

**IN THE CARIBBEAN COURT OF JUSTICE  
APPELLATE JURISDICTION**

**ON APPEAL FROM THE COURT OF APPEAL OF  
THE CO-OPERATIVE REPUBLIC OF GUYANA**

**CCJ Appeal No GYCV2025/003  
GY Civil Appeal No 80 of 2018**

**BETWEEN**

**THE ATTORNEY GENERAL OF GUYANA**

**APPELLANT**

**AND**

**AZAD MEERZA  
(trading under the name and style, Falcon  
Transportation and Construction Services of  
Lot 108 Meten-Meer-Zorg, West Coast Demerara)**

**RESPONDENT**

**Before:** **Mr Justice Anderson, President  
Mme Justice Rajnauth-Lee  
Mr Justice Jamadar  
Mme Justice Ononaiwu  
Mr Justice Bulkan**

**Date of Judgment:** **11 March 2026**

**Appearances**

Mr Nigel Hawke, Ms Raeanna Clarke, Ms Mohanie Sudama and Ms Shania Persaud for the Appellant

Mr K A Juman-Yassin SC and Mr Teni Housty for the Respondent

*Arbitration – Arbitrator sitting again in proceedings of the same facts and issues – Duty to disclose – Apparent bias – Waiver – Prompt objection required – UNCITRAL Arbitration Rules.*

## SUMMARY

The appellant, the Government of Guyana acting through its Attorney General, entered into a contract with the respondent, Azad Meerza of Falcon Transportation and Construction Services, for certain road works. In these proceedings, the appellant resists the enforcement of an arbitral award made against it concerning a dispute arising during the contract, claiming bias on the part of Mr Edward Gonsalves, one of the arbitrators. Their objection was that Mr Gonsalves was previously involved in adjudicating the same matter on a first panel which had decided in favour of the respondent. The High Court did not enforce the first award made in March 2015 because the panel was found to be improperly constituted.

Following the non-enforcement of the first award, the respondent filed an originating summons under the Arbitration Act to nominate appointees to form a new panel, to which, at the direction of the High Court (Persaud J), Mr Gonsalves was nominated again by the respondent with no objection from the appellant. The process of nominating the rest of the panel took place over the months following with intermittent participation by the appellant. Thereafter, the reconstituted panel conducted the arbitration proceedings and again made an award in favour of the respondent in the sum of GYD179,946,850. The appellant did not participate in the arbitration proceedings despite being notified on several occasions.

The respondent once again returned to the High Court for an Order enforcing the second award. At first instance, the application was refused on the basis that the second tribunal was improperly formed, the court reasoning that the Order of Holder J in the first enforcement proceedings brought the tribunal's tenure to an end. The court added that there was no evidence that the parties had consented to designating the High Court as an appointing authority to constitute the second tribunal. The Court of Appeal of Guyana reversed this decision, holding that the appellant was estopped from objecting to the composition of the second panel since its objection was outside the 15-day window prescribed by the UNCITRAL Arbitration Rules, by which the parties were bound. By a majority, the Court of Appeal ordered that the award of the reconstituted panel be enforced. The appellant appealed this order, repeating before the Caribbean Court of Justice ('CCJ')

or ‘Court’) its contention of apparent bias on the part of the reconstituted panel and arguing that Mr Gonsalves erred by failing to disclose that he had served on the first arbitral panel.

This Court affirmed the principles of disclosure and their importance in maintaining the impartiality of an arbitrator and the integrity of arbitral proceedings, but found that the fact of Mr Gonsalves’ prior involvement as an arbitrator was no secret, and in those circumstances, he did not violate any duty to disclose what was already known.

On the issue of apparent bias, the CCJ applied the common law test of ‘whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the judge was biased.’ Based on the authorities considered, this Court agreed that the mere fact of having sat on a panel that previously adjudicated on the same dispute between the parties does not automatically give rise to a presumption of apparent bias, but rather something additional of substance is required for such a finding. The Court discussed a plethora of reasons in support of this position, including the fact that arbitrators and judges are trained to be fair and open-minded, while other factors such as judicial economy and efficiency are relevant in determining whether the same judge or panel should sit again in the same dispute.

Ultimately, this Court determined that there is no exhaustive list of situations that automatically suggest apparent bias by an arbitrator, with each case having to be evaluated on the basis of its specific facts and circumstances from the perspective of the ‘fair-minded observer.’ On the facts before the Court, there was no evidence to support a finding of apparent bias on the part of Mr Gonsalves.

On the issue of waiver, this Court found that the appellant had waited more than seven months to object to the constitution of the panel, when the UNCITRAL Arbitration Rules only allow for a 15-day window to do so. The rules also caution that a lack of promptitude in objecting to an issue by any party results in that party waiving its right to object. This Court noted the case law in international arbitration frowns upon the strategy of a party waiting to raise an objection at the end of arbitral proceedings only if the result is unfavourable to it, especially where the issue could have been remedied at an earlier stage.

This results not only in a waste of time and resources but is also fundamentally unfair to the other party who may have diligently participated in the process.

Based on the evidence before the Court, the appellant was fully aware and had been represented at various stages of the court proceedings, which was supported by the exchange of correspondence between the parties. In the circumstances, this Court dismissed the appeal, holding that the appellant effectively waived its right to object and upholding the decision of the Court of Appeal of Guyana that the award be enforced.

### **Cases referred to:**

*Amec Capital Projects Ltd v Whitefriars City Estates* [2005] 1 All ER 723; *Dimes v Grand Junction Canal (Proprietors of)* (1852) 3 HL Cas 759, 10 ER 301; *Halliburton Co v Chubb Bermuda Insurance Ltd* [2021] AC 1083; *Helow v Secretary of State for the Home Department* [2009] 2 All ER 1031; *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451; *Manzanero v R* [2020] CCJ 17 (AJ) BZ, (2020) 101 WIR 116; *Meerza v A-G* (GY CA, 9 February 2024); *Otkritie International Investment Management Ltd v Urumov* [2014] EWCA Civ 131; *Panton v Minister of Finance (No 2)* [2001] UKPC 33, (2001) 59 WIR 418 (JM); *Porter v Magill* [2002] 2 AC 357; *President of the Republic of South Africa v South Africa Rugby Football Union* 1999 (4) SA 147 (CC); *Prosecutor v Lubanga* (Annex to the Notification of the Decision on the Defence Application for the Disqualification of Judge Sang-Hyun Song from the Case of *The Prosecutor v Thomas Lubanga Dyilo*) (International Criminal Court, Presidency, Case No ICC-01/04-01/06-3040-Anx, 11 June 2013); *Prosecutor v Banda and Jerbo* (Annex to the Notification of the Decision on the Defence Request for the Disqualification of a Judge) (International Criminal Court, Presidency, Case No ICC-02/05-03/09-344-Anx, 5 June 2012); *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119; *R v Gough* [1993] AC 646; *Rustal Trading v Gill & Duffus SA* [2000] CLC 231; *Szilard v Szasz* [1955] SCR 3; *Thyssen Canada Ltd v Maritime SA* [2005] 1 Lloyd's Rep 640; *Valente v R* [1985] 2 SCR 673; *Walsh v Ward* [2015] CCJ 14 AJ (BB), (2015) 87 WIR 101; *Williams v Kissoon* [2023] CCJ 3 AJ GY.

### **Legislation referred to:**

**Guyana** – Arbitration Act, Cap 7:03; Constitution of the Co-operative Republic of Guyana 1980; **Jamaica** – Constitution of Jamaica 1962, Financial Institutions Act 1992.

### **Other Sources referred to:**

‘Bangalore Principles of Judicial Conduct’ (2002); International Bar Association (IBA) ‘IBA Guidelines on Conflicts of Interest in International Arbitration’ (May 2024); United Nations Commission on International Trade Law (UNCITRAL), ‘UNCITRAL Arbitration

Rules as revised in 2010' (New York 2011); United Nations Office on Drugs and Crime (UNODC), 'Commentary on the Bangalore Principles of Judicial Conduct' (2007).

## JUDGMENT

### Reasons for Judgment:

Bulkan J (Anderson P, Rajnauth-Lee, Jamadar and Ononaiwu JJ concurring) [1] - [77]

**Disposition** [78] - [79]

### BULKAN J:

[1] In these proceedings, the State resists enforcement of an arbitral award in the princely sum of GYD179,946,850, on the basis that the tribunal which ordered it was improperly constituted. The specific complaint is that one member of that tribunal had sat in a first arbitration proceeding in the same dispute, raising issues of apparent bias and waiver. Aside from the significant financial implications of this dispute for both parties, it is connected to the constitutional right to a fair hearing before an independent and impartial body and is thus of utmost gravity.

### Background Facts

[2] The parties to this dispute are the Government of Guyana acting through the Ministry of Agriculture (hereafter referred to interchangeably as 'the appellant' or 'GOG') and Azad Meerza of Falcon Transportation and Construction Services (hereafter 'the respondent' or 'Meerza'). The genesis of the dispute lies in a contract between the parties in 2009 for certain road works pursuant to a project known as the 'Agricultural Export Diversification Programme ... Canal Polder Control Structures and Access Road.' Alleged changes to the scope of the work spawned a disagreement in 2011, which the parties have been trying to resolve over the intervening 15 years through adjudication, arbitration and now litigation.

- [3] At first, the dispute was referred to an adjudication process, as required by the contract, but this proved futile. There were difficulties in identifying an adjudicator, then the findings of the one eventually appointed were rejected by the parties.
- [4] The parties then turned to arbitration, also required by the contract, but that was equally unproductive, dogged by delays and non-cooperation and giving rise to multiple bouts of litigation. The first arbitration proceeding failed because of irregularities in the composition of the tribunal. It was appointed in 2013 and consisted of Paul Sarran (GOG nominee), Clairmont Marshall (Meerza nominee) and George Howard (selected by the other two to be the Chairman of the tribunal). Membership changed soon after due to the resignation of George Howard upon his employment with the State and then the recusal of Paul Sarran following an objection by the respondent after discovering that he was employed with the Ministry of Agriculture at the time of his appointment to the panel. These departures left Clairmont Marshall as the sole arbitrator and, on his invitation, Edward Gonsalves joined the tribunal as a replacement for the others.
- [5] The now two-person tribunal of Marshall and Gonsalves proceeded to conduct hearings and in March 2015 made an award in favour of the respondent in the sum of GYD176,285, 299.55, to be paid within four months. The state refused to comply and when the respondent initiated enforcement proceedings, Holder J vacated the award on the ground that the tribunal was improperly constituted.
- [6] At this point, progress seemingly stalled. In February 2016 the respondent then issued an originating summons under s 6 of the Arbitration Act, Cap 7:03 requesting the Court to appoint an arbitrator for the appellant so as to constitute the tribunal. These new proceedings continued somewhat desultorily over the course of the next few months, with the GOG represented on record by the Attorney General and his delegates.

- [7] The summons was heard by Persaud J, who ordered each party to nominate an arbitrator of their choice. The respondent duly nominated Edward Gonsalves to sit again and, with no objection from the appellant, this was accepted by the court. The GOG, in turn, nominated George Howard, but after his acceptance by the court, he resigned. Several adjournments followed because of no appearance by or on behalf of the GOG and, eventually in June 2016, Persaud J nominated Leon Rutherford to be the second arbitrator. As directed by the court, Gonsalves and Rutherford then selected Maurice Veacock as the third arbitrator and chairman of the tribunal. This second panel of arbitrators was thus constituted by Edward Gonsalves, Leon Rutherford and its chairman Maurice Veacock.
- [8] The reconstituted tribunal then proceeded to conduct hearings, but it appears that for the most part and despite being duly notified, the GOG through the Ministry of Agriculture, did not participate. Nonetheless the tribunal proceeded with its work and in February 2017, acting on the oral and documentary evidence, found in favour of the respondent and awarded him the sum of GYD179,946,850.
- [9] Once again, the respondent turned to the court to secure enforcement of this award. At first instance, however, Singh J refused to do so, holding the second arbitral tribunal to be improperly formed because the order of Holder J had brought its tenure to an end. He held further that Persaud J erred by entertaining the action since there was no evidence that the parties had consented to designating the Court as an appointing authority to constitute the Tribunal. Singh J concluded that this impropriety rendered its award invalid, and he thereupon set it aside pursuant to s 12 of the Arbitration Act.
- [10] Meerza appealed successfully to the Court of Appeal of Guyana, which restored the February 2017 award. The Court of Appeal rejected Singh J's conclusion that the tribunal had been improperly constituted, noting that both the terms of the contract and the Arbitration Act required the parties to continue the arbitration process to resolve the dispute, which they had evidently embarked on doing. Moreover, given

the appellant's prolonged failure to appoint a replacement after its original nominee (George Howard) resigned, Persaud J was found to have properly exercised his jurisdiction under s 6 of the said Act to appoint the other arbitrators, including one for the appellant.

- [11] On the question of bias, neither Singh J nor the Court of Appeal answered the question definitively whether an arbitrator (in this case, Edward Gonsalves) could properly sit on the reconstituted tribunal having sat on the previous one which had determined the matter in favour of the respondent. However, the Court of Appeal invoked the doctrine of estoppel, finding that the GOG could not properly object to Mr Gonsalves when it purported to do so in November 2016 because the time for doing so had long since passed. Gregory JA rejected the appellant's claim that it had no notice of that appointment, pointing out that not only was it in court when it was made, but also that there was multiple correspondence to the government from the tribunal in which it would have been clear that Edward Gonsalves had been reappointed. Gregory JA also observed as an aside that the GOG's nominee was himself someone who had sat on a previous panel, which reinforced the view that they had no issue with any arbitrator who had previously been involved in the matter.
- [12] Having regard to the State's conduct in the matter, particularly its initial participation in the nomination process before Persaud J and its failure to raise any objection until more than seven months after Gonsalves' appointment, the Court of Appeal held that it was estopped from objecting to the panel. By the time it raised an objection in November 2016, the 15-day period as stipulated by the governing UNCITRAL Rules for doing so had long since passed. Accordingly, the appeal was allowed and by a majority, an order was made for the 2017 arbitral award in Meerza's favour to be duly enforced.
- [13] In its appeal before this Court, the GOG considerably narrowed its complaint, focusing essentially on the issue of bias. In an affidavit in support of the motion

seeking leave to appeal, Ocelisa Marks deposed that the intended appeal ‘would seek to raise a discreet (sic) but unique point of law as to whether an arbitrator was bias (sic) by sitting on a previous panel that made an awarded (sic) against the State and whether the arbitrator had a duty to disclose and whether the majority erred by ordering enforcement of the award.’ In its oral submissions, these were the same points argued by Mr Hawke on behalf of the appellant, namely those of disclosure, bias and waiver.

[14] In light of the grounds of appeal as supplemented by the written and oral submissions, the following issues arise for consideration:

- (a) Whether Mr Gonsalves had a duty to disclose that he had sat on the previous arbitration panel in the same dispute (‘duty to disclose’);
- (b) Whether the second panel was tainted by apparent bias because Mr Gonsalves, one of the three arbitrators, had sat on the previous panel (‘apparent bias’); and
- (c) Whether by failing to object in a timely manner to the appointment of Mr Gonsalves on the second panel, the appellant had waived its right to object (‘waiver’)

### **Duty to Disclose**

[15] Counsel for the appellant submitted that the duty of disclosure is not simply good arbitral practice but a legal duty in English law, arising directly from an arbitrator’s primary duty to act fairly and impartially. This ‘paramount’ obligation, Mr Hawke argued, required Mr Gonsalves to disclose, at the time of his appointment by Persaud J, the fact that he had sat on the previous panel which had decided the dispute in the respondent’s favour.

[16] Counsel for Meerza resisted the proposition that such an obligation existed in this case, arguing that the appellant would have been aware of the fact that Mr Gonsalves had sat on the first arbitration tribunal. Mr Juman-Yassin S.C. noted that

both parties had been involved in the prior proceedings before Holder J, which in dealing with the first arbitral award considered the issue of the composition of the panel on which Mr Gonsalves had sat. Moreover, those proceedings had not taken place so long before that the fact of Mr Gonsalves' involvement could have been forgotten. For these reasons, Mr Juman-Yassin argued, the appellant must have been aware of Mr Gonsalves' prior involvement and no direct communication from him was needed.

- [17] This issue was not addressed by Singh J in the High Court, who vacated the award on the ground that the panel was improperly formed as its tenure had come to an end with the ruling of Holder J. The Court of Appeal did consider the issue, however, making exceedingly short shrift of it. Finding that the GOG would have been aware of Mr Gonsalves' prior involvement in the arbitration process, Gregory JA held tersely that 'no question of non-disclosure by the appellant of the previous involvement of Edward Gonsalves could reasonably arise having regard to what was already known.'

### **Analysis**

- [18] There can be no dispute with the appellant's basic claim that the duty to disclose is a crucial requirement in international arbitration. It indeed arises from the overriding duty of impartiality, for the fact of prior or current involvement with one of the parties or of inside knowledge of the larger dispute *may* impact on an arbitrator's ability to approach the issues with a fresh, open mind – a liability that will be explored in greater depth in the following section. Disclosure therefore ensures that the parties are apprised of all the facts and equipped to make informed decisions when deciding on the composition of a panel.

- [19] Both parties cited *Halliburton Co v Chubb Bermuda Insurance Ltd*,<sup>1</sup> a decision of the UK Supreme Court, which addressed the question whether disclosure was

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<sup>1</sup> [2021] AC 1083.

required in the course of arbitration proceedings arising out of the Deepwater Horizon incident. The latter was a major oil spill in the Gulf of Mexico in 2010, which spawned multiple references. In *Halliburton*, the question arose whether an arbitrator appointed in one of those references needed to disclose that subsequent to that appointment he accepted two other appointments in relation to other proceedings arising out of the oil spill. In other words, could an arbitrator accept multiple appointments without disclosing them to the parties not involved in those other proceedings?

[20] On the facts, the Supreme Court found that the arbitrator in question did not breach the duty to disclose, while reinforcing some cardinal principles along the way. Lord Hodge, who delivered the leading judgment, started from the premise that impartiality is a cardinal feature in arbitration, requiring an arbitrator to disclose facts and circumstances which would or might reasonably give rise to the appearance of bias. Whether the duty applied in any specific case was a context-specific exercise, which meant it had to be assessed with regard to all the circumstances existing at the material time.

[21] The factual situation in the *Halliburton* case illustrates why the need for disclosure holds such salience in the world of international arbitration. Arbitration is a private, contract-based proceeding, unlike litigation which is public. Arbitral proceedings are invariably constrained by obligations of confidentiality, so that those involved may be contractually precluded from divulging any details of their involvement or even of the fact of ongoing arbitration. In situations as that which obtained in the Deepwater Horizon oil spill, a maze of different and sometimes overlapping disputes may arise out of a single incident, and it is likely that parties to a dispute would not be aware of other arbitration processes apart from the one in which s/he is involved. And because of its private nature, there is no central Registry to consult for a record of pending or completed arbitrations. In that complex and private arena, without voluntary disclosure, a third party or stranger would therefore have no way of knowing what other arbitral proceedings might be ongoing or have taken place.

- [22] Of course, this is not to suggest that disclosure may not be relevant in judicial proceedings. Potential conflicts of interest will inevitably arise there as well, which may be known only to the judge in question. It may be that the judge has shares in a company involved in the litigation, or some prior connection with one of the parties, or previously spoken out on one of the issues arising. Where such a scenario exists, the same principle enunciated in *Halliburton* should apply, namely, that the judicial officer should disclose any circumstance that would likely give rise to the appearance of bias.
- [23] In any event, none of those factors applies in this case, which was not any major international incident giving rise to multiple and private arbitration proceedings, nor some past secret association known only to the arbitrator in question. Rather, there was only one dispute in this matter, which arose in the course of a single contract for road works in one area on the West Bank of the Demerara River. That dispute gave rise to successive arbitration proceedings *between the same parties* in an attempt to resolve one legal question.
- [24] Moreover, there is detailed evidence as to the extent of the parties' respective involvement in and familiarity with the proceedings as they unfolded. As Gregory JA pointed out in the court below, the fact of the composition of the first tribunal was the subject of litigation before Holder J. It would have therefore been impossible for the respondent not to know that Edward Gonsalves was on that first panel, as the irregularity of a two-person composition of that tribunal was the sole reason Holder J refused to enforce its award.
- [25] In short, there was nothing secret about the earlier proceedings – on the contrary, the GOG had been involved both in the process of selection and then in the subsequent litigation before Holder J, so it cannot credibly claim that it was unaware that Mr Gonsalves was an arbitrator on that first tribunal. In these circumstances, therefore, where what had transpired before was clearly known to those involved, no duty arose on the part of Mr Gonsalves to 'disclose' that he had

sat on the previous arbitration tribunal which had given a decision in the respondent's favour.

### **Apparent Bias**

[26] The appellant argues that having sat on the previous arbitration proceedings which ended in favour of the respondent, Edward Gonsalves was not impartial, rendering the second tribunal improperly constituted. Invoking the test of bias at common law, namely, 'whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the judge was biased', which has been adopted by this Court and applied in a number of cases,<sup>2</sup> Mr Hawke added that the duty of impartiality applies equally to party-appointed arbitrators as to independently appointed arbitrators. In this case, Mr Hawke argued, Edward Gonsalves could not meet this test of impartiality, for his previous involvement in the matter raised the possibility of apparent bias by being predisposed against the position of the GOG.

[27] The respondent countered that the mere fact of having sat before in the same matter does not preclude someone from sitting on a new panel convened to resolve the same dispute between the parties, and in support cited several English authorities. Notable among those is *Amec Capital Projects Ltd v Whitefriars City Estates Ltd*,<sup>3</sup> where an objection to an adjudicator that he had already decided the same issue (in earlier proceedings that were set aside) was rejected, the court requiring something additional and of substance in order to find a real possibility of bias.

### **Analysis**

[28] In determining this issue, it would be useful to acknowledge at the outset that the requirement of impartiality on the part of a decision-maker is an integral aspect of the fundamental right to a fair trial. It is a component of the protection of the law,

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<sup>2</sup> *Walsh v Ward* [2015] CCJ 14 AJ (BB), (2015) 87 WIR 101 at [95]. See also *Williams v Kissoon* [2023] CCJ 3 (AJ) GY.

<sup>3</sup> [2005] 1 All ER 723.

which is entrenched in all Caribbean constitutions. In Guyana, Article 144 guarantees a fair hearing by an ‘independent and impartial’ court or tribunal for the determination of both criminal<sup>4</sup> and civil<sup>5</sup> matters. These values are the *sine qua non* for true justice, and more broadly they promote the legitimacy of the system and ultimately even the Rule of Law.

[29] Acknowledging the constitutional standard is easy enough; at a practical level, how might dependence or partiality be manifested? As situations arise, how might a court or other tribunal determine if its independence or impartiality is or becomes questionable? Standards developed in actual disputes and those generated by courts themselves help to answer these questions. As conventionally interpreted, the quality of ‘independence’ refers to objective indicators, namely, the institutional conditions which ensure that the judiciary functions independently of other branches, while ‘impartiality’ connotes the subjective state of mind of the tribunal or decision-maker in relation to the parties and/or the specific issues in the case.<sup>6</sup> Generally, then, when the issue of bias, or apparent bias, arises in relation to a particular matter, it is invariably this individual dimension that is in focus. To what extent is a decision-maker, whether court or juror or arbitration tribunal, impartial and free from bias?

[30] As the parties’ submissions make clear, the constitutional requirement of impartiality is mirrored by the common law. I would add that its prominence in modern judicial codes of conduct indicates its fundamental nature and extensive reach. The first two principles of the highly influential *Bangalore Principles of Judicial Conduct* are devoted to the values of independence and impartiality, outlining clear standards to be observed by judges in the execution of their functions.<sup>7</sup> Among these are the requirements to carry out the judicial function free from any and all extraneous influences, inducements, pressures and interference, to

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<sup>4</sup> Constitution of the Co-operative Republic of Guyana 1980, art 144(1).

<sup>5</sup> *ibid* art 144(8).

<sup>6</sup> *R v Valente (No 2)* [1985] 2 SCR 673.

<sup>7</sup> ‘The Bangalore Principles of Judicial Conduct’ (2002) <[https://www.unodc.org/pdf/crime/corruption/judicial\\_group/Bangalore\\_principles.pdf](https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf)> accessed 06 February 2026.

be independent of the parties to a dispute under consideration, to be free from inappropriate connections with and influence by other branches of government, including other judicial colleagues, and ultimately to be free from any favour, bias, prejudice or situation leading to a conflict of interest. Impartiality is rightly considered to be a sacrosanct requirement and a ‘core attribute’ of any decision-maker.

[31] The common law has a much longer tradition in this regard and is equally stringent, treating impartiality as a cardinal feature of *all* adjudicative processes. Two forms of bias are recognised: actual bias, where the judge has an interest in the outcome, which leads to automatic disqualification,<sup>8</sup> and apparent bias, where the circumstances are such as to create a reasonable apprehension of bias.<sup>9</sup> One can surmise that the former presents nothing but the rarest of situations, as no one expects any judge to knowingly preside in a case where a personal conflict of interest exists. The majority of cases therefore concern situations of apparent bias, where the focus is on objective appearances. The law recognises that bias is ‘insidious’ and may operate unconsciously,<sup>10</sup> hence the need to eliminate situations which may generate prejudice or prejudgment.

[32] The common law test for apparent bias has evolved over time and in its current iteration, it is expressed as ‘whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.’<sup>11</sup> As pointed out by counsel for the appellant, this test has been adopted by this Court, which has framed it in virtually identical language:

In determining whether, in instances such as these, a judge is disqualified from hearing a case, the reviewing court must place itself in the position of an objective and fair-minded lay observer fully informed of the facts. The pertinent question is whether such an observer would conclude that there was a real possibility of bias. What matters is not so much the reality of bias or prejudice on the part of the judge but its appearance. This test is aimed at

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<sup>8</sup> *Dimes v Grand Junction Canal (Proprietors of)* (1852) 3 HL Cas 759, 10 ER 301.

<sup>9</sup> *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451.

<sup>10</sup> *R v Gough* [1993] AC 646 at 659 (Lord Goff).

<sup>11</sup> *Porter v Magill* [2002] 2 AC 357.

preserving confidence in the administration of justice and not at censure of the judge.<sup>12</sup>

- [33] This test applies to all decision-makers, whether ‘justices or members of other inferior tribunals, ... jurors, or ... arbitrators.’<sup>13</sup> In other words, impartiality is required of all those who sit in judgment, and the yardstick used to monitor the appearance of bias is the same, regardless of who or what the entity is.
- [34] But while this test is simple enough to describe, its application is not as straightforward. The difficulty lies in its parsimonious, even vague, parameters, which are devoid of any concrete guidance as to what could lead to a ‘real possibility’ of bias. Indeed, the test has an element of circularity – paraphrased, it reads thus: *apparent bias exists where a fictional third party would conclude on the basis of all the facts that there is a real possibility of bias*. Moreover, since the standard is undefined and involves an individual value-judgment,<sup>14</sup> the outcome is potentially variable and unpredictable.
- [35] Given these challenges, the best way to understand the test is to examine actual situations which have been found to generate a ‘real possibility of bias’, and from these to identify relevant considerations. Thus, for example, sitting as a judge in matters involving one’s family,<sup>15</sup> close friends or business associates,<sup>16</sup> or where there might be a shared ideological stance with one of the parties,<sup>17</sup> or where the case is approached with a closed mind,<sup>18</sup> are all instances that have been found to present a ‘real possibility of bias.’
- [36] In this regard, perhaps the most fulsome guidance on what possibly constitutes bias was given by the English Court of Appeal in *Locabail (UK) Ltd v Bayfield*

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<sup>12</sup> *Walsh v Ward* [2015] CCJ 14 AJ (BB), (2015) 87 WIR 101 at [95] (Saunders J) (footnote omitted).

<sup>13</sup> *Gough* (n 10) at 670.

<sup>14</sup> Admittedly, subsequent case law has been more forthcoming as to the characteristics of the ‘fair-minded and informed observer.’ See *Helow v Secretary of State for the Home Department* [2009] 2 All ER 1031.

<sup>15</sup> *Williams v Kisoona* [2023] CCJ 3 (AJ) GY.

<sup>16</sup> *Szilard v Szasz* [1955] SCR 3.

<sup>17</sup> *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119.

<sup>18</sup> *Otkritie International Investment Management Ltd v Urumov* [2014] EWCA Civ 1315 at [1] (Longmore LJ).

*Properties Ltd.*<sup>19</sup> Even though this judgment predates the refined test of bias in *Porter*, the adjustment instituted by the latter (from ‘real danger’ to ‘real possibility’) was acknowledged to be ‘modest’ and does not detract from the detailed exposition provided in *Locabail*. The Court of Appeal explained, in a passage worth quoting in its entirety:

It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or membership of the same Inn, circuit, local Law Society or chambers (*K.F.T.C.I.C. v. Icori Estero S.p.A.* (Court of Appeal of Paris, 28 June 1991, International Arbitration Report, vol. 6, 8/91)). By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see *Vakauta v. Kelly* (1989) 167 C.L.R. 568); or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be

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<sup>19</sup> *Locabail (UK) Ltd* (n 9).

obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be.<sup>20</sup>

[37] These views were endorsed by the Privy Council in an appeal originating from Jamaica, involving a challenge to the impartiality of one member of the Court of Appeal. In *Panton v Minister of Finance (No 2)*,<sup>21</sup> shareholders in three financial institutions challenged the constitutionality of the Financial Institutions Act 1992 ('the FIA') on the ground that it violated their right to property. The action was dismissed both in the Constitutional Court and the Court of Appeal. Before the Privy Council the shareholders raised a preliminary point that they were denied a hearing before an independent and impartial tribunal when they appeared before the Court of Appeal, in violation of s 20(2) of the Constitution, because of an apparent bias on the part of the Court of Appeal President, Rattray P. The reason for the complaint was that Rattray P was the Attorney General at the time of the passage of the FIA, in which capacity he signed a pro forma certificate attesting to the Act's constitutionality. The shareholders submitted that this certification of the constitutionality of the Act was essentially a determination of the same issue that fell to be decided in the present case, so that Rattray P could not be regarded as independent or impartial.

[38] The Privy Council rejected the claims of both actual and apparent bias. The certification was a general exercise in which Rattray as Attorney General played a minor role, and in his capacity on the court he could not be remotely considered as a judge in his own cause. Neither the substance of his prior role nor the time that had passed since was of such significance as to raise the prospect of prejudgment of specific questions arising in the instant appeal. The Board agreed with the Court of Appeal in *Locabail* that past opinions, whether judicial or otherwise, do not

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<sup>20</sup> *ibid* at [25].

<sup>21</sup> [2001] UKPC 33, (2001) 59 WIR 418 (JM).

automatically disqualify a judge from determining the same point of law arising in another case.<sup>22</sup>

[39] As useful as *Locabail* is, however, there obviously can be no exhaustive list of situations giving rise to apparent bias, and allegations that it exists must be resolved with regard to the facts and circumstances of the case, evaluated according to the principles described and from the perspective of the notional ‘fair-minded observer’. This, therefore, is the framework in which to consider the scenario presented in this case – namely, whether the fact of having sat before in the same dispute, on a previous arbitral panel, raises the possibility of apparent bias thereby precluding an arbitrator from sitting in the same matter again?

[40] There is surprisingly no shortage of authority on this question – from different appellate levels, different juridical systems, as well as this Court itself – which may be an indication that it is not so unusual for a judge to sit on a re-hearing of the same matter (or to determine multiple aspects of the same matter). As just mentioned, no less an authority than Lord Bingham CJ and Lord Woolf MR in *Locabail* accepted that the ‘mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection.’<sup>23</sup> That assertion signals quite clearly that previous interactions, *even in the same case*, may be relevant to the question of bias but not by itself dispositive.<sup>24</sup> But there are other, more direct, affirmations of this position.

[41] One such instance is *Amec Capital Projects Ltd*,<sup>25</sup> cited by the respondent. In *Amec*, as in this case, an arbitral award was not enforced because of an irregularity in composition (namely, that the arbitrator was not the one named in the contract). Before fresh arbitration proceedings could be commenced, however, the arbitrator actually named in the contract died. The original arbitrator was then re-appointed

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<sup>22</sup> *ibid* at [10].

<sup>23</sup> *Locabail (UK) Ltd* (n 9) at [25].

<sup>24</sup> See also *Rustal Trading v Gill & Duffus SA* [2000] CLC 231.

<sup>25</sup> *Amec Capital Projects Ltd* (n 3).

and made a second award, which was again in the claimant's favour. The defendants failed in their bid to avoid liability on the ground of bias, the court holding that the mere fact that the tribunal had decided the issue before was not enough for apparent bias. Rather, something more of substance was required to lead the fair-minded and informed observer to conclude that there is a real possibility that the tribunal will not bring an open mind and objective judgment to bear.<sup>26</sup>

[42] Dyson LJ provided multiple reasons in defence of this position. He pointed to the nature of the judicial role itself, noting that judges/arbitrators by training and experience are versed in adjudication, and thus familiar with having to approach each case with an open mind and free from personal or other biases. Indeed, this was one of the very reasons advanced by the Privy Council in *Panton* when dismissing the allegation of bias against Rattray P. There, Lord Clyde put it this way: 'It is not to be thought that a judge will have such mental allegiance to his earlier views or such lack of integrity as to be unable to approach the question with an open mind or to be embarrassed at the prospect of revising or rejecting the view which he had earlier expressed.'<sup>27</sup>

[43] This very rationale has also been applied in other jurisdictions, including at the international level. A few examples illustrate how instrumental it has been found to be. On a recusal application in *President of the Republic of South Africa v South African Rugby Football Union*, the South African Constitutional Court said this of the judicial role: 'The reasonableness of the apprehension [of bias] must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves.'<sup>28</sup>

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<sup>26</sup> *ibid* at [21] (Dyson LJ).

<sup>27</sup> *Panton* (n 21) at [11].

<sup>28</sup> *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147 (CC) at [48] (footnote omitted).

[44] Similar sentiments were expressed by the Supreme Court of Canada,<sup>29</sup> and in the international arena the International Criminal Court ('ICC') has reinforced the strong presumption of impartiality in the following terms:

The [...] disqualification of a judge [is] not a step to be undertaken lightly, [and] a high threshold must be satisfied in order to rebut the presumption of impartiality which attaches to judicial office, with such high threshold functioning to safeguard the interests of the sound administration of justice. When assessing the appearance of bias in the eyes of the reasonable observer, unless rebutted, it is presumed that the judges of the Court are professional judges, and thus, by virtue of their experience and training, capable of deciding on the issue before them while relying solely and exclusively on the evidence adduced in the particular case.<sup>30</sup>

[45] I do not interpret any of these statements as suggesting that judicial officers are like Caesar's wife, above suspicion or clothed in impermeable armour. Rather, their training and experience are continually highlighted to demonstrate the ability they necessarily develop and hone to decide cases dispassionately, justifying in turn the high bar to attain in order to infer apparent bias.

[46] In *Amec*, Dyson LJ added that when a case is sent for a re-hearing, there will usually be explicit directions to follow, such as having to correct a mistake of law made earlier, evaluate some fresh or previously ignored evidence, or consider a different perspective or even new point altogether. The re-hearing is unlikely to be a bare rehash of the prior proceedings, invariably requiring the decision-maker to address something specific the second time around. This suggests that there would be an obvious benchmark by which to assess the regularity of the new proceedings, making it easier to detect prejudgment. On the other hand, if the tribunal made some hostile remark about a party that would be something more, creating an appearance of bias that might be advisable to avoid in future proceedings.

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<sup>29</sup> *R v RDS* [1997] 3 SCR 484 at [32].

<sup>30</sup> *Prosecutor v Banda and Jerbo*, (Annex to the Notification of the Decision on the Defence Request for the Disqualification of a Judge) (International Criminal Court, Presidency, Case No ICC-02/05-03/09-344-Anx, 5 June 2012) [14].

[47] Similar reasoning prevailed in this Court in *Manzanero v R*,<sup>31</sup> which was an appeal against a conviction for murder. The appellant's confession was rejected by the trial judge at the close of the voir dire, even as the judge noted that she did not find the appellant to be wholly credible. This being a bench trial, the judge then continued with the main trial, finding the appellant guilty of murder on the evidence given by his common-law spouse. On appeal in this Court, the appellant argued unsuccessfully that having made an adverse finding on his credibility in the voir dire, he was denied a fair trial by being tried by the same judge on the merits. This Court held that it did not automatically follow that, in a judge alone trial, where a trial judge has made an adverse finding on the credibility of the accused on the voir dire, or has heard evidence which was prejudicial to or indicative of the guilt of the accused, the accused is denied a fair trial if the judge ultimately arrives at a guilty verdict.

[48] At least three rationales for this position can be discerned from the court's reasoning. The first is the very one discussed above as to the nature of the judicial role or mindset. As expressed by Saunders P and Rajnauth-Lee J in their joint judgment, in determining this issue of bias, 'an appellate court is entitled to consider [that] the judge is an experienced professional trained to exclude from her mind any prejudicial material or inadmissible evidence to which she has been privy in assessing credibility or deciding other disputed issues.'<sup>32</sup>

[49] Second, Saunders P and Rajnauth-Lee J reviewed the actual reasons for the decision as to guilt, noting that the judge had 'carefully and thoroughly' analysed the evidence and explained her findings, all the while demonstrating awareness of the applicable legal standards.<sup>33</sup> This reason mirrors that given in *Amec*, where Dyson LJ also noted that on a re-hearing there exists an obvious benchmark in what needs to be corrected, against which allegations of apparent bias can be assessed. In other

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<sup>31</sup> [2020] CCJ 17 (AJ) BZ, (2020) 101 WIR 116.

<sup>32</sup> *ibid* at [31].

<sup>33</sup> *ibid* at [32].

words, the (impugned) judgment itself can offer clues as to whether it is rational and credible.

- [50] Third, the *Manzanero* judgment relies, in part, on the factor of necessity, which has also featured in other cases. This was how it was expressed: ‘If, during a judge alone trial, on every occasion the judge makes unfavourable findings about the credibility of the accused at a voir dire, that judge is deemed to be too prejudiced against the accused to continue on with the main trial, judge alone trials will become unworkable and impractical.’<sup>34</sup> In other words, the point made here is that by design, judges in a bench trial will have different roles to undertake, such as determining issues of law (in the voir dire) and issues of fact (guilt or innocence in the main trial). If the same judge cannot carry out these differing functions, then judge alone trials will no longer be possible. Thus, for bench trials to work in place of trial by jury, then by necessity *the same judge* must be able to determine successive questions of fact, even if they involve credibility, within the same trial.
- [51] *Otkritie International Investment Management Ltd v Urumov*<sup>35</sup> is another decision of the English Court of Appeal where a similar issue as that in *Manzanero* arose, namely, whether there comes a point where pre-trial findings made by a judge disqualify him/her from continuing with a case and likewise whether findings made at trial disqualify a judge from hearing consequential matters. In *Otkritie*, having convicted the defendant of multiple counts of fraud, at the defendant’s request the judge recused himself from subsequent contempt proceedings for apparent bias. On appeal, the judge was found to have erred by doing so. The Court of Appeal held that there was no reason to suppose that he would be unconsciously biased by reason of having made findings adverse to the respondent in the trial, and even if the matters complained of were properly characterised as bias, they were not sufficient to raise the prospect of prejudgment on his part or to justify recusal.

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<sup>34</sup> *ibid* at [22].

<sup>35</sup> *Otkritie International Investment Management Ltd* (n 18).

- [52] In *Otkritie*, Longmore LJ described the general rule as being against recusal in a new hearing even where a judge might have to rely on his previous findings, insisting that ‘there must be substantial evidence of actual or imputed bias before the general rule can be overcome.’<sup>36</sup> Longmore LJ added that ‘many English cases have emphasised that the fact that a judge has made adverse findings against a party or a witness does not preclude him from sitting in judgment in subsequent proceedings and some cases have even emphasised the desirability of his doing so.’<sup>37</sup> Desirable because having the same judge decide ancillary matters in subsequent proceedings would promote efficiency and even accuracy by entrusting any such questions to the person most intimately acquainted with the facts. In turn, this represents a prudent use of resources and promotes sound administration.
- [53] In the same vein of prudent administration, other benefits have been mooted. Where there is no judge to sit on a re-hearing other than the one who originally decided the matter, recusal is not an option – and given the perennial complaints of limited resources, this is not a fanciful scenario. Otherwise, the decidedly worse alternative may be that the matter is not re-heard or is delayed, thereby denying the litigants any chance at a resolution of their dispute altogether. In other words, as recognised even by the Commentary on the Bangalore Principles, necessity may override considerations of apparent bias.<sup>38</sup> The Privy Council also adverted to this factor in *Panton* and expressed it this way: ‘It has also to be recognised that the purity of principle may require to give way to the exigencies and realities of life. In extreme cases the doctrine of necessity may require a judge to determine an issue even although he would otherwise be disqualified.’<sup>39</sup>
- [54] Another practical and relevant consideration is that where the issue of bias arises in relation to just one member on a panel, any potential unfairness would be

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<sup>36</sup> *ibid* at [13].

<sup>37</sup> *ibid* at [16].

<sup>38</sup> United Nations Office on Drugs and Crime (UNODC), ‘Commentary on the Bangalore Principles of Judicial Conduct’ (2007) 100 <[https://www.unodc.org/conig/uploads/documents/publications/Otherpublications/Commentry\\_on\\_the\\_Bangalore\\_principles\\_of\\_Judicial\\_Conduct.pdf](https://www.unodc.org/conig/uploads/documents/publications/Otherpublications/Commentry_on_the_Bangalore_principles_of_Judicial_Conduct.pdf)> accessed 06 February 2026.

<sup>39</sup> *Panton* (n 21) at [16].

eliminated by the other members who are expected to act independently. This was how it was put by Eboe-Osuji J, operating in a different but no less relevant context, where a challenge was brought to one member of an appellate panel because of his association with an NGO involved in the matter: ‘Since the Judge was only one member in a panel of five judges in the appeal, the Judge would not be the sole decision-maker. Each of the other judges, who act independently and enjoy a presumption of integrity, would be duly mindful of any potential influence that the Judge's involvement with UNICEF could possibly have on the Judge's contributions to the decision of the Appeals Chamber or its deliberations. The other judges would thus be able to assess how much weight to attach to those contributions.’<sup>40</sup>

[55] Thus, as to whether a judge or arbitrator may sit on a re-hearing of the same matter, there is copious authority from diverse sources which answers this question in the affirmative. More accurately, all the authorities insist that there is no *a priori* answer to this question but rather it is one where in determining it, a tribunal has some discretion. It involves consideration of a multiplicity of factors, among which are, on the one hand, questions of economy, efficiency, and prudent court administration, to be balanced against, on the other hand, anything suggesting bias or prejudgment and the overall need for fairness and to preserve the integrity of the system as a whole.

[56] This approach explains why guidelines adopted by the Council of the International Bar Association on conflicts of interest in international arbitration treat prior involvement in a dispute as a waivable situation.<sup>41</sup> If such prior involvement inexorably leads to bias or prejudgment, then it would be automatically disqualifying; however, the fact that it may be waived by the parties means that it is a factor to be considered in light of all the circumstances.

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<sup>40</sup> *Prosecutor v Lubanga* (Annex to the Notification of the Decision on the Defence Application for the Disqualification of Judge Sang-Hyun Song from the Case of *The Prosecutor v Thomas Lubanga Dyilo*) (International Criminal Court, Presidency, Case No ICC-01/04-01/06-3040-Anx, 11 June 2013) at [52].

<sup>41</sup> International Bar Association (IBA), ‘IBA Guidelines on Conflicts of Interest in International Arbitration’ (May 2024) Pt 2, para 2.1.2.

[57] In this case, the sole reason advanced to impugn the impartiality of Mr Gonsalves was the fact that he had sat on the previous panel which made an award against the GOG. Applying the principles emerging from the above authorities, however, that fact by itself is insufficient to raise the possibility of bias, and something more has to be shown to indicate that as a professional, he would have abandoned his training and approached the re-hearing with a closed mind.

[58] This conclusion is reinforced by the evidence as to how both processes unfolded. In neither did the Ministry deign to participate, despite multiple opportunities afforded for it to do so. The respondent provided detailed proof of the efforts made by the second arbitration panel to solicit a defence from the Ministry, all being unsuccessful. When months later the Ministry eventually responded, it was only to object to the panel as constituted and not to offer any substantive defence. As Mr Juman-Yassin S.C. submitted, the panel cannot be criticised for proceeding in the absence of the appellant when they deliberately stayed away from the hearings, never responded to email requests and failed to file a Statement of Defence despite multiple requests to do so. In the absence of any defence from the GOG, once the respondent's evidence was tendered and accepted, an award in its favour is not surprising. In those circumstances, there is no reason to suppose that Mr Gonsalves personally, or the panel as a whole, acted irregularly towards the appellant.

[59] For these reasons, there is no basis on the evidence upon which to conclude that Edward Gonsalves was tainted by the appearance of bias or that the entire arbitration panel demonstrated actual bias in how it carried out its work.

### **Waiver**

[60] While the Court of Appeal allowed the respondent's appeal from the decision of Singh J, each of the judges came to this conclusion by a different route. Kurtzious J concluded that there was no bias on the part of Mr Gonsalves or the panel as a whole, whereas Cummings-Edwards C (Ag) thought that the matter should be

remitted to the trial judge to consider the issues of bias, waiver and estoppel. The only member of the panel who delivered a written judgment, Gregory JA, agreed with Kurtzious J that the arbitral award should be enforced, but on the separate basis that by virtue of its actions (or inaction), the GOG was estopped from contesting the award.

[61] Gregory JA parsed the evidence carefully, recounting the multiplicity of occasions on which the GOG could have objected to Mr Gonsalves serving once again as arbitrator, only doing so in November 2016, more than nine months after the respondent filed his originating summons. As she summarised: ‘...the [GOG] had the opportunity to object when the originating proceedings were served, when they appeared in court and attended the proceedings on several dates before absenting themselves after partially complying with the court’s order and waiting until November of 2016 when the hearing was underway by the panel to then object. It is also significant that the [GOG] had nominated someone else, George Howard, who had himself been involved in the proceedings previously to sit on the panel with Edward Gonsalves.’<sup>42</sup> Noting that the governing UNCITRAL Rules required objections to be made within 15 days of being notified of the appointment, she concluded that having failed to act within this time, they were estopped from doing so thereafter.

[62] Before us, the GOG contested the finding that it had waived its right to object to Edward Gonsalves sitting on the re-constituted arbitration panel. Its argument on this ground was a bare denial of the evidence accepted by the Court of Appeal. While accepting that there was a 15-day period in which to object to a member of the panel, the GOG submitted that there was no evidence on record suggesting that it had ‘prior knowledge of the state of affairs of the arbitration process.’ In the absence of disclosure by Mr Gonsalves, it submitted, no question of waiver arose.

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<sup>42</sup> *Meerza v A-G of Guyana* (GY CA, 9 February 2024) at [55].

[63] In answer, the respondent provided a detailed rebuttal on the facts, documenting minutely all the evidence demonstrating that the GOG had participated in the earlier processes and was present in court when Mr Gonsalves was appointed, but never objected. The respondent tendered letters into evidence by which the Ministry was informed of the composition of the Tribunal as well as other correspondence where Edward Gonsalves was copied as a member. Relying on Article 32 of the UNCITRAL Rules, the respondent submitted that in light of its failure to object within the required time period, the GOG had waived its right to do so thereafter.

### **Analysis**

[64] As noted already, the contract entered into between the parties contained an arbitration clause requiring any dispute arising out of the contract to be settled by arbitration, conducted in accordance with UNCITRAL Arbitration Rules as then in force. In the 1976 version of those Rules, which were in force at the time of the contract, as well as in the Rules as revised in 2010, a party to arbitration may challenge an arbitrator where there are doubts as their impartiality. However, notice of any such intended challenge must be served on the opposing party within 15 days of being notified of the appointment.

[65] Moreover, Article 32 of the 2010 Rules (replicating a similar provision in Article 30 of the 1976 Rules) provides for waiver in the following terms:

A failure by any party to object promptly to any non-compliance with these Rules or with any requirement of the arbitration agreement shall be deemed to be a waiver of the right of such party to make such an objection, unless such party can show that, under the circumstances, its failure to object was justified.<sup>43</sup>

[66] The standards imposed by these rules – of timely objection and waiver of the right to object for failing to do so promptly in cases of non-compliance with the rules –

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<sup>43</sup> United Nations Commission on International Trade Law (UNCITRAL), 'UNCITRAL Arbitration Rules as revised in 2010' (New York 2011).

have been strictly applied by courts. Two of the authorities relied upon by the respondent are instructive. The first of these, *Rustal Trading v Gill & Duffus SA*,<sup>44</sup> concerned enforcement proceedings of an award made in arbitration proceedings arising out of a dispute over liability for delay which led to substantial costs in a maritime contract. As in this case, the applicant resisted the award on the basis of doubts as to the arbitrator's impartiality because of his prior dealings with one of the parties. While the court found that such prior involvement did not constitute solid grounds for doubting the arbitrator's impartiality, the court held that the complaint was barred by reason of delay. Under the governing legislation, the applicant had continued to take part in the arbitration after it knew or could have discovered the grounds for the irregularity of which it complained and was thereby precluded from complaining.

[67] What is useful about *Rustal Trading* is the rationalisation of the waiver rule provided by Moore-Bick J. He described the strategy of taking part in proceedings only to object if dissatisfied with the outcome as fundamentally unfair. Such an approach was exacerbated if the defect in question could have been remedied if challenged in time. The same position was taken in *Thyssen Canada Ltd v Mariana Maritime SA*, where the claimants sought unsuccessfully to set aside an award in favour of the owners of the vessel they had chartered in respect of cargo damaged by a fire.<sup>45</sup> The claimants had become aware that the owners were lying by denying responsibility for the fire, but chose not to act on the information for fear of damaging their case. The court refused to set aside the award since the claimants had not objected within the time prescribed by statute and were thus taken to have waived their right to do so.

[68] In the course of his judgment, Cooke J reinforced the explanations of Moore-Bick J that to allow a party to object belatedly, and only if dissatisfied with the outcome of the proceedings, was not only a waste of time and money but was also

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<sup>44</sup> *Rustal Trading* (n 24).

<sup>45</sup> [2005] 1 Lloyd's Rep 640.

fundamentally unfair. In his view, ‘It cannot be right for a party to participate in proceedings, which he believes to be fundamentally irregular, with the intention of taking advantage of any decision in his favour, whilst keeping up his sleeve an objection to an irregularity, which he will only produce in the event of an unfavourable decision.’<sup>46</sup>

[69] For these very reasons, the appellant’s position on this ground must be rejected. Claims that the GOG was unaware of Edward Gonsalves’ membership on the first panel and/or his reappointment to the second panel cannot be sustained against the weight of the evidence to the contrary. The award made by the first tribunal was rejected by Holder J for the sole reason concerning the panel’s membership – there being only two and not three arbitrators. The GOG was represented in those proceedings, so as Gregory JA pointed out in the Court of Appeal, there is no way it would have been unaware of the identity of those two arbitrators.

[70] The GOG is in an even more untenable position as regards the second tribunal. The evidence from which knowledge of Edward Gonsalves’ appointment to the panel by Persaud J can be imputed to them is, quite frankly, voluminous. A few aspects of the evidence suffice to demonstrate this:

- (i) When the court accepted the respondent’s nomination of Edward Gonsalves as an arbitrator on 22/4/16, counsel for the appellant was present in court.
- (ii) The appellant continued to participate in the nomination process thereafter, putting forward George Howard (who, incidentally, like Edward Gonsalves, had served on a previous panel).
- (iii) In June 2016 the respondent notified the PS in the Ministry of Agriculture by way of registered mail of the appointment of Edward Gonsalves.

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<sup>46</sup> *ibid* at [18].

- (iv) On 3 July 2016 the chair of the panel wrote to the PS in the Ministry of Agriculture, outlining the selection process of the panel and naming the three arbitrators – one of whom was Edward Gonsalves.
- (v) Multiple correspondence followed in the months thereafter in which information was passed on to the Ministry of Agriculture, in which Edward Gonsalves was explicitly copied as a member of the arbitral panel. On some occasions, the PS replied and himself copied Edward Gonsalves!
- (vi) The arbitral panel continued to contact the PS in the months of August and September 2016, requesting him to provide the defence of the GOG – all to no avail.
- (vii) Simultaneously, the matter continued to be called in court, and at least on 2 occasions in 2016 as identified in the evidence – September 23 and October 28 – the appellant was represented in court.

[71] Throughout this period, from the time the appointment was made and as the arbitral panel attempted to start its work, the GOG made no objection to Edward Gonsalves but allowed the panel to proceed. It was not until November 2016, more than seven months after his appointment, that it wrote objecting to him on the ground that he had served before. This was far beyond the 15-day period for making any objection under the governing UNCITRAL Rules as well as beyond the time for making any objections for non-compliance with the Rules. In these circumstances, the GOG must be taken to have waived any right it may have had to object, and I so find. To hold otherwise would not only overlook the time and expense expended in the course of 2016 and 2017 as the second arbitration took place but would be fundamentally unfair to all those who *did* participate.

[72] For much the same reason, I would dismiss the remaining objection raised by the appellant. Mr Hawke submitted that Singh J at first instance was correct when he ruled that the arbitral process had come to an end when Holder J ruled that the first award could not be enforced because the two-member panel was improperly constituted. Mr Hawke submitted, in line with Singh J, that as a consequence of Holder J's ruling the parties had to decide once again whether they would proceed with arbitration for a second time.

[73] As Gregory JA pointed out in the Court of Appeal, there was no question of the parties having to decide whether to continue with arbitration because according to the terms of their contract (and the governing legislation) they were bound to do so. Moreover, in any event, they had already consented to do so, presumably by their conduct in participating in the appointment process before Persaud J.

[74] I regard the latter point to be significant and applicable because of the waiver provision in the UNCITRAL Rules, discussed earlier. If the GOG was opposed to continuing with arbitration, it ought to have raised that objection at the outset of the hearing of the originating summons brought by the respondent. But far from objecting, it appeared and however lackadaisically participated in the process of selecting arbitrators. While it was not present in court on every occasion, it did take part, albeit in a desultory fashion, in the hearings that took place over the course of that year.

[75] Once the new panel was constituted, it began its work and over the next year wrote letters, engaged or tried to engage with the parties, received evidence, conducted deliberations and eventually made an award. For most of this period, the GOG sat idly by – whether as a strategy or out of sheer negligence and disregard for the public purse it is unclear. As noted by Moore-Bick J when commenting on similar facts, to allow one party to object months later would not only result in a colossal waste of time and money but would also be fundamentally unfair to all those who had been diligently participating throughout. And so, for these reasons, rooted both

in the Rules and principles of fairness, I find that GOG waived its right to object both to Edward Gonsalves and to the panel as a whole.

### **Conclusion**

[76] Given the somewhat lengthy discussion on the issues of disclosure and bias, it would be desirable to summarise the key principles, as follows:

- (a) In arbitration proceedings, as in any decision-making process, there is a duty on the decision-maker (whether arbitrator or judge) to disclose any fact or circumstance which could give rise to an appearance of bias.
- (b) In determining whether apparent bias exists, personal characteristics – which would cover ethnicity, gender, religion, and analogous protected statuses – are irrelevant. So too are previous judicial decisions and other extra-curricular utterances (*Locabail; Panton*). On the other hand, a decision-maker’s professional and social background may be relevant (*Pinochet*), while close relationships with or animosity towards a party would disqualify a judge from sitting.
- (c) Beyond these obvious scenarios, it is not possible to identify all the situations which may give rise to apparent bias, and determining this issue is a fact-based exercise.
- (d) The key is to avoid situations where because of some close connection to or other relationship with the parties or a prior involvement with them or the issue in question, doubts may arise as to the judge’s neutrality or open-mindedness. Do the objective facts create an appearance of bias or the spectre of pre-judgment?
- (e) The mere fact of prior interaction with a party or involvement with the issue is generally not enough to raise the possibility of bias, whether this arises in a re-hearing of the same matter (*Amecc*) or while deciding different aspects

of the same matter (*Manzanero*). Every allegation of bias must be determined on the facts and circumstances of the individual case.

- (f) In determining whether there may be concerns about impartiality, relevant factors to balance are, on the one hand, the training and experience of the judicial officer, the nature of the re-hearing, and matters relevant to the administration of justice (such as necessity, economy and efficiency) as against, on the other hand, whether the judicial officer in question has demonstrated bias, such as by expressing strong opinions on the credibility of a party.
- (g) Where disclosure is made of some prior connection or involvement, whether with the parties, the issues, or even the dispute itself, or where an affected party is demonstrated to be aware of the judicial officer's previous interactions, and in neither case enters a timely objection, a court will likely consider that the affected party has waived its right to object and allow the appointment to stand.

[77] In light of the foregoing, I would resolve the identified issues as follows:

- (a) Given that the same parties were involved in various attempts to resolve the dispute, the fact of Edward Gonsalves' prior appointment as arbitrator on the first tribunal was no secret. In those circumstances, there was no need to disclose what was already known and Mr Gonsalves did not violate any duty of disclosure by not formally informing the appellant of having been on the previous tribunal.
- (b) There is no basis on the evidence to conclude that Edward Gonsalves' involvement on the second tribunal was affected by the appearance of bias or that the entire arbitration panel demonstrated actual bias in how it carried out its work.

- (c) In any event, since the GOG would have been aware of the appointment of Edward Gonsalves on both arbitration panels but failed to object within the time period specified by the governing UNCITRAL Rules, it lost the right to do so.

**Disposition**

[78] For these reasons, I would dismiss the appeal and affirm the order of the Court of Appeal.

[79] Based on the proposals on costs submitted in the parties' respective case management checklists (the value of this appeal having been agreed by them), and with reference to r. 17.15 and sch 2 of the Caribbean Court of Justice (Appellate Jurisdiction) Rules 2024, the appellant shall pay to the respondent standard costs.

/s/ W Anderson

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**Mr Justice Anderson (President)**

/s/ M Rajnauth-Lee

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**Mme Justice Rajnauth-Lee**

/s/ P Jamadar

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**Mr Justice Jamadar**

/s/ C Ononaiwu

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**Mme Justice Ononaiwu**

/s/ A Bulkan

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**Mr Justice Bulkan**