tribunal**"). All three members of the Tribunal are and were eminent KCs.

8. On 1 February 2024 Zaiwalla & Co, solicitors for the Claimants ("**Zaiwalla**"), wrote to the Tribunal suggesting that the members of the Tribunal were in repudiatory breach of their contractual agreements with the parties and that their breach was accepted by the Claimants. From the date of that letter onwards the Claimants ceased to participate in the Arbitration, as is apparent from the Tribunal's summary of the procedural history set out in its Partial Final Award at paragraphs 24-56. This forms the basis of the Claimants' section 67 challenge.

9. A hearing in the Arbitration took place on 16-17 July 2024. Consistently with their letter of 1 February 2024 noted above, the Claimants did not attend and nor did they adduce evidence or make any submissions.

10. A reasoned Partial Final Award was published by the Tribunal on 12 August 2024. The Tribunal declared that K was entitled to the amount of the Deposit (together with interest) and subject to permission for release being granted by OFAC, K was entitled to the return of the Deposit. All of the Claimants' counterclaims were dismissed.

C. *The grounds of challenge*

11. Section 67 of the Act provides as follows:

> *"(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court—*
>
> *(a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or*

(b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.

A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3)."

12. The alleged repudiatory breach by the Tribunal (referred to in paragraph 8 above) arose, according to the Claimants in the original Claim Form filed on 5 September 2024, by reason of the fact that the arbitration between the parties was said to have been conducted without impartiality, being tainted by actual or apparent bias (in the Claim Form (Continuation Sheet) filed on 7 October 2024, allegations of actual bias were, however, abandoned)[1]. This allegation was based solely upon the alleged fact that the Tribunal demonstrated apparent bias in its procedural decisions given in the arbitration, it is said, in favour of K: see the Claimants' skeleton argument at paragraphs 55-59 and 90[2]. Having accepted the repudiatory breach on 1 February 2024, it is said that the Tribunal ceased to have substantive jurisdiction over the parties' dispute thereafter, and it made its Award without jurisdiction, within the meaning of section 67(1) of the Act.

13. Section 68 of the Act provides as follows:

"(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.

A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—

(a) failure by the tribunal to comply with section 33 (general duty of tribunal)."

14. Section 33 provides as follows:

"(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.

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1 As was confirmed at the hearing before this court by Leading Counsel for the Claimants.

2 Which refer to the Tribunal's decisions dated 13 June 2023; 5 September 2023 and 13 September 2023.

> *(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."*

15. It is common ground that actual or apparent bias on the part of the tribunal would, if established, amount to a breach of this general duty and a serious irregularity under section 68(2)(a).

16. The Claimants' grounds of challenge under section 68 of the Act are set out in the Claim Form (Continuation Sheet) and paragraphs 9 and 84 of the first witness statement of Leigh Crestohl dated 5 September 2024 and paragraphs 7 and 61 of the second witness statement of Leigh Crestohl, dated 7 October 2024. They are alleged to be as follows:

    a. the repeated lack of candour by K's party-appointed arbitrator, Mr. H, in misrepresenting the nature and extent of his relationships with Zaiwalla, the Claimants' solicitors, and with Reed Smith (K's solicitors who had appointed him). These inadequate disclosures are said to go to his impartiality and independence; it is said that he "*either downplayed or even concealed*" until the Award was rendered, the connection between himself and Reed Smith.

    b. the Tribunal's refusal to deal with the Claimants' complaints that K's solicitors, Reed Smith, were acting in an "own-interest conflict" situation by reason of (i) having acted in the underlying vessel sale transaction for all parties while also acting as escrow holder, and (ii) simultaneously defending itself in proceedings brought against it by the Claimants in the High Court for wrongful acts alleged to have caused the vessel sale transaction to fail. It is said that "*Reed Smith were obviously prohibited from acting on behalf of [K] in this arbitration*";

    c. By reason of these factors, the Tribunal's chairman (Mr. S) and K's party appointed arbitrator (Mr. H) showed apparent bias by seeking to protect the interests of Reed Smith, and its partner, Mr. Charles Weller. Mr. S mischaracterised the Claimants as having made "*serious allegations of professional misconduct*" against Reed Smith when they only advanced a case in negligence against them;

    d. numerous rulings adverse to the Claimants without the provision of adequate reasons, which resulted in the reference proceeding "*with extreme haste*";

    e. a reasonable apprehension of apparent bias by the Claimants, compounded by the factors enumerated above, and the Tribunal's refusal during the course of the arbitration to address substantively (other than general denial) a detailed list of instances of apparent bias submitted by the Claimants under cover of an email dated 29 January 2024; and

    f. the Arbitrators' decision to purport to continue in office after their right to do so was terminated by the Claimants for repudiatory breach of the contracts pursuant to which they were appointed, the terms of which included compliance with the relevant LMAA rules and guidance as well as the implied duties of skill and care implied by the Supply of Goods and Services Act 1982, s.13.

17. However, at the start of the morning of the second day of this hearing, I asked Mr. Chirag Karia KC (counsel for the Claimants together with Mr. Jacob Turner) precisely which of these grounds of apparent bias he was relying upon for his grounds of challenge under

sections 67 and 68 because in his submissions he had focussed upon ground (a), namely the alleged lack of candour by K's party-appointed arbitrator, Mr. H, in allegedly misrepresenting the nature and extent of his relationships with Zaiwalla, the Claimants' solicitors, and with Reed Smith. Mr. Karia's answer was that ground (a) was now the *only* ground that the Claimants were relying upon, and the other matters were provided "*by way of context*", but they were not pursued by way of "*freestanding, separate grounds*".

18. This concession kills off the challenge under section 67. As I explain below, the section 67 challenge, based upon the alleged apparent bias of the Tribunal in the making of its procedural decisions and referred to in paragraphs 55-59 of the Claimants' skeleton argument, was always hopeless in any event. It leaves the challenge under section 68 standing only in so far as the allegation of apparent bias against Mr. H is concerned. It is troubling that the Claimants have seen fit to advance the serious accusation that the Tribunal is guilty of apparent bias in respect of all six of these grounds throughout this arbitration claim and indeed during the arbitral process itself, only to abandon five of those six grounds at the hearing of its claim when pressed by the court.

19. In any event, when one analyses the decisions of the Tribunal throughout the arbitration process (including those decisions taken before Mr. S was appointed as presiding arbitrator) and in particular the approach taken by it in respect of the matters referred to in paragraphs 16 (b)-(e) above, it is clear that it behaved throughout with nothing but impeccable fairness.

20. Accordingly, if the Tribunal's decisions provide "context" to the Claimants' challenge under ground (a), that context makes it *less* likely, not more likely, that the fair minded and informed observer would conclude that there was a real possibility of bias on the part of Mr. H. The context shows how the Tribunal, including Mr. H, was nothing but impartial in the conduct of the arbitration; and I accordingly turn to that next.

The Tribunal's handling of the arbitral process

21. *The Tribunal's decision of 13 June 2023 (Claimant's skeleton argument, paragraph 56)*: As I have mentioned, K served its Claim Submissions in the arbitration on 27 April 2023. On 17 May 2023, Zaiwalla emailed Reed Smith seeking a 4-week extension of time for service of the Claimants' Defence until 21 June 2023. On 18 May 2023 Reed Smith replied, offering a 2-week extension of time for service of the Claimant's Defence, namely until 8 June 2023. On 26 May 2023 at 14.15 hrs Zaiwalla reverted, rather dismissively stating that they would serve their Defence and Counterclaim "*as soon as they are ready*". Reed Smith replied almost immediately at 15.52 hrs, stating that Zaiwalla would accordingly need to make an application for an extension of time and that if they failed to do so by 30 May 2023, K would apply to the Tribunal. On the very last day of this period, 30 May, Zaiwalla emailed Reed Smith stating that the agreed date for service of the Defence was 8 June 2023.

22. Despite this, on 7 June 2023, just one day before that deadline, Zaiwalla wrote to Reed Smith seeking a yet further 2-week extension of time for service of the Claimants' Defence to 22 June 2023. On 8 June 2023 Reed Smith responded by reasonably stating that K would agree to the extension until 22 June 2023 provided it was treated as an order of the Tribunal. Zaiwalla responded on the same day and stated that it was not possible for them to agree to this. On the same day, Reed Smith once again told Zaiwalla that it

would accordingly be necessary for the Claimants to make an application to the Tribunal. On 9 June 2023 Zaiwalla again refused to do so.

23. The agreed date for service of the Claimants' Defence, of 8 June 2023, had now passed. K accordingly applied to the Tribunal (at this stage comprising only Mr. H and Mr. B) for an order requiring service of the Defence forthwith.

24. On 12 June 2023 Zaiwalla wrote to the Tribunal opposing K's application, wrongly suggesting that the parties had "*effectively agreed*" to service of the Defence on 22 June 2023.

25. On 13 June 2023, the Tribunal nonetheless agreed, very fairly, to allow the Claimants until 22 June 2023 to serve their Defence, with costs reserved. Despite this, the Claimants criticise this ruling in paragraphs 23-25 of Mr. Crestohl's second witness statement and paragraph 56 of their skeleton argument. They unreasonably state that this was when "*the concerns began to manifest* [*themselves*]". They suggest that K sought a peremptory order from the Tribunal and that the Tribunal did not provide any reasoning for the shortness of time afforded to the Claimants. Yet, as can be seen, the Tribunal (a) did not make a peremptory order and (b) awarded the Claimants the precise extension of time that they sought. The criticism is accordingly completely unfounded and should not have been made. Rather, this episode shows how tolerant the Tribunal (consisting at this stage of Mr. H and Mr. B) was of the Claimants' repeated failures to serve its Defence as promised.

26. *The Tribunal's decision of 5 September 2023 (Claimants' skeleton argument, paragraph 57*): On 18 August 2023 K applied for an order from the Tribunal (still comprised at this stage of Mr. H and Mr. B) requiring the exchange of LMAA Questionnaires by 1 September 2023. On the same day, the Claimants responded to K's application by Mr. Zaiwalla of Zaiwalla ("**Mr. Zaiwalla**") sending an email to Mr. B (copied in to Mr. H and Reed Smith), asking the Tribunal to make no order. Mr. Zaiwalla ended his email by stating as follows:

> *"We would also respectfully ask the arbitrators to complete the Tribunal by appointment of the third arbitrator before proceeding any further in this reference. In any case as this is a holiday period and the undersigned is away this arbitration might well be suited to remain on ice until 10th September 2023.*
>
> *Finally as the origin of this dispute involves a large professional negligence claim against solicitors Reed Smith we feel compelled to ask [Mr. H] to disclose all his previous connections, if any, with Reed Smith or Mr. Weller personally. Many thanks."*

27. It follows that the Claimants asked the Tribunal to delay exchange of LMAA Questionnaires for their solicitors' convenience until 10 September 2023. That is then precisely what the Tribunal agreed to do by its ruling on 5 September 2023. Again, therefore, the way in which this decision is presented in the Claimants' skeleton argument is misleading. They say:

> *"57.1 On 18 August 2023, K sought a direction for the LMAA Questionnaire ("**LMAAQ**") to be exchanged by no later than 1*

> *September 2023 (the original deadline having fallen in August, when the Claimants' key solicitors were travelling. The Claimants requested that no order be made given the complex background to the claim and noting out that there was no urgency for matters to proceed at pace.*
>
> *57.2 On Tuesday, 5 September 2023, though it accepted there was no urgency or haste, the Tribunal nonetheless accepted K's request and ordered the exchange of LMAAQs by 10 September 2023 (which was a Sunday). The Tribunal's order therefore gave the Claimants only 3 business days to prepare and exchange their LMAAQ."*

28. This is simply wrong. The Tribunal acceded to Zaiwalla's request on 18 August, not K's request, for exchange of these documents on 10 September, being (as it had specifically requested) after the holiday period. Accordingly, the Claimants had had over 3 weeks to prepare its LMAA Questionnaire, not 3 business days.

29. Zaiwalla's reference to a "*large professional negligence claim against solicitors Reed Smith*" was a reference to the Claimants' allegation (ultimately rejected by the Tribunal) that the conduct of Reed Smith in instructing its bank, Barclays Bank PLC, to "*block all amounts received from [V]*" was unlawful and resulted in the freezing of both the Deposit and the balance of the purchase price; and that this was the true cause of the failure of the sale of the Vessel (see further below). But it was a non-sequitur to link that fact to Zaiwalla allegedly "*feel[ing] compelled to ask Mr. H to disclose all his previous connections, if any, with Reed Smith or Mr. Weller personally.*" The fact that the Claimants were intending to bring a High Court claim against Reed Smith did not, of itself, afford any logical reason why Mr. H should have to disclose all of his previous "connections" with Reed Smith or with Mr. Weller, a partner in Reed Smith.

30. *The Tribunal's decision of 13 September 2023 (Claimants' skeleton argument, paragraph 58)*: Despite the deadline of 10 September 2023 being the Claimants' own requested deadline, they failed to file their Questionnaire as ordered on that date. Instead, one day later, on 11 September, they applied (out of time) for an extension of time for the exchange of the LMAA Questionnaires by an entire 4 weeks. On 12 September 2023 Reed Smith wrote to the Tribunal opposing the Claimants' application for an extension of time and submitting that time should be extended only until 14 September 2023 and then on a peremptory basis. K's frustration with the Claimants' failure, once again, to meet its own deadline is readily understandable.

31. On 13 September 2023 the Tribunal (still consisting only of Mr. H and Mr. B) extended time for the exchange of the LMAA Questionnaires to 18 September 2023 by way of a final order and indicated that it would proceed with the appointment of a third arbitrator. This decision, in view of the Claimants' behaviour referred to in paragraphs 26-30 above, was entirely reasonable. It is plain that a final order was necessary to put an end to the Claimants' constant prevarication.

32. In not referring in paragraph 58 of their skeleton argument to the fact that the Claimants had themselves originally proposed exchange of Questionnaires on 10 September which deadline they then ignored, the Claimants put forward a misleading case. The making of

a final order by the Tribunal for exchange by 18 September 2023 was (and is) both entirely reasonable and readily understandable in the circumstances.

33. It is plain that the suggestion that these procedural rulings evidence a "*very high number of occasions where the Tribunal simply complied with the requests of the Defendant, ignoring the submissions of the Claimants and, in most cases, failing to give reasons for their decisions*", such that this resulted in the reference "*proceeding with extreme haste when no proper reasons had been given by the Defendant for seeking that haste*"[3], is an unjustified and grossly misleading summary of the relevant events. Likewise, the Claimants' assertions in correspondence with the Tribunal that the Tribunal had, by its rulings, appeared consistently to favour Reed Smith (and thereby its client, K) and had thereby shown unconscious, apparent (or even actual) bias[4], were wholly unjust and a gross misrepresentation of what actually occurred.

34. To make matters worse, Zaiwalla emailed the Tribunal on 29 November 2023 going so far as to suggest that it should step down as a result of these innocuous and transparently fair rulings:

> *"For the above reasons, it is clear that the Tribunal has misdirected itself. The proper course is for the Tribunal now to step down, or alternatively in the interest of fairness and justice stay the arbitration pending the trial of the relevant issues by the High Court in the proceedings commenced by the Respondents against Reed Smith on the basis of the negligence we describe above."*

35. It is perfectly clear that this was opportunistic and tactical behaviour on the part of the Claimants. It appears that the Claimants were searching for any reason, no matter how spurious, to derail the arbitration so that they could focus first on their claim against Reed Smith in the High Court action.

36. The Tribunal itself fully and fairly addressed the procedural history of the arbitration in paragraphs 9-56 of its Partial Final Award. It can be seen from the Tribunal's summary of the procedural history that instead of engaging with the substantive issues in the arbitration, the Claimants chose repeatedly to accuse the Tribunal of actual or apparent bias, adopting an obstructive stance throughout (which included seeking a stay of the arbitration at a Procedural Hearing on 9 January 2024). It is hardly surprising that against that background the Tribunal was keen to move the arbitration forward without undue delay.

37. The only other complaint of the Claimants concerning the Tribunal's handling of the arbitrations is its alleged "*approach to Reed Smith's own interest conflict*" (paragraph 59 of the Claimants' skeleton argument). This was another attempt by the Claimants to derail the arbitration by arguing that the Tribunal ought to *order* K to seek alternative representation in the arbitration or alternatively ought to stay the arbitration in favour of the High Court claim which the Claimants were threatening to bring against Reed Smith (as a party). Zaiwalla maintained that there should only be one set of proceedings on foot, consisting of <u>either</u> the High Court proceedings against Reed Smith <u>or</u> the arbitration, but if it were to be the latter then it asserted that Reed Smith had to be joined *as a party* to it.

[3] See Crestohl (2), paragraph 61b

[4] Summarised in Crestohl (1), paragraph 39

It is clear that the Claimants' tactical approach was to seek to join Reed Smith squarely into either the court or arbitral proceedings.

38. The Tribunal, however, correctly pointed out to the Claimants that this was not a matter for it to determine. The Claimants complain that as a result[5]

> *"the Tribunal ignored the Claimants' request and failed to reach any decision as to the application that [K] be required to obtain alternative representation. To the contrary, the Tribunal acted to protect Reed Smith. On 14 November 2023, [Mr. S] alleged that the Claimants had made "serious allegations of professional misconduct" against Reed Smith and required that these be "properly particularised". In fact, no such "serious allegations of professional misconduct" had been made. Rather, the Claimants' case was, and remains, that Reed Smith was professionally negligent and breached other contractual and fiduciary duties."*

39. This complaint is also without merit and seeks to re-write the relevant events. As the Tribunal painstakingly explained in its Procedural Order and Accompanying Reasons dated 16 January 2024, at paragraphs 8, 10 (in particular), 15 and 18, the Claimants *themselves* deleted the "own interest" allegation from their pleaded case on 29 November 2023, with the Claimants informing the Tribunal as follows:

> *"The [Claimants] maintain their position that Reed Smith is in an 'own interest' conflict and cannot properly continue to represent [K] in this Arbitration. Indeed the continued involvement of Reed Smith as legal representatives has serious consequences as regards the fairness and procedural regularity of the proceedings, as to which all of the Respondents' rights are reserved. Notwithstanding the foregoing, since the conflict of Reed Smith has now been brought to the attention of the Tribunal, the [Claimants] are content for the proposed amendment to paragraph 10 of the Defence to be removed[6]. The [Claimants] have taken this position not as any admission that it was inappropriate to have sought to make such an amendment but rather in the interests of minimising costs through argument on the point."* (emphasis added)

40. Accordingly, as the Tribunal had rightly recorded in its Ruling on the Claimants' application for a preliminary issue dated 7 October 2023 at paragraph 10, it was not for the Tribunal "*to express any view, still less to adjudicate, upon any allegation of breach of any professional or other duty on the part of Reed Smith*", not least because no such allegation formed any part of the pleaded issues in the arbitration and was specifically withdrawn by the Claimants. Mr. Crestohl's suggestion in paragraphs 50-51 of his third witness statement of 8 November 2024 that the *voluntary withdrawal* of this allegation by the Claimants from their pleaded case on 29 November 2023 was merely "peripheral"

[5] Paragraphs 59.3 and 59.4 of its skeleton argument

[6] The Reed Smith "own interest" conflict allegation.

to the discharge of the Tribunal's duty of fairness, so as not to affect that duty, is unfair to the Tribunal and unsustainable.

41. It follows that the Tribunal did not "*ignore*" the Claimants' request or "*fail to reach any decision*" concerning an application that K be required to obtain alternative representation by reason of the own-interest conflict argument. There was no failure of duty on the part of the Tribunal. As it stated, the argument was not one for the Tribunal to address and indeed the Claimants themselves voluntarily deleted it from their pleaded case.

42. The Claimants further saw fit to suggest that the Tribunal had acted to "*protect*" Reed Smith, which was supposedly evidenced by the fact that on 14 November 2023 Mr. S alleged that the Claimants had made "*serious allegations of professional misconduct*" against Reed Smith and the Tribunal required that these be "*properly particularised*".

43. In an email to the Tribunal dated 16 November 2023, despite the terms of their proposed amendments to their claim, the Claimants sought to suggest that no "*serious allegations of professional misconduct*" was being made by them against Reed Smith but that rather, the Claimants' case was that Reed Smith were professionally negligent and breached other contractual and fiduciary duties. The Claimants say that it can be inferred from this that the Tribunal appeared inclined to "*protect*" the position of Reed Smith by casting any criticism of its conduct as being a matter of "*serious allegations of professional misconduct*" and hence subject to a higher standard than actually needed to be demonstrated on the Claimants' case as properly understood.

44. This, too, is simply false. From 12 October 2023 onwards in a series of proposed amendments to their pleaded case, the Claimants *did* indeed make, or seek to make, serious allegations of professional conduct against Reed Smith, as is explained in the Tribunal's Procedural Order and Accompanying Reasons dated 16 January 2024 at paragraphs 10 (referring to the Claimants' allegation that Reed Smith had exercised undue influence over them), 28 (Claimants' allegation of criminal conduct by Reed Smith), 32(1) and 41 (Claimants' allegation of undue influence); 32(3) (Claimants' allegation of criminal acts); and 35 (Claimants' allegation of undue influence and criminal conduct). The Tribunal refused permission to make the undue influence amendments at that Procedural Hearing (see paragraphs 46-48) although it allowed the criminal acts amendments (paragraph 53).

45. As I have outlined above, the Claimants' argument in the arbitration was that K was not entitled to terminate the MOA, as by the time of V's designation as an SDN[7] by OFAC, it had been replaced as Buyer under the MOA by its nominee N, which was not subject to any sanctions; and furthermore, that the allegedly criminal conduct of Reed Smith in instructing its bank, Barclays Bank PLC, to "*block all amounts received from V*" ("**the Freezing Decision**") resulted in the freezing of both the Deposit and the balance of the purchase price, and that was the true cause of the failure of the sale of the Vessel. This was a causation issue.

46. The Tribunal carefully considered and rejected that causation argument in its Partial Final Award at paragraphs 123-149, concluding at paragraph 149 as follows:

[7] Specially Designated National and Blocked Person

> *"For all the foregoing reasons, the Tribunal rejects the [Claimants]' case that [K] was not entitled to terminate the MOA because of the Freezing Decision. Irrespective of what capacity Reed Smith was acting in when it sent the Freezing Decision email, and of what, if any, action Barclays took on or following receipt of that email, [K] was entitled to terminate the MOA pursuant to clause 19 thereof on 30 September 2022, by reason of the designation of [V] as an SDN, and the consequent imposition on [V] of secondary sanctions, on 29 September 2022. It was that designation of [V] that caused the transaction to fail, not the Freezing Decision."*

47. It follows that in all the circumstances there is no basis for contending that a fair-minded and informed observer would consider that the Tribunal's conduct in its handling of the arbitration (in particular its procedural decisions[8]) gives rise to any possibility that it was biased; nor that it amounted to a repudiatory breach of contract. I consider that the Claimants' suggestion to the contrary, advanced repeatedly by the Claimants right up to the hearing of this claim until it was rightly abandoned by Mr. Karia KC on day 2, was purely tactical, had and has no merit whatsoever, and indeed should never have been made. It afforded no ground whatsoever for a section 67 or a section 68 challenge.

Mr. H's disclosures

48. Against that background, I turn next to consider the merits of the sole remaining ground of appeal relied upon by the Claimants to support the section 68 challenge, namely that the fair minded and informed observer would consider that there was a real possibility of bias on the part of Mr. H in failing to disclose his previous connections with his appointing solicitors, Reed Smith and Mr. Weller in particular, and in answering as he did the enquiries made by the Claimants about his previous connections with Reed Smith and Mr. Weller.

49. This requires first, consideration of the Supreme Court's decision in *Halliburton v Chubb*, followed by an analysis of the exchanges between Mr. H and Zaiwalla, before considering whether on the facts of this case the test of apparent bias is met.

D. The law

50. The leading case concerning an arbitrator's duty of impartiality, albeit in the context of section 24 of the Act, is the Supreme Court's decision in *Halliburton Co v Chubb Bermuda Insurance Ltd* [2021] AC 1083. In that case pursuant to an arbitration clause in a Bermuda Form liability policy the claimant commenced an arbitration against the first defendant. In accordance with the terms of the arbitration clause, the claimant and the first defendant each appointed an arbitrator and, in the absence of agreement between the parties, the second defendant, Mr. Rokison KC, was appointed as third arbitrator and chairman by the High Court exercising its powers under section 18 of the Act. Subsequent to that appointment, Mr. Rokison accepted appointments as an arbitrator in two related

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[8] The Claimants' list of complaints submitted under cover of its email dated 29 January 2024 contains nothing further of any merit in support of a contention that the Tribunal was biased, "*unconsciously or otherwise*" in the making of its procedural decisions in the arbitration and unsurprisingly the Claimants' skeleton argument did not rely upon, and Mr. Karia KC did not take the court to, any further specific decisions contained in that List.

arbitrations, in one of which he was the first defendant's appointee. Those appointments were not disclosed to the claimant. The claimant brought a claim seeking an order under section 24(1)(a) of the Act that Mr. Rokison be removed as an arbitrator on the ground that circumstances existed that gave rise to justifiable doubts as to his impartiality, in particular his acceptance of the later appointments, his failure to notify the claimant of those appointments or give it the opportunity to object to them, and the first defendant's refusal to permit him to resign from the first appointment.

The test for apparent bias

51. At [52] Lord Hodge set out the relevant test for apparent bias, as stated by Lord Hope in *Porter v Magill* [2002] 2 AC 357 at [103] as follows: "*The question 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*." This requires objectivity and detachment.

52. The fair-minded observer is neither complacent nor unduly sensitive or suspicious and the conclusions which they reach must be justified objectively [52]-[53].

53. However, context forms an important part of the material which the fair-minded observer must consider before passing judgment [52]. Thus, Lord Hodge observed at [91]:

> *"As GAFTA and LMAA have shown, it is an accepted feature of their arbitrations that arbitrators will act in multiple arbitrations, often arising out of the same events. Parties which refer their disputes to their arbitrations are taken to accede to this practice and to accept that such involvement by their arbitrators does not call into question their fairness or impartiality. In the absence of a requirement of disclosure of such multiple arbitrations, the question of the relationship between such disclosure and the duty of privacy and confidentiality does not arise."*

54. It follows that, as Lord Hodge stated at [127]-[128]:

> *"The objective observer will appreciate that there are differences between, on the one hand, arbitrations, in which there is an established expectation that a person before accepting an offer of appointment in a reference will disclose earlier relevant appointments to the parties and is expected similarly to disclose subsequent appointments occurring in the course of a reference, and, on the other hand, arbitrations in which, as a result of relevant custom and practice in an industry, those expectations would not normally arise. The objective observer will consider whether in the circumstances of the arbitration in question it would be reasonable to expect the arbitrator not to have the knowledge or connection with the common party which the multiple references would give him or her…*
>
> *Mr. Constantine Partasides QC, who appears on behalf of ICC, represents to the court that such interrelated arbitrations are not*

> *common in ICC arbitrations and therefore such circumstances may more readily give rise to an appearance of bias. GAFTA and LMAA explain that multiple appointments are common in their fields of operation, see paras 43 and 44 above."*

55. At [44] Lord Hodge had stated as follows:

> *"LMAA similarly explains that multiple appointments are relatively common under their procedures because they frequently arise out of the same incident. Speed and simplicity are necessary because of the tight limitation periods in maritime claims. There is a relatively small pool of specialist arbitrators whom parties use repeatedly. LMAA terms give arbitral tribunals the power to order concurrent hearings where two or more arbitrations raise common issues of fact or law without requiring the consent of the parties. Disclosure of multiple appointments should be required only when it is arguable that the matters to be disclosed give rise to the appearance of bias. LMAA points out that the IBA Guidelines recognise that in certain types of arbitration no disclosure of multiple appointments is required if parties are familiar with such custom and practice…"*

56. It follows that, as Lord Hodge stated at [130], the custom and practice in the relevant field (in this case the LMAA) should be "*examined closely*", as the assessment of the fair-minded and informed observer of whether there is a real possibility of bias is an objective assessment which has regard to the customs and practices of the relevant field of arbitration [152].

57. A failure by an arbitrator to make disclosure is a *factor* for the fair-minded and informed observer to take into account in assessing whether there is real possibility of bias [155].

58. The professional reputation and experience of an individual arbitrator is a relevant consideration for the objective observer when assessing whether there is apparent bias as an established reputation for integrity and wide experience in arbitration may make any doubts harder to justify. But the weight which the fair-minded and informed observer should give to that consideration will depend upon the circumstances of the arbitration and whether, objectively and as a generality, one could expect people who enter into references of that nature to be informed about the experience and past performance of arbitrators [67].

59. The objective observer is also alive to the possibility of opportunistic or tactical challenges. Parties engage in arbitration to win. Their legal advisers present their cases to the best of their ability, and this pursuit can include making tactical objections or challenges in the hope of having their dispute determined by a tribunal which might, without any question of bias, be more predisposed towards their view or simply to delay an arbitral determination [68].

Legal duty of disclosure?

60. An arbitrator is under the statutory duties in section 33 of the Act to act fairly and impartially in conducting arbitral proceedings. Those statutory duties give rise to an

implied term in the contract between the arbitrator and the parties that the arbitrator will so act. The arbitrator is accordingly under a legal duty to disclose facts or circumstances which would or might lead the fair minded and informed observer, having considered the facts, to conclude that there was a real possibility that the arbitrator was biased [74]-[81].

61. However, if, because of the custom and practice of specialist arbitrators in specific fields, such as LMAA arbitrations, multiple appointments are a part of the process which is known to and accepted by the participants, then no duty of disclosure would arise [135]. Thus, Lord Hodge went on to state at [137]:

> *"Unlike in GAFTA and LMAA arbitrations, it has not been shown that there is an established custom or practice in Bermuda Form arbitrations by which parties have accepted that an arbitrator may take on such multiple appointments without disclosure."*

62. The failure of an arbitrator to make disclosure in a case where they have accepted an appointment in multiple references in circumstances which *might* reasonably give rise to justifiable doubts as to their impartiality, is *a factor* for the fair-minded and informed observer to take into account in assessing whether there is a real possibility of bias. There may, however, still be factors pointing the other way.

63. In *Halliburton* in the case of Mr. Rokison, by the time of the hearing for his removal[9], he had given an explanation of his failure to disclose his appointments in references 2 and 3. His explanation of oversight was genuine; there was a lack of clarity in English case law as to whether there was a legal duty of disclosure and whether disclosure was needed; he provided a measured response to the robust challenge; he did not receive any secret financial benefit; and there was no basis for inferring any subconscious ill-will in response to the robustness of the challenge, as Mr. Rokison responded in a courteous, temperate and fair way. These factors meant that the fair-minded and informed observer would not conclude that there was a real possibility of bias at the date of the application for Mr. Rokison's removal.

E. The nature of the disclosures in the present case

64. As set out above, it was on 18 August 2023, in its email to Mr. B, that Mr. Zaiwalla asked Mr. H, for the first time through Mr. B, to disclose all of his previous connections, if any, with Reed Smith or Mr. Weller personally, because, it was said, "*this dispute involves a large professional negligence claim against solicitors Reed Smith*". This was not strictly accurate, in that *the arbitration dispute* did not involve that claim at all (Reed Smith had refused the invitation to become a party to the arbitration, as the Claimants knew). But this alleged fact was used to persuade Mr. H to make disclosure about these connections.

65. On 19 August 2023 Mr. Zaiwalla then sent a follow up email to Mr. H as follows:

> "*Dear [Mr. H],*

[9] At [157] Lord Hodge explained that the correct time to ask the question as to whether there was a real possibility of bias is at the date of the hearing for the removal of the arbitrator or, in this case, at the time of the section 68 challenge.

> *You will see from our e-mail to [Mr. B] yesterday we have taken the liberty of requesting you to disclose all your previous and recent connections with the firm, Reed Smith, and whether you have had any oral conversations or personal contact with Mr. Weller relating to this matter.*
>
> *We make this request particularly in light of Mr. Weller's aggressive correspondence which we have been receiving for some time now, the cause of which possibly reflects that Reed Smith has been informed by our client that it is pursuing a negligence claim pursuant to the advice we have received from counsel….*
>
> *In the above circumstances we sincerely trust that you will understand our request and, in keeping with your professional duty of candour, you will revert to us."*

66. The Claimants submit that "*this request could hardly have been clearer*" and that this was a "*crystal-clear question*". I do not agree. Whilst the email referred to Reed Smith, it only referred in general terms to "connections" and "conversations" and "personal contact"; and, moreover, the focus of the email was clearly upon Mr. Weller: "*whether you have had any oral conversations or personal contact with Mr. Weller relating to this matter"* and "*we make this request particularly in light of Mr. Weller's aggressive correspondence… the cause of which possibly reflects that Reed Smith has been informed by our client that it is pursuing a negligence claim [against it]*". Mr. H was asked to respond, "*in keeping with [his] professional duty of candour*."

67. In those circumstances, it is unsurprising that Mr. H responded in the terms that he did just one day later:

> *"For the whole of my career at the English bar, since 1987, I have had professional involvement with both Zaiwalla & Co and Reed Smith (formerly Richards Butler), as barrister, arbitrator and judge. This has included professional involvement with both Mr. Zaiwalla and Mr. Weller. I am not currently retained by either firm, nor am I sitting as arbitrator or judge in any dispute in which either firm is a party.*
>
> *As regards this arbitral reference under the LMAA Terms 2021, I can confirm that I have had no oral conversations or personal contact with Mr. Weller."*

68. The Claimants submit that *"[s]elf-evidently, the above statement did not answer the question posed*"; and there was certainly no compliance with Mr. H's "*professional duty of candour*" that the Claimants had invoked. Indeed, they argue, the Court might consider Mr. H's response to be dismissive of the Claimants' concerns and deliberately non-responsive. Self-evidently, they say, the Claimants were not worried about, nor were they interested in the extent of Mr. H's relationship with their own solicitors, Zaiwalla. And, again self-evidently they say, Zaiwalla did not need to ask Mr. H about the extent of their relationship with him.

69. I consider this submission to be unjustified. It is clear that Mr. H reasonably understood the enquiry to be a general one in relation to his conversations and personal contact with Mr. Weller, as well as generally about his professional involvement with Reed Smith over the years. His reference to "professional involvement" with Zaiwalla and Reed Smith is consistent with that understanding. To suggest that this response was "deliberately non-responsive" is unfair to Mr. H. Moreover, Mr. H's reference to not sitting as arbitrator or judge in any dispute in which Reed Smith *"is a party"* was clearly a response to Mr. Zaiwalla's reference in his email to the High Court claim which he said was being pursued against Reed Smith *as a party*. Contrary to the Claimants' submission, this response is nowhere near "*sufficient to persuade the observer that there was a real possibility that [Mr. H] was biased*".

70. Nor do I accept the criticism made of Mr. H that he was deliberately seeking to draw a "*false equivalence*" between instructions received by him from Zaiwalla (the firm) and instructions received by him from Reed Smith. As Mr. Marcus Mander (Counsel for K together with Mr. James Bailey) submitted, if as an arbitrator you are being asked by one party about your connections with one party's solicitors, you might very well in fairness state your connections with the other party's solicitors, in order to be even-handed. There is nothing sinister in that.

71. Indeed, if Mr. H's response did indeed "self-evidently" not answer the question posed, it is impossible to understand how Mr. Zaiwalla could have responded to it in the following terms that same day, 20 August 2023:

> *"Your email below confirms the high standard which you hold. This is not at all surprising for me as my firm and I indeed have had a longstanding good relationship with [your chambers], the first occasion being around 48 years ago with John Hobhouse when I was training at Stacken & Co. As it happens, I mention in my book 'Honour Bound' published by Harper Collins, the names of John Hobhouse, Adrian Hamilton, and Michael Dean from your chambers in a complimentary manner. I can now confirm the withdrawal of my request for a third arbitrator at this stage. My firm will leave the decision to [Mr. B] and your good self".*

The Claimants make no mention in their skeleton argument of this important email in response. Had the Claimants wanted chapter and verse about Mr. H's past appointments by Reed Smith as arbitrator they could easily have asked for it; but they did not. The Claimants clearly considered that Mr. H had answered satisfactorily the broadly framed questions which had been posed, and they were uninterested in Mr. H's previous appointments by Reed Smith, no doubt because they were to be expected in this (LMAA) market. This is important context which the fair minded observer would consider before passing judgment. I return to this below.

72. Over the course of the next 6 months the correspondence from Zaiwalla to the Tribunal became much more critical, and indeed hostile, in the light of the procedural rulings by the Tribunal concerning amendments to the Claimants' pleaded case, applications for extensions of time and the like, as described above. Zaiwalla went so far as to advance allegations of not just apparent bias but *actual* bias on the part of the Tribunal in their attempts to have the members of the Tribunal stand down.

73. In particular, on 11 January 2024 Mr. Zaiwalla wrote to the Tribunal to complain of the fact that the Tribunal had "blocked" the Claimants from including in their defence references to Reed Smith's actions. Mr. Zaiwalla again made the unfounded allegation that the Tribunal was intent on protecting Reed Smith's reputation. He said that Zaiwalla would be obliged to advise the Claimants as to their right to challenge any final decision of the Tribunal on the basis of serious irregularity in the conduct of the reference arising out of the Tribunal's failure to comply with its duties under section 33(1) of the Act in refusing amendments to the Claimants' pleading. As I have shown, there was no merit at all in this suggestion. Finally, he also suggested that any member of the Tribunal with a professional relationship with Reed Smith should stand down.

74. Mr. B responded to this email on 16 January 2024. He pointed out that some of the Claimants' desired amendments to its pleading were allowed and some were not, which hardly exhibits bias in favour of K. He also pointed out that if there were any substance in the complaints the Claimants' remedy would lie in section 24 of the Act[10] and that application should be made by them without delay, rather than waiting until an award was published and only then making a challenge under section 68.

75. On 19 January 2024 Mr. Zaiwalla responded. He stated that "*we are in the process of beginning consultation with both the SRA and the Law Society*" about Reed Smith's position.[11] He further stated that the Claimants were considering the advisability of seeking Leading Counsel's advice on a section 24 application and "*we trust that the tribunal will grant the [Claimants] time to consider whether they wish to pursue a remedy under section 24 of the Act and will not require them to take steps in the arbitration that prejudice that right in the interim*". Again, the Claimants sought in this way to delay the progress of the arbitration.

76. On 29 January 2024 Mr. Zaiwalla emailed the Tribunal again and asked it to "*suspend the need for further directions while we seek our client's instructions and advice of counsel*" on an application under section 24. The Tribunal understandably rejected this prospect of an indefinite delay by Mr. S's email dated 30 January 2024, pointing out that the Claimants had failed to engage with K's proposed procedural directions for the arbitration. Mr. S reasonably observed that the Tribunal saw no reason why the Claimants' engagement with the proposed directions should not be expressed to be without prejudice to any section 24 application.

77. Mr. Zaiwalla responded by email to the Tribunal on 1 February 2024, rejecting that suggestion. Instead, he asserted that the members of the Tribunal were in repudiatory breach of their terms of appointment by reason of their "*bullying*" correspondence, with the consequence that "*the [Claimants] no longer consider the Tribunal to be properly constituted or vested with the requisite jurisdiction to make an effective award in this*

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[10] *"(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; …
(d) that he has refused or failed—
(i) properly to conduct the proceedings, or
(ii) to use all reasonable despatch in conducting the proceedings or making an award,
and that substantial injustice has been or will be caused to the applicant."

[11] Nothing further has been said about this alleged process, including whether it was ever commenced and if so what happened to it.

matter." I consider this to be yet another wholly meritless accusation, designed to derail the arbitration process. Mr. Zaiwalla once again referred *in terrorem* to the prospect of the Claimants' bringing a section 24 application against the members of the Tribunal.

78. By email dated 12 February 2024 Mr. Zaiwalla finally informed the Tribunal that "*The [Claimants] are now in the process of preparing a section 24 application.*" Despite this unequivocal statement, in fact no such application was ever made. Accordingly, if advice was taken concerning a section 24 challenge, it appears to have been negative: that there was no basis for the removal of any of the arbitrators. In paragraph 22 of Mr. Crestohl's 4th witness statement the Claimants suggested for the first time that the reason that they did not pursue a section 24 application was because the Tribunal members' contract had already been terminated for repudiatory breach. But that explanation seems unlikely as the Claimants' statement that they were preparing a section 24 application came 11 days after the alleged repudiatory breach and, moreover, the allegation of repudiatory breach was based upon the Tribunal's purported favouring of Reed Smith in its procedural rulings and not upon Mr. H's previous arbitral appointments by Reed Smith.

79. Having failed to stay or delay the arbitration, and having failed to persuade the members of the Tribunal to stand down, the Claimants then went back on the attack against Mr. H personally, some 6 months after their first enquiry about his connections with Reed Smith and Mr. Weller. Thus, on 15 February 2024 Mr. Zaiwalla wrote to Mr. H in the following terms, in sharp contrast to the cordial email which he sent back on 20 August 2023:

> *"Dear [Mr. H],*
>
> *You will recall that by your email of 20 August 2023, you had mentioned that you had professional involvement with our firm and "both Mr. Zaiwalla and Mr. Weller". Having searched our records, we cannot find any evidence of any professional involvement with your good self either by our firm or Mr. Zaiwalla. Would you therefore kindly check your records and confirm whether this statement was made in error.*
>
> *For your ready reference we enclose our exchanges during this period including your email of 20 Aug 2023."*

80. Mr. H responded by email 4 days later on 19 February 2023. He stated that:

> *"So far as professional instructions are concerned, my recollection is that I was instructed by your firm in about 1987 to assist my Head of Chambers …. I specifically recall meeting Mr. Zaiwalla personally in that context. I have no personal records that date back to 1987 and my clerks have checked the chambers' financial records. My clerks are obliged under the UK Data Protection Regulation to anonymise information from financial records when it is no longer needed. There are some financial records dating back to 1985, but these early records are incomplete and do not include cases which were recorded on what were referred to as "case cards". Such financial records as do exist show no cases either live, completed, deleted or archived but my clerks have informed me that many instructions were only recorded manually on hard copy case cards. I have*

> *also had professional involvement with Mr. Zaiwalla as counsel instructed for an opposing party.*
>
> *As regards other professional involvement, I have attended LMAA dinners and conferences at which Mr. Zaiwalla was present. Indeed, my contact with Mr. Zaiwalla over the years has only been in a professional context."*

81. On the same date, Zaiwalla sent a further letter by email to the members of the Tribunal, again alleging that they were in repudiatory breach of contract and that the Claimant had accepted that breach with the consequence that the arbitration agreement was at an end. The members of the Tribunal were invited to agree that this was so. Unsurprisingly they did not. Mr. S responded by email dated 20 February 2024 in which he explained that the Tribunal saw no basis in law or in fact for such an allegation and that it would continue to discharge its responsibilities to hear and determine the reference. He noted that no section 24 application had been brought, despite Mr. Zaiwalla having stated that it was being prepared.

82. With that avenue closed down, Mr. Zaiwalla returned to the topic of Mr. H's previous instructions one week later in an email to Mr. H dated 27 February 2024. This email, in which Mr. Zaiwalla opined that "*these are matters which do not frequently arise in the ordinary course of an LMAA arbitration*", reveals that he had convinced himself of *"[Mr. H's] possible [lack of] independence*" because "*during the holiday period of August 2023 we felt that interlocutory decisions by you were being rushed along at an unusual and unnecessary pace"* despite the Claimants' objections and *"[they] had concerns that you were cooperating unconsciously with Reed Smith who [they] suspected of acting to cover up its mistake of prematurely and wrongly notifying Barclays Bank to freeze the escrow money which in turn had the consequence of frustrating the sale of the vessel [K] to our client.*" The supposed connection between the alleged "rushing along" of interlocutory decisions in August 2023 and Mr. H's alleged lack of independence is transparently false, as the analysis of those procedural decisions above demonstrates. There is no evidence to support any rushing along or any "*unconscious cooperation*" on the part of Mr. H.

83. Mr. Zaiwalla further questioned whether Mr. H had in fact ever been instructed by his firm and then concluded his letter by stating as follows:

> *"A more relevant consideration will b[e] any professional involvement that you may in the recent past have had with Reed Smith LLP. As your clerks have recently been assisting you with this enquiry, may I at the same time request that they verify the extent of your previous professional involvement with Reed Smith (and its predecessor firm Richards Butler), and/or Mr. Weller, whether as counsel or arbitrator appointed by one of its clients".*

84. The Claimants suggest that this was a straightforward request that Mr. H disclose his connections to Reed Smith LLP (and its predecessor Richards Butler). But one can readily understand how, in the context of an LMAA arbitration and in view of the formulation of "Reed Smith and/or Mr. Weller", Mr. H might have taken this enquiry to be focussing particularly on cases in which he had been instructed by Mr. Weller and other members of his department within Reed Smith. That is particularly so in light of

the earlier correspondence from Zaiwalla in which Mr. Weller is the focus of their enquiry.

85. That indeed appears to be how Mr. H understood this enquiry when he responded on 2 March 2024. Having fairly pointed out that accusing him of actual or apparent bias overlooked the fact that "*[t]he Tribunal has not ever made a decision in this reference other than unanimously – between Mr. [B] and me, before Mr. [S] was appointed, and between all three arbitrators, since Mr. [S]'s appointment*", he answered the enquiry of Mr. Zaiwalla as follows:

> *"In answer to your final question, my clerks have informed me that, in my capacity as barrister, I have been instructed by Mr. Weller or members of his department once, in 2014 (total fees earned - £3,900); and between 2008 and the present, I have been appointed arbitrator on 8 occasions (excluding the current reference). Four did not progress beyond appointment, in two there was minimal additional involvement (total fees £1,250 and £872.50) and two progressed to awards, where my total fees were £14,900 (appointment in 2008) and £26,175.00 (appointment in 2017)."*

86. It appears that Mr. H was informing Mr. Zaiwalla about his instructions by Mr. Weller and his department at Reed Smith, which makes sense in the context of an LMAA arbitration. In any event, once again had the Claimants wanted broader information than this, concerning any instructions by Reed Smith as a firm, then no doubt they would immediately have asked for it in response. But they did not. Nor, unsurprisingly, did they suggest that (i) Mr. H should have disclosed the 8 arbitral appointments over a 16-year period at any earlier stage and (ii) his failure to do so was in any way wrongful. This again lends support to a finding that there was no voluntary duty upon Mr. H to disclose any previous instructions by Reed Smith in the context of an LMAA arbitration, and this is again important context which the fair minded observer would consider before passing judgment. I return to this below.

87. Instead, the Claimants let matters lie after receipt of Mr. H's email until the publication of the award some 6 months later (see further below). Furthermore, if as the Claimants now argue, "*the meaning of Mr. Weller's "department" is entirely obscure*", why did they not ask Mr. H what he meant by that? But they did not. I do not accept that it is obscure in any event. Mr. Weller signed his letters at the time with a footer which read "*Transportation Industry Group/Shipping*." He was a partner in Reed Smith's Shipping Department of the Transportation Industry Group.

88. It follows that in respect of this enquiry, as in respect of the first enquiry, the Claimants had drawn a blank in their attempt to have Mr. H removed as an arbitrator.

89. On 6 March 2024, Mr. B sent an email to Mr. Zaiwalla in which he also made the obvious point, in respect of Mr. Zaiwalla's allegation that Mr. H had favoured Mr. Weller/Reed Smith in the interlocutory decisions taken by the Tribunal, that

> *"Your letter ignores the fact that at all times I was a party to the decisions to which you object. None of those decisions could have been made without my participation. In every respect the tribunal's decisions were made by [Mr. H] and myself jointly*

> *and I fully participated in and agreed with all of them. I am senior to [Mr. H] in call and am in no way under his influence, yet I am not accused of excessive closeness to Mr. Weller or Reed Smith nor could I be. If the allegations you make are justified, then they are just as much criticisms of myself but there could be no corruption of the sort you claim.*
>
> *You may wish to reconsider your position."*

90. Mr. Zaiwalla's response to this email simply fails to grapple with this point. Instead, he simply asserted as follows:

> *"The centrepiece of the [Claimant's] concern is and has been the unique fact that Mr. Weller, the Reed Smith partner, is facing a personal allegation of having made an erroneous decision amounting to negligence which prevented the contract for the sale of the vessel from being performed and caused substantial consequential losses to our client, which are at present being claimed in the proceedings in the High Court commenced by our client against Reed Smith. It is apparent from Mr. Weller's conduct that he and his firm, Reed Smith, were seeking friendly protection from the Tribunal of which [Mr. H] is a member, and it seems to both [the Claimants] and our firm that they have been deriving protection through the Tribunal's unusually generally one-sided approach and conduct, seeking to protect Mr. Weller's and Reed Smith's reputation".*

91. The suggestion that the Tribunal, in making its interlocutory rulings, was "*seeking to protect Mr. Weller's and Reed Smith's reputation*" was and is wholly unfounded, there being no evidence to support such a serious allegation, as I have explained above.

92. On 8 March 2024 Mr. S sent an email to Mr. Zaiwalla in which he stated that the suggestion that he or the Tribunal had danced to the tune of K was "*nothing short of preposterous*." He explained that:

> *"We have not, in the light of my very considerable experience as an arbitrator in LMAA, ICC, LCIA, UNCITRAL and other arbitrations, acted with undue haste, nor have we consistently made one-sided decisions as you have suggested. To the contrary we have considered each application before us on its merits, independently and without favouring either side. The fact that we have made decisions with which one or other side has disagreed is of course no indication of bias, conscious or unconscious and as you are aware the [Defendant] as well as the [Claimants] have been the recipient of adverse procedural decisions. If our approach has been more "formal" than that common in at least some LMAA arbitrations, it is a function of the nature and seriousness of the issues raised, as we made clear in early correspondence, and as has proved to be more than amply justified as the case has developed."*

93. Mr. S also pointed out that:

> *"If there was any substance to your firm's allegations of bias, then, as has been pointed out, your clients' remedy lay in an application under section 24 of the Arbitration Act 1996. Yet despite your firm's having informed us, on the 30 January 2024, that instructions had been received to seek the advice of leading counsel on making a section 24 application, no such application has been made. On the contrary, your clients have apparently embarked on a course of non-participation for which we can see no factual or legal justification."*

94. Accordingly, it must have been clear to the Claimants and Zaiwalla by this stage that the Tribunal was not going to accede to the repeated, unfounded suggestions for it to stand down. But the Claimants failed to issue section 24 proceedings. Instead, they played no further part in the arbitration and on 12 August 2024 the Tribunal published its Partial Final Award in favour of K.

95. The Claimants' tactical approach to the arbitration had accordingly seriously backfired. The members of the Tribunal had refused to stand down and the Claimants did not have the courage of their (asserted) conviction: no section 24 application had been made by them.

96. Some five months later, Mr. Zaiwalla returned to the subject of bias in his email to the members of the Tribunal dated 14 August 2024. As Mr. Mander submitted, this may well have been prompted by the publication of the judgment in *Aiteo v Shell* [2024] EWHC 1993 (Comm), a judgment of Jacobs J which was handed down on 1 August 2024 (and which I consider below). Mr. Zaiwalla stated that the Claimants were "*at present considering applying to the court to challenge the award under section 68*" and that:

> *"For this purpose, we would request each of you individually to kindly disclose any past and present connection, personal or otherwise (including number of times instructed as counsel or appointed as arbitrator) with Reed Smith, Mr. Weller or any other partners of Reed Smith, giving full details. Need we say, we expect you to each frankly state your connection, including, any personal or social connection with Mr. Weller, or any other Partners of Reed Smith."* (emphasis added)

97. In other words, the Claimants were looking for some material to support a section 68 challenge; and this time they had decided to focus not just upon Mr. H but also upon Mr. B and Mr. S. Further still, they widened their request to any past or present connection, personal or otherwise, with any partners of Reed Smith other than Mr. Weller.

98. Mr. B was not taking the bait: he stated that the Tribunal was *functus officio* and the request was inappropriate. Accordingly, he did not intend to respond. Similarly, Mr. S stated in his email in reply dated 14 August (more accurately) that the Tribunal was "*functus officio in respect of all matters decided therein*" but that if he had any material disclosure to make, he would have done so at the time of his appointment. For completeness, he had no record of being appointed as arbitrator by Reed Smith since 2013 and he had no personal or professional relationship with Mr. Weller.

99. Mr. H responded by email dated 19 August 2024. He stated in particular:

> *"So far as I can recall I have had no personal or social contact with any partner of Reed Smith (including Mr. Weller) in the last five years. (I have taken the period of five years to be conservative, three being the more normal period of reference.) During this period, I have not been retained as counsel by any partner of Reed Smith. According to my clerks, who retain these records, I have received 88 appointments as arbitrator during this period, of which 14 were appointments by Reed Smith (about 16%). Most of these appointments have been in LMAA arbitrations – a field of arbitration which has its own particular characteristics, circumstances, customs and practices – although I have also had 2 LCIA and 1 ICC appointment. The ICC arbitration and most of the LMAA arbitrations never proceeded beyond appointment. I suspect that, like many of my arbitral appointments, the appointment was made to prevent claims becoming time barred. Two LMAA arbitrations are still active. The proportion of my income as an arbitrator during this period which relates to appointments by Reed Smith is about 8% (of which the [K] arbitration accounts for about 37%)."* (emphasis added)

100. Mr. H accordingly made clear to the Claimants that, as with his earlier disclosure on 2 March 2024, the information which he was conveying to them was information which had been provided to him by his clerks, who retained the relevant records.

101. The Claimants argue that there is a confusing and unexplained mismatch of terminology between Mr. H's response of 2 March 2024 and his response of 19 August 2024. In the former, Mr. H referred to appointments by "*Mr. Weller or members of his department*" whereas in the latter he referred to "*Reed Smith*", which as Mr. Weller states in his first witness statement at [69], "*is of course significantly larger than my department*". But it can be seen that mismatch is likely the product of the questions which were asked of him by Zaiwalla: the request of 14 August 2024 is apparently wider than the request of 2 March 2024. At the very least, since the scope of the information being sought was ambiguous, the fair minded and informed observer would certainly not conclude that there was a real possibility of bias on the part of Mr. H purely as a result of his answering the enquiries as he did.

102. The Claimants also suggest that there is an inconsistency between Mr. H's email of 2 March 2024 in which he says that, between 2008 and March 2024 (16 years) he had been appointed as arbitrator *by Mr. Weller or members of his department* on 8 occasions (excluding the K arbitration) and his last email of 19 August 2024 in which he says that in the past 5 years (presumably up until August 2024) he had received 14 appointments by Reed Smith as a firm (not limited to Mr. Weller or his department), most of which were LMAA arbitrations although 2 were LCIA arbitrations and one ICC arbitration. Mr. Mander argued that there may be no inconsistency in that in his email of 2nd March 2024 Mr. H may have been referring to LMAA arbitrations only (of which there are 9) as he is referring to Mr. Weller's department, and whilst in his 19 August email he refers to 14 appointments, the additional 5 may be explained by the fact that 3 are non-LMAA arbitrations and the two active LMAA arbitrations may be new arbitration appointments

since March 2024. Mr. Karia KC takes issue with that, maintaining that in his email of 2 March 2024, Mr. H does not say that he is only referring to LMAA arbitrations.

103. Without an explanation from Mr. H (or rather his clerks) it is impossible to resolve this question. It is *possible* that there is an inconsistency, and if so, that may simply be that, as Mr. Mander submitted, a more extensive search of the relevant records was undertaken by the clerks in August 2024 in view of the fact that it was clear that the Claimants were intending to bring a section 68 application.

104. But in any event, I reject any suggestion that Mr. H was guilty of a lack of candour in making this disclosure in his third email. On the contrary, it is clear that he was being fully transparent in respect of his previous instructions by Reed Smith, by asking his clerks to interrogate the records which chambers holds, which information he then passed on to Zaiwalla in his email, making clear that this was what he had been told by his clerks, who held the records.

105. Indeed, if the Claimants considered that there were any inconsistency between these two emails, they could simply have asked Mr. H to check the position with his clerks, rather than keeping quiet about it, and then launching this section 68 challenge on 7 October 2024 on the basis of this email, alleging a lack of candour based upon their interpretation of it in Mr. H's absence. That is reinforced by the fact that had a section 24 application been made, as was repeatedly threatened by the Claimants, Mr. H would have been entitled to appear before the court and be heard. Instead, the Claimants have chosen to invite the court to look at ambiguous correspondence passing between them and Mr. H and then to invite the court to adopt a construction of that correspondence which is unfavourable to Mr. H in order to support the very serious finding, damaging to his professional reputation, that he was being deliberately evasive about his relationship with Reed Smith and Mr. Weller. Particularly when these email exchanges are seen in the context of the correspondence as a whole and in the context of the transparently fair way in which all procedural applications were handled by Mr. H, I do not consider that the fair minded and informed observer would conclude that there was a real possibility of bias on the part of Mr. H.

F. The present case: duty of disclosure?

106. In any event, I consider that Mr. H had no duty of disclosure of his previous Reed Smith arbitral appointments in the present case.

107. As explained above, in *Halliburton* Lord Hodge pointed out on a number of occasions that there is an established custom or practice in LMAA arbitrations that an arbitrator may take on such multiple appointments without disclosure.

108. In the present case, the court is not concerned with "multiple appointments", that is appointments in multiple references concerning the same or overlapping subject matter with only one common party, as in *Halliburton*, where the arbitrator may become privy to information in arbitration 1 which will be unknown to one of the parties in arbitration 2. Rather, this case concerns repeated instructions in *unrelated* arbitrations by the *same law firm* over a number of years. As Mr. Mander rightly submitted, law firms specialising in maritime law such as Reed Smith will naturally act for many different clients, such that the inevitability of repeat appointments of individual LMAA arbitrators is greatly magnified.

109. In support of his argument that there was no legal duty upon Mr. H to make disclosure of previous instructions by Reed Smith for him to act as a LMAA arbitrator, Mr. Mander referred to and sought to rely upon the LMAA Advice on Ethics.

110. The opening paragraph of the LMAA Advice on Ethics is significant. It states:

> *"This advice is intended for arbitrators conducting maritime arbitrations, or accepting appointments as arbitrator, on terms of the London Maritime Arbitrators Association. The advice draws in part on the IBA Guidelines on Conflicts of Interest in International Arbitration published in February 2024, but reflects the recognised fact that in maritime arbitration, arbitrators are drawn largely from a specialised pool of individuals and the number of specialised law firms and other representatives internationally who appoint arbitrators is relatively small. Consequently, there is a custom or practice for parties or their representatives to frequently appoint the same arbitrator in different cases."* (emphasis added)

111. Paragraph 1.8 of the LMAA Advice on Ethics further provides:

> *"It has been suggested that the frequent appointment of arbitrators on different cases by the same appointing person, party or entity may give rise to a lack of independence, or a perception of bias. However, it remains the case in maritime arbitration that the pool of arbitrators and the number of specialised law firms and other representatives who appoint arbitrators is not large and it is accepted as inevitable that such circumstances will arise. This is not considered to be a matter for disclosure although an arbitrator should always be satisfied as to the other matters referred to in these notes …"* (emphasis added).

112. Mr. Karia KC, on the other hand, sought to rely upon paragraph 1.4 as requiring disclosure in a case such as the present. That reads as follows:

> *"1.4 Where there has been a regular relationship in the past, whether with the proposed appointor or with the opponents to the dispute, the test is usually one of time. As a general guideline a period of less than three years will require disclosure by the arbitrator. However, whilst the question of actual independence is very important, what is crucial is the question of how a reasonable party may perceive the situation. If a reasonable party may reasonably think that there is or has been an undue connection resulting in a perceived lack of independence, then whether or not that is the case, the Courts would be likely to intervene, if invited. It follows that arbitrators should not accept appointments in the first instance where there is any substantial risk of that happening."*

113. However, paragraph 1.4 follows on from paragraph 1.3 which reads:

> *"1.3 There are obvious cases which preclude the acceptance of an appointment, if it be offered. These include a personal or ongoing or recent commercial relationship with one of the parties, even though it may be, or may have been, on a casual basis only, and whether or not related to the dispute. In such circumstances an arbitrator should consider carefully whether, to a third party, he or she would be seen as independent and impartial. In most cases it is likely that the prudent course would be to refuse the appointment."*

114. Since the opening paragraph of the Advice on Ethics refers to the LMAA custom or practice for parties or their representatives to *frequently* appoint the same arbitrator in different cases but that (per paragraph 1.8) the *frequent* appointment of arbitrators on different cases by the same appointing person, party or entity is not considered a matter for disclosure, I do not consider that paragraph 1.4 can have been intended to go back on that central proposition. It is more likely that paragraph 1.4 is intended to refer to a regular relationship with the *appointing party*. In any event, the Advice on Ethics clearly refers to there being, in the London maritime market, a custom or practice of the appointment of the same arbitrator in different cases such that disclosure of those appointments is not required (absent some other special feature(s) making disclosure in the particular case necessary). I do not consider that there is any such special feature in this case.

115. Mr. Karia KC also pointed out that whilst this document is on the LMAA website it is not part of the LMAA terms which an arbitrator accepts upon appointment. However, as its states in its first sentence, the "*advice is intended for arbitrators conducting maritime arbitrations, or accepting appointments as arbitrator, on terms of the London Maritime Arbitrators Association*." It is of course correct that this advice does not contain binding terms of an LMAA appointment. But it is clearly intended to reflect the custom and practice of the participants in the London maritime market (being updated from time to time).

116. Moreover, the "*custom or practice*" of the London maritime market which is referred to in the opening paragraph of the Advice on Ethics is consistent with the submissions, accepted by Lord Hodge, which were made to the Supreme Court by the LMAA in *Halliburton*. In *Halliburton* Lodge Hodge referred to the fact that even in the case of multiple *overlapping* LMAA arbitrations disclosure was not required by the arbitrator as a matter of custom or practice as this fact was not generally perceived (in the LMAA market) as calling into question an arbitrator's impartiality or giving rise to unfairness.

117. Mr. Karia KC sought to distinguish this case from the factual situation which arose in *Halliburton* in that, he argued, we are here not concerned with multiple overlapping arbitrations arising out of the same incident but rather a number of "historic instructions". However, if there is no duty of disclosure in the case of multiple *overlapping* LMAA arbitrations, it is even less likely that there is a duty of disclosure in the case of instruction in multiple *unrelated* LMAA arbitrations concerning different parties.

118. I consider that this would be understood by regular participants in the London maritime market such as Zaiwalla and Reed Smith, such that disclosure of previous appointments in this case would not be thought necessary. Indeed, this conclusion is supported by the Claimants'/Zaiwalla's own actions in this case, as set out in paragraphs 71 and 86 above. This also presumably explains why, in the correspondence referred to above, Zaiwalla

did not simply allege that Mr. H had a duty voluntarily to disclose all of his arbitral instructions by Reed Smith. Rather, they looked to find a reason to demand disclosure by Mr. H of his previous appointments by Reed Smith. In particular they sought to suggest that the Tribunal's procedural rulings favoured Reed Smith's client and sought to justify their request for disclosure by the fact that, they said, they intended to bring a claim against Reed Smith in the High Court.

119. In the circumstances, I do not consider that Mr. H had a duty of disclosure of his previous Reed Smith arbitral appointments in the present case.

Aiteo v Shell

120. However, Mr. Karia KC further submitted that this conclusion cannot stand in the light of the decision of Jacobs J in *Aiteo Eastern E&P Co Ltd v Shell Western Supply* [2024] EWHC 1993 (Comm), arguing that there was a "*striking similarity between the facts of that case and those of the present case*".

121. I do not accept Mr. Karia KC's submission. The facts of *Aiteo* are materially different.

122. *Aiteo* concerned an Onshore and an Offshore ICC arbitration. Shell nominated Dame Elizabeth Gloster (DEG), a retired Court of Appeal judge, as arbitrator in the Offshore Arbitration, and the Onshore Lenders did likewise in the Onshore Arbitration. The Lenders requested the consolidation of both arbitration references.

123. The facts of the case were that:

    (1) In the period 2018-2023, DEG had received a total of 7 arbitral nominations/appointments and expert instructions, in which Freshfields were acting, together with the appointment in the arbitral reference giving rise to the challenge before the court. This included two expert instructions and one arbitral appointment during the currency of the arbitral proceedings: [5].

    (2) On her appointment on 23 December 2020, however, DEG stated only that she "*had been party appointed in two other unrelated arbitrations in the last 2 years by clients represented by Freshfields*". DEG inadvertently did not disclose the fact that, in June-July 2020, she gave expert advice in conference to a client of Freshfields in an unrelated matter: [14].

    (3) Four partial awards had been made by the panel in the *Aiteo* arbitration which included DEG, between 15 March 2022 and 25 August 2023. But the full picture with respect to the professional connections between DEG and Freshfields emerged only on 9 December 2023, as a result of DEG's responses to some detailed questions asked by Aiteo's solicitors: [5].

124. Aiteo appealed to the court under section 68 of the Arbitration Act 1996, seeking to set aside the four Arbitration Awards on the grounds of DEG's apparent bias by reason of her professional links with Freshfields and her failure to disclose those links in a timely fashion. Aiteo argued that the breach of section 68 had given rise to substantial injustice.

125. In *Aiteo,* Jacobs J referred to two important features of that case which clearly distinguish it from the present case.

126. First and most importantly, the Judge referred at [71] to the fact that the court was concerned with ICC arbitrations and he referred to the ICC Rules (which it was common ground operated contractually) concerning the required independence and impartiality of ICC arbitrators which, importantly, has a subjective element:

> *"Article 11 requires the disclosure of "any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality". Halliburton indicates that the reference to "eyes of the parties" connotes, certainly as far as independence is concerned, an element of subjectivity; it requires consideration of how the parties might view matters, not simply how a fair-minded observer might do so."*

127. The Judge also referred at [23] to the guidance which the ICC provides concerning independence and impartiality which makes the same point, and also provided as follows:

> *"Each arbitrator or prospective arbitrator must assess what circumstances, if any, are such as to call into question his or her independence in the eyes of the parties or give rise to reasonable doubts as to his or her impartiality. In making such assessment, an arbitrator or prospective arbitrator should consider all potentially relevant circumstances, including but not limited to the following: …*
>
> *• The arbitrator or prospective arbitrator has in the past been appointed as arbitrator by one of the parties or one of its affiliates, or by counsel to one of the parties or the counsel's law firm."*

128. In consequence, the Judge found that [at 76-77]:

> *"76. Against this background, it was in my view clearly appropriate, under the applicable ICC Rules and bearing in mind the guidance given in the Arbitrator Statement and the Note (which in my view must be taken as representing good current arbitral practice) for DEG to disclose the two relatively recent appointments by Freshfields, which brought the total number of appointments or nominations for appointment (including the current nomination) to four, within a relatively short space of time. As Mr. Juratowitch KC's submissions acknowledged, the Lenders' present case would certainly have been problematic if disclosure of these two appointments had not been made.*
>
> *77. However, the disclosure was in fact made, and no criticism can be made of the arbitrator in relation to the two prior appointments. The question which arises is whether, as Aiteo contends, the disclosure was incomplete, because of the non-disclosure of a further recent professional relationship between DEG and Freshfields."*

129. The Judge held at [78] that it *was* incomplete. The nature of the instruction was important: "*An advisory engagement of that kind [i.e. the engagement in June-July 2020], whether in respect of a barrister or retired judge, gives rise to a closer and different relationship to that which exists between arbitrator and the firm of solicitors which has appointed him or her*" [79]. But most significantly, the Judge's finding that DEG was bound to disclose her instruction by Freshfields in June-July 2020 was clearly made in the context of the application of the ICC Rules, containing as they do the element of subjectivity: see [87] and, in particular [93]:

> *"I do not consider that it is appropriate to approach this issue by considering what the position would be under English law divorced from the terms of the ICC Rules; bearing in mind that the parties, as well as the arbitrator when accepting appointment, were bound by those Rules. The more significant question, therefore, is whether the June–July 2020 engagement was disclosable under article 11 of the ICC Rules; because it was a fact or circumstance which "might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties" or because it was a circumstance that "could give rise to reasonable doubts as to the arbitrator's impartiality". In approaching that question, I consider that the guidance provided by the ICC in the standard form ICC Arbitrator Statement, and the Note, is relevant. Against that background, I consider that the June–July 2020 engagement by Freshfields was indeed disclosable…"*

130. In addition, the Judge found that DEG failed to disclose, but ought to have disclosed, her instruction to provide an expert declaration in unrelated foreign law proceedings in February/March 2022. Once again, the Judge's finding in this respect was driven by the ICC context. He stated at [102]:

> *"The February–March 2022 engagement was another professional engagement by Freshfields, and both the Note and the terms of the ICC Arbitrator Statement would point very clearly in the direction of disclosure."*

131. Finally, the Judge held, by parity of reasoning, that there was a failure to disclose an October 2023 instruction to advise on English law in connection with foreign proceedings: [111].

132. Second, as the Judge stated at [3]:

> *"[a]n important and unusual feature of the present case is that a successful challenge to DEG was made to the ICC Court, which is the ICC body responsible for dealing with challenges to arbitrators pursuant to article 14 of the rules which govern ICC arbitrations, namely the ICC Rules of Arbitration ("the ICC Rules"). … Challenges are often made, but rarely succeed. The ICC Court gave its unreasoned decision [on 17 January 2024], upholding the challenge on its merits. The challenge was made*

> *upon substantially the same grounds as those advanced on the present application under section 68."*

133. He addressed this unusual feature at [113] ff. of his judgment. He stated that it was common ground, based on Halliburton, that the fair-minded and informed observer would know that the ICC had accepted the challenge to DEG and had removed her. He held at [136] that:

> *"In my view, the observer would pay regard to the decision, and indeed it is difficult to see how the observer's approach could not, at least to some degree, be coloured by the decision taken by the arbitral institution, here the ICC Court, which has determined the challenge. An informed observer would recognise that the ICC Court had considerable experience of determining challenges, inevitably far more experience than the observer. He or she would also recognise that the ICC is one of the world's leading arbitral institutions, and that the parties must have had faith in that institution since they agreed to submit their disputes to ICC arbitration."*

134. He added at [137] that the informed observer would also appreciate that the ICC's decision to remove DEG is a relatively rare example of a challenge that succeeded. Ultimately, whilst the observer would recognise that he or she should make up his or her own mind on the basis of the underlying facts, and that it would be wrong to reach a conclusion simply by reference to what the ICC Court had decided, the decision of the ICC Court could serve as a useful cross-check on the observer's own conclusions based on the underlying facts ([138]).

135. Mr Justice Jacobs concluded at [166] that, whilst there were arguments that could be made on either side, "*I consider that the observer would consider that when considering the facts in the round, this case falls on the wrong side of the line, and that there was a real possibility of unconscious bias. The observer's view to that effect would be confirmed and reinforced by the decision of the ICC Court to remove DEG*". The expert instruction which predated and was concluded prior to the appointment in issue was not unduly concerning, but the second and third advisory/expert engagements occurred during the currency of the arbitration and in view of the close relationship to which they gave rise this *was* concerning. Accordingly (at [184]):

> *"The observer would consider that there was a real possibility of unconscious bias, notwithstanding that there were some factors which would favour a different conclusion. The observer would feel comfortable in reaching that conclusion in circumstances where the ICC Court had removed DEG as arbitrator. Any possible doubt as to the answer to the question for the observer would be resolved by the consideration of the decision of the ICC Court, which would strike the observer as rational and well founded."*

136. The determination as to whether the fair-minded and informed observer would conclude that there was a real possibility that an arbitrator was biased will depend in each case on the facts of the particular case. The critical factors in *Aiteo* which led to that conclusion

were: (1) it was an arbitration under ICC rules with an element of subjectivity in the test; (2) the ICC had already upheld the challenge to the arbitrator; and (3) the relevant engagements gave rise to a particularly close relationship which occurred during the currency of the arbitration. None of these factors are present in the instant case.

G. Other factors which the fair-minded and informed observer would take into account

137. Even if I am wrong about this and Mr. H did have a duty to disclose his other unrelated appointments by Reed Smith as arbitrator, I do not consider that that factor, namely Mr. H's failure to disclose them, when viewed in the light of all other relevant factors, would or might lead the fair-minded and informed observer, having considered all the facts, to conclude that there was a real possibility that he was biased.

138. The factors which the fair minded and informed observer would take into account before passing judgment in this case, and which would lead him/her to conclude that there was no real possibility that Mr. H was biased, are as follows.

139. First, the custom or practice for parties or their representatives to frequently appoint the same arbitrator in different cases in the London maritime market.

140. Second, I accept the evidence of Mr. Weller who states at [70] of his first witness statement:

> *"For a leading silk/arbitrator in a very specialist area like shipping, the number of occasions on which Mr. H has been appointed by either me or my department (which acts in many shipping arbitrations at any one time) or my firm (which practices in many other areas) more generally, is not unusually high, whether in absolute terms or relative to his overall practice."*

141. Seen in this context, when one looks at the substance of the information given by Mr. H about his previous instructions, I consider that the fair minded and informed observer would not conclude that there was a real possibility of bias on the part of Mr. H. During the past 5 years (2019-2024), Mr. H has received 88 appointments as arbitrator, of which just 14 were appointments by Reed Smith (16%) over the entire 5-year period (which averages under 3 a year), being mostly LMAA arbitrations. It follows that 74 were not (the other 84%). Moreover, most of these never proceeded beyond appointment. Last, Reed Smith's appointments account for merely 8% of Mr. H's total income from his arbitral appointments during this period (of which K itself accounts for 37%).

142. This information certainly does not suggest that Mr. H was dependent in any way upon Reed Smith for his appointment as an arbitrator (and certainly not as counsel) and it affords no reason to doubt Mr. H's integrity and impartiality.

143. Third, the transparent fairness with which Mr. H, together with Mr. B, and then subsequently with Mr. B and Mr. S, made all of the Tribunal's rulings throughout.

144. Fourth, that Mr. H has an established reputation for integrity and wide experience in maritime arbitration, which would be known to both Zaiwalla and Reed Smith.

145. Fifth, that both Mr. B and Mr. S who also have an established reputation for integrity, wrote to Zaiwalla to confirm that none of the Tribunal's decisions have been influenced

by any past professional relationship with Reed Smith and to state that all of the Tribunal's decisions had been taken unanimously on the merits.

146. Sixth, that Mr. H responded promptly and courteously to all enquiries made of him by Zaiwalla despite the provocative nature of those enquiries. Indeed, whilst Mr. B and Mr. S stated that they were not required to respond to the enquiries of Zaiwalla about their connections with Reed Smith after the arbitration was concluded and the Award published, Mr. H constructively and voluntarily obtained the available information from his clerks and passed it on to Zaiwalla.

147. Seventh, that Mr. H's courteous response to the enquiries was given in the context of opportunistic and tactical challenges to the integrity of the Tribunal as a whole, as described above.

148. Eighth, the fact that Mr. H made clear, on each of the two occasions when he provided Zaiwalla with the statistics concerning his receipt of appointments as counsel and as arbitrator, that he was passing on the information given to him by his clerks who kept the relevant records. Mr. H was not seeking to mislead; rather he was passing on historical information given to him by his clerks, the accuracy of which it is not alleged he had any reason to doubt.

149. Ninth, despite threatening to do so and despite repeated offers by the Tribunal to do so, the Claimants never brought a section 24 challenge to have Mr. H removed as arbitrator based upon his past professional connections with Reed Smith and/or Mr. Weller (when Mr. H would have been entitled to appear before the court and be heard).

150. Tenth, the Claimants and Zaiwalla's own actions set out in paragraphs 71 and 86 above.

151. Eleventh, if in fact there were a duty upon Mr. H to disclose his appointments by Reed Smith in unrelated arbitrations, then there was a lack of clarity in English law as to that obligation of disclosure. Mr. H might legitimately have thought, particularly in the light of the submissions to the Supreme Court by the LMAA in *Halliburton* and/or the LMAA's Advice on Ethics that there was no obligation of disclosure resting upon him in respect of unrelated appointments by Reed Smith.

152. In all the circumstances I firmly reject the suggestion:

    (1) that the Tribunal demonstrated apparent bias in its procedural decisions or any of its rulings given in the arbitration in favour of K;

    (2) of a repeated lack of candour by K's party-appointed arbitrator, Mr. H, in allegedly misrepresenting the nature and extent of his relationship with Reed Smith (and Zaiwalla);

    (3) that Mr. H failed to provide full and frank disclosure about his connections with Reed Smith upon being asked about them;

    (4) that the fair-minded and informed observer, having considered the facts of this case, would or might conclude that there was a real possibility that Mr. H was biased.

H. Conclusion

153. In the result, both the section 68 challenge and the section 67 challenge fail on their merits. This is certainly not a case where the Claimants have surmounted the high

threshold of showing that the arbitral tribunal has gone so wrong in its conduct that justice cries out for it to be corrected[12] and the Tribunal throughout undoubtedly had substantive jurisdiction to make its award.

154. I would add that, since I have found that there was no serious irregularity (apparent bias) affecting the Tribunal in this case, it is unnecessary to go on to consider whether that alleged serious irregularity has caused substantial injustice to the Claimants.

155. In view of the failure of the Claimants' substantive challenge under sections 67 and 68, I shall deal relatively briefly with K's procedural challenges as follows:

(1) Should the Claimants' service of the Arbitration Claim Form be retrospectively validated pursuant to CPR 6.15(2) or CPR 3.9?

(2) If so, should K be granted a retrospective extension of time to serve its application to set aside the Bright J. Order?

(3) If so, should the Bright J. Order extending time for challenging the Award and serving the Claim Form be set aside either (i) because it was not appropriate to extend time; or (ii) for breach of the duty of full and frank disclosure?

(4) Have the Claimants waived their rights to pursue their ss. 67 and/or 68 challenges under s. 73(1) of the Act?

(5) If not, should the Claimants have permission to amend the Claim Form to include a challenge to the Award under s. 67 of the Act?

I. Should the Claimants' service of the Arbitration Claim Form be retrospectively validated?

156. The Tribunal issued its Award on 12 August 2024. By section 70(3) of the Act, the 28-day period for any application or appeal under sections 67-69 expired on 9 September 2024.

157. On 5 September 2024, the Claimants issued their Arbitration Claim Form. That Arbitration Claim Form was never served on K, despite Reed Smith requesting, by email dated 13 September 2024 that Zaiwalla do so. Instead, on 6 September 2024 the Claimants filed an *ex parte* application for permission to amend the Claim Form and for a 28-day extension of time for service of that Amended Claim Form and to bring a section 68 or section 69 challenge (the "**Ex Parte Application**"). This was supported by a witness statement from the Claimants' solicitors ("**Crestohl 1**") dated 5 September 2024.

158. Bright J. granted the application on 10 September 2024, and extended time until 4pm on Monday 7 October 2024 to bring a section 68 or section 69 challenge (but not a section 67 challenge, which the Claimants had not sought). But for the Bright J. Order, the Claim Form would have expired after one month, namely on 5 October 2024.

159. On the very last day of the extended period, namely 7 October 2024, Zaiwalla purported to serve the Amended Claim Form and other documents on Reed Smith by email. Reed Smith had not indicated their willingness to accept service by email. Under CPR PD 6A, paragraph 4.1, service may be effected by email only if the party to be served, or their

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[12] *RAV Bahamas Ltd v Therapy Beach Club Inc (Bahamas)* [2021] 2 Lloyd's Rep 188 at [30]-[31].

solicitors, have indicated in writing that they will accept service by this means. Further still, 7 October 2024 was too late to effect service in any event as service by email on that date would not have been deemed to take effect until 2 business days later: CPR 6.14. Service was therefore defective in any event.

160. One week after its attempt to effect electronic service, Zaiwalla purported to effect service by post, sending hard copies of the Claim Form and related documents to Reed Smith on 15 October 2024. By that time the Claim Form had expired, but had it not, deemed service would have occurred on 17 October 2024.

161. On 25 October 2024 K applied to set aside service upon it of the Claim Form and the Amended Claim Form, in particular pursuant to CPR 11. The Claimants' responsive evidence ("**Crestohl 3**") did not contest that K had not given written indication that service could be effected on it electronically. However, it was not until 2 December 2024 (around 5 weeks after K filed its application), that the Claimants applied under CPR 6.15(2) for retrospective validation of their purported service by email on 7 October, as well as for relief from sanctions under CPR 3.9, on the ground that K was "*playing technical games*" and its challenge was "*wholly technical*" because it was made aware of the contents of the Amended Claim Form by email on 7 October. The Claimants did not address the criteria under CPR 3.9 or explain its 5-week delay in filing the application.

162. CPR 6.15 provides as follows:

> *"**Service of the claim form by an alternative method or at an alternative place***
>
> *6.15*
>
> *(1) Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place.*
>
> *(2) On an application under this rule, the court may order that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service."*

163. As Lord Clarke stated in *Abela v Baadarani* [2013] 1 WLR 2043 at [33], "*under rule 6.15(2), in a case not involving the Hague Service Convention or a bilateral service Treaty, the court should simply ask whether, in all the circumstances, there is good reason to order that steps taken to bring the claim form to the attention of the defendant is good service*."

164. Whether there is good reason so to order is a matter of factual evaluation which does not lend itself to over-analysis: *Barton v Wright Hassall LLP* [2018] 1 WLR 1119 at [9]. In particular Lord Sumption explained as follows (in elaborating upon *Abela*):

    (1) Service has a number of purposes, but the most important is to ensure that the contents of the document are brought to the attention of the person to be served (*Abela* at para [37]). This is therefore a critical factor. However, the mere fact that the defendant learned of the existence and content of the claim form cannot,

without more, constitute a good reason to make an order under rule 6.15(2): [9(2)]. Thus, the question is whether there is good reason for the court to validate the mode of service used, not whether the claimant had good reason to choose that mode: [9(3)].

(2) In the generality of cases, the main relevant factors are likely to be (i) whether the claimant has taken reasonable steps to effect service in accordance with the rules and (ii) whether the defendant or his solicitor was aware of the contents of the claim form at the time when it expired, and (iii) what if any prejudice the defendant would suffer by the retrospective validation of a non-compliant service of the claim form, bearing in mind what he knew about its contents. None of these factors can be regarded as decisive in themselves. The weight to be attached to them will vary with all the circumstances ([10]).

165. Crucially, Lord Sumption stated as follows in *Barton* at [16]:

> *"The first point to be made is that it cannot be enough that Mr. Barton's mode of service successfully brought the claim form to the attention of Berrymans. As Lord Clarke JSC pointed out in Abela v Baadarani [2013] 1WLR 2043, this is likely to be a necessary condition for an order under CPR r 6.15, but it is not a sufficient one. Although the purpose of service is to bring the contents of the claim form to the attention of the defendant, the manner in which this is done is also important. Rules of court must identify some formal step which can be treated as making him aware of it. This is because a bright line rule is necessary in order to determine the exact point from which time runs for the taking of further steps or the entry of judgment in default of them. Service of the claim form within its period of validity may have significant implications for the operation of any relevant limitation period, as they do in this case. Time stops running for limitation purposes when the claim form is issued. The period of validity of the claim form is therefore equivalent to an extension of the limitation period before the proceedings can effectively begin. It is important that there should be a finite limit on that extension. An order under CPR r 6.15 necessarily has the effect of further extending it. For these reasons it has never been enough that the defendant should be aware of the contents of an originating document such as a claim form. Otherwise any unauthorised mode of service would be acceptable, notwithstanding that it fulfilled none of the other purposes of serving originating process."*

166. Mr. Barton had failed to take reasonable steps to serve the claim form in accordance with the rules (CPR 7.5). All that he did was employ a mode of service which he should have appreciated was not in accordance with the rules [21].

167. Like the Claimants in this case, Mr. Barton advanced the submission that the defendant had been playing "technical games" with him. However, the sole basis for that submission was that the defendant had taken the point that service was invalid. Since they did nothing before the purported service by e-mail to suggest that they would not

take the point, Lord Sumption explained that this did nothing to advance Mr. Barton's case [22].

168. Lord Sumption also observed at [23] that Mr. Barton had failed to "*allow himself time to rectify any mishap. But having issued the claim form at the very end of the limitation period and opted not to have it served by the court, he then made no attempt to serve it himself until the very end of its period of validity. A person who courts disaster in this way can have only a very limited claim on the court's indulgence in an application under CPR r 6.15(2). By comparison, the prejudice to [the defendant] is palpable. They will retrospectively be deprived of an accrued limitation defence if service is validated*."

169. This is strikingly similar to the facts of the instant case. As was the case in *R v The Good Law Project v Secretary of State for Health and Social Care* [2022] EWCA Civ 355 at [97], the starting-point in the instant case is that we are concerned with an application for retrospective validation of a non-compliant form of service in circumstances where the effect of the order sought would be to deprive the defendant of a limitation defence. The loss of a limitation defence is an important factor in the exercise of the court's discretion.

170. Moreover, this is not one of the typical types of case where it would be just to retrospectively validate non-compliant service, such as where the defendant has obstructed compliant service or where a claimant has taken reasonable steps to effect service but has been thwarted by some unforeseen external occurrence: *The Good Law Project* at [98]. Rather, all that the Claimants did was employ a mode of service which they should have appreciated was not in accordance with the rules.

171. Despite being given an extended period to serve their amended Claim Form, as in *Barton* the Claimants chose to do so on the very last day of the extended period, giving themselves no time to rectify their careless error. This was not a technical or trivial procedural error, or a case of K "playing technical games"; rather, the error was entirely of the Claimants' own making. Indeed, as Underhill LJ stated in *Good Law Project* at [101]:

> *"A claimant is asking for a retrospective validation of non-compliant service in order to circumvent a limitation defence. Quite trivial errors can sometimes lead to limitation deadlines being missed. That can be harsh, and may be characterised as technical; but it is recognised as a necessary consequence of a limitation regime. The court will in this context be less ready to overlook mistakes of a kind which in other contexts would be accorded no real weight."*

172. In the circumstances, I do not consider that there is good reason to order that the steps taken to bring the claim form to the attention of K is good service. Accordingly service of the Arbitration Claim Form, as originally served and as amended, should not be retrospectively validated under CPR 6.15(2).

173. I also accept the submission of Mr. Mander that the Claimants' alternative ground for retrospectively validating service of the Arbitration Claim Form, based upon CPR 3.9

(and applying the three stage test in *Denton v White* [2014] EWCA Civ 906[13]), is misconceived, as CPR 3.9 is not an alternative route to validation of defective service of originating process. As Carr LJ stated in the *Good Law Project* at [79]:

> *"However and fundamentally, the court in Denton v White was not addressing relief from sanctions (or extensions of time) in the context of service of originating process. As set out above, applications for extensions of time for service of Part 7 and Part 8 claims do not fall under CPR r 3.1(2)(a) (but under CPR r 7.6). There is nothing to suggest that the court in Denton v White (or Hysaj) had in mind failures in service of originating process and applications for extensions of time for service of any claim of any sort, including judicial review claims. The three cases the subject of the appeals in Denton v White involved failures to comply with procedural failures during the life of the claims in question, that is to say after service of the claim forms. The breaches were variously late service of witness statements, failure to comply with an "unless" order, late service of a costs budget and late reporting of the outcome of settlement negotiations. The earlier case of Mitchell v News Group Newspapers Ltd (Practice Note) [2014] 1WLR 795("Mitchell") also arose out of the late filing of a costs budget. The cases following Mitchell and considered in Denton v White (at paras 13—19) arose out of late service of particulars of claim, late disclosure, late service of witness statements and late tendering of security for costs. Hysaj involved late service of a notice of appeal."*

174. The same approach to CPR 3.9 was adopted in *Barton* at [8][14].

175. But even if CPR 3.9 and the three-stage *Denton* test did apply in this case, I would not have granted the Claimants relief from sanctions in any event because in short, as the Defendant rightly submits, the failure to comply with CPR 7.5 was serious (giving rise as it did to the expiry of the limitation period); it arose as a result of carelessness on the part of the Claimants; and there are no countervailing factors. Indeed, the application for relief was not even made promptly: see paragraph 161 above. So far as the original Claim Form is concerned, the Claimants state that they chose not to serve it on K *"because they were mindful that such claim form did not reflect the full legal advice which they would have wished to obtain"*. They refer to it as a "placeholder" with a view to it being updated once permission had been granted for an extension of time for service of an Amended Claim Form and Counsel's views had been obtained. That is an extraordinary position to adopt and certainly provides no justification for the default which occurred.

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[13] (1) the first stage is to identify and assess the seriousness and significance of the failure to comply with the rule; (2) the second stage is to consider why the default occurred; (3) and the third stage is to evaluate all the circumstances of the case, so as to enable the court to deal justly with the application.

[14] See also *Chehaib v Kings College Hospital* [2024] EWHC 2 at [80].

176. I accordingly refuse the Claimants' application for service of the Arbitration Claim Form to be retrospectively validated pursuant to CPR 6.15(2) or CPR 3.9, with the consequence that the claim fails for this reason as well.

177. In the circumstances, it is unnecessary to go on to consider the issues referred to in paragraph 155(2) and (3) above.

178. So far as paragraphs 155(5) is concerned, I refuse permission to amend the Claim Form to include a challenge to the Award under s. 67 of the Act because I consider it to be unarguable by reason of the matters set out in paragraphs 17-18 and 21-47 above. In the circumstances I do not intend to add to the length of this judgment by considering the nice question (referred to in paragraph 155(4) above) of whether the Claimants have waived their rights to pursue their ss. 67 and/or 68 challenges under s. 73(1) of the Act.

J. Result

179. In the circumstances, the Claimants' challenges under sections 67 and 68 of the Act both fail and the arbitration claim is dismissed.