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KEY DEVELOPMENTS UPDATE

NOVEMBER 2022

Message from Khawar Qureshi KC, Head of McNair International

The post summer vacation period has been busy for law reform initiatives. The UK Law Commission is reviewing the extremely effective Arbitration Act 1996, and the European Parliament has voted to regulate litigation funding. Meanwhile the difficult balance to be struck between the policy underlying Russia Sanctions and the fundamental right of access to justice has been rightly adjusted in two respects. First, by means of narrow exemption for litigation and arbitration in the EU context. Second, by the Office of Financial Sanctions Implementation (OFSI) issuing a General Licence on 17 October 2022 for LCIA Arbitration costs, and a further General Licence issued on 28th October 2022 to provide clearance for legal fees in accordance with its terms and conditions.

Should you be interested in any of the headlines below, please click here to see the newsletter in full or visit www.mcnairinternational.com/publications for a full list of our previous publications.

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The following updates are covered in this newsletter:

- **McNair International – public webinars and seminars.** We have held a number of successful events, in the UK, Qatar and internationally, including webinars and seminars on Hot Topics in International Arbitration, Emerging Trends and Opportunities in International Commercial Arbitration in Africa, The Role of the Court of Arbitration for Sport (CAS) resolving FIFA World Cup™ Disputes, Damages in International Arbitration, The Implications of Russia Sanctions for Litigation and Arbitration and Dispute Resolution in the International Energy Sector. We have a number of upcoming webinars and in-person seminars. Should you be interested in attending (either remotely or in person), please email office@mcnairinternational.com and we will be delighted to send you further details of events most suitable for your areas of interest and location.

- **UK Law Commission announces review of English Arbitration Act 1996.** On 22 September 2022, the Law Commission published a consultation paper on potential reforms to the Arbitration Act 1996. While the general view (both from the Law Commission and stakeholders) is that the Act works well and major reform is neither needed nor wanted, a number of discrete areas for reform were identified, including immunity of arbitrators and interim measures.

- **EU Parliament votes in favour of regulation of litigation funding.** On 13 September 2022, the EU Parliament passed a resolution setting out various recommendations on the regulation of Europe's litigation funding sector, including the creation by Member States of a system for the authorisation and monitoring of the activities of litigation funders, requirements for the contents of litigation funding agreements, transparency requirements and provisions for the avoidance of conflicts of interest, details of invalid agreements and clauses, prohibition on terminating funding agreement and disclosure of funding arrangements.

- **South Africa not entitled to State Immunity in "treasure hunter" case.** In Argentum Exploration Limited v The Silver [2022] EWCA Civ 1318, the English Court of Appeal held that the Republic of South Africa was not entitled to state immunity in the context of a claim relating to 2,364 bars of silver recovered from the seabed of the Indian Ocean.

- **Update on Russia sanctions and implications for provision of legal services.** There have been a number of key developments in this area in recent months which will have a significant effect both on parties engaged in litigation and arbitration involving sanctioned or potentially sanctioned entities, along with those engaged in the provision of legal services relating to such matters.

- **Rare successful challenge to arbitrator in Germany-Venezuela BIT case.** In *Deutsche Lufthansa AG v Bolivarian Republic of Venezuela*, PCA Case No. 2022-03, Dr. Wolfgang Peter was disqualified as an arbitrator after the Secretary-General of the PCA, Mr. Marcin Czepelak, held that the involvement of Prof. Tercier in the Air Canada Cases, being a another case brought against Venezuela on similar factual and legal grounds, and his professional relationship with Dr. Peter constituted a sufficient basis to uphold Venezuela's challenge.

McNAIR INTERNATIONAL – WEBINARS AND SEMINARS

Over the past few months, we have held a number of successful events, in the UK, Qatar and internationally, including:

- 20 September: To coincide with the ICCA 2022 Edinburgh, we hosted an executive breakfast on **Hot Topics in International Arbitration**, followed by one-to-one meetings with the Congress attendees. Whilst Debal Banerji shared valuable insights on Developments in Indian Arbitration Law, Professor Damilola S. Olawuyi SAN (Senior Counsel) talked about Recent Trends in Energy Arbitration. The event was chaired by Professor Khawar Qureshi KC. James McGlaughlin (Senior Associate) also joined the team in Edinburgh.

- 28 September: Professor Khawar Qureshi KC hosted a seminar for delegates from the Bar Association of Sri Lanka (BASL) on **ADR and arbitration**. The delegates thoroughly enjoyed the day of seminars held at The Bar Council and were grateful for his expertise and discussion.

- 28 September: We co-hosted a seminar at the Law Society of England and Wales on **"Gulf Disputes"**, where Professor Khawar Qureshi KC chaired a panel discussion on litigation and arbitration enforcement trends in UAE, Saudi Arabia and Qatar (including perspectives from the DIFC Courts, DIAC and SCCA). The event was co-hosted by LexisNexis Middle East.

- 30 September: Professor Khawar Qureshi KC and Professor Damilola S. Olawuyi SAN took part in an event organised by the International Law Association, Mauritius Branch, on the **Emerging Trends and Opportunities in International Commercial Arbitration in Africa**.

- 3 October: Professor Zachary Calo (Senior Counsel) spoke at an event at the Qatar International Court and Dispute Resolution Centre, together with Antonio de Quesada, the Head of Arbitration at the Court of Arbitration for Sport, to discuss **The Role of the Court of Arbitration for Sport (CAS) resolving FIFA World Cup™ Disputes**.

- 3 October: Together with HKA we co-hosted an in-person seminar in Doha on **Damages in International Arbitration**, chaired by Professor Khawar Qureshi KC. Dr. Daniel Greineder (Senior Counsel) and Anastasia Medvedskaya (Associate), provided practical tips for counsel on working with experts, from appointment through to cross-examination, as well as an overview of recent arbitral decisions concerning quantum calculations.

- 3 October: Professor Khawar Qureshi KC was asked to provide an **Overview of ISDS Arbitration** to the practitioners of ENSafrica. During this exclusive internals-only talk, which considered the rise of ISDS and Bilateral Investment Treaties across Africa, he shared practical insights on investor-treaty arbitration.

- 12 October: To coincide with Istanbul Arbitration Week 2022, we co-hosted a breakfast seminar on **The Implications of Russia Sanctions for Litigation and Arbitration**, together with lawyers from RPC and Moroglu Arseven. Joseph Dyke (Senior Associate) joined as a speaker remotely from the London office.

- 18 October: Professor Khawar Qureshi KC delivered the keynote address and Professor Damilola S. Olawuyi SAN also spoke at our joint webinar with Nigerian Institute of Advanced Legal Studies on **Dispute Resolution in the International Energy Sector**.

We have a number of upcoming webinars and in-person seminars. Should you be interested in attending (either remotely or in person), please email office@mcnairinternational.com and we will be delighted to send you further details of events most suitable for your areas of interest and location.

UK LAW COMMISSION ANNOUNCES REVIEW OF ENGLISH ARBITRATION ACT 1996

"Review of the Arbitration Act 1996: A consultation paper"

Introduction

On 22 September 2022, the Law Commission published a consultation paper on potential reforms to the Arbitration Act 1996. While the general view (both from the Law Commission and stakeholders) is that the Act works well and major reform is neither needed nor wanted, a number of discrete areas for reform were identified. Comments on the proposals are sought by 15 December 2022.

Proposals for reform

The specific areas discussed in detail in the consultation paper are:

1. Confidentiality: The Act does not currently contain provisions on confidentiality. The Law Commission's proposal is that no provisions on confidentiality should be included in the Act, and that the law of confidentiality is better left to be developed by the courts.

2. Independence of arbitrators and disclosure: The Act does not impose a duty of independence on arbitrators (compared to a duty of impartiality, which is provided for in Section 33). The initial view is that no provisions relating to independence should be added (it being more important that arbitrators should be impartial), but that the Act should be amended to provide that arbitrators have a continuing duty to disclose any circumstances which might reasonably give rise to justifiable doubts as to their impartiality.

3. Discrimination: The Law Commission noted that concerns exist as to diversity in arbitration, for example, in relation to the under-representation of women. Various proposals are set out, including that any agreement between the parties in relation to the arbitrator's protected characteristics should be unenforceable, unless, in the context of that arbitration, requiring the arbitrator to have that protected characteristic is a proportionate means of achieving a legitimate aim.

4. Immunity of arbitrators: Section 29 provides that an arbitrator is not liable for anything done in the purported discharge of their functions as an arbitrator unless done in bad faith. However, arbitrators may incur liability when they resign or if they are the subject of a removal challenge (even if ultimately unsuccessful). The Commission's proposals would strengthen the immunity of arbitrators, and, in particular, would reverse the case law which holds them potentially liable for the costs of court applications. Views are also sought on whether an arbitrator should incur liability for resignation at all, or perhaps only if their resignation is shown to be unreasonable.

5. Summary disposal of issues which lack merit: The Act does not include any express provision for summary disposal of issues, although it is likely that Section 33(1) (requiring the tribunal to adopt procedures which avoid unnecessary delay and expense) would probably allow this. However, to avoid uncertainty, the Commission proposes the insertion of an explicit (but not mandatory) provision allowing a tribunal to adopt a summary procedure to dispose of a claim or defence. Views are sought on whether the threshold should be "manifestly without merit" or "no real prospect of success".

6. Interim measures ordered by the court in support of arbitral proceedings: Section 44 provides that the court has power to make orders in support of arbitral proceedings, including such matters as the taking or preservation of evidence, and the granting of an interim injunction. The Commission has set out a number of proposals in relation to two points related to this power: (a) whether the court can make orders against third parties who are not party to the arbitral proceedings, and (b) to what extent section 44 is available when arbitral parties have also agreed a regime which provides for an emergency arbitrator.

7. Jurisdictional challenges against arbitral awards (Section 67): Various proposals are set out, including determining the nature of any application under Section 67 where a tribunal has already determined a jurisdictional challenge under Section 30, the ability of the court to declare an award to be of no effect (to be consistent with Sections 68 and 69) and cost consequences.

8. Appeals on a point of law (Section 69): No reforms to this area are proposed. It is thought that Section 69 strikes the appropriate balance between finality of awards and ensuring that errors of law are corrected.

The consultation paper and further information is available here.

EU PARLIAMENT VOTE IN FAVOUR OF REGULATION OF LITIGATION FUNDING

European Parliament resolution of 13 September 2022 with recommendations to the Commission on responsible private funding of litigation (2020/2130(INL))

Introduction

On 13 September 2022, the EU Parliament passed a resolution setting out various recommendations on the regulation of Europe's litigation funding sector.

At the outset, the EU Parliament noted that commercial third party litigation funding (TPLF) (which defines the scenario where private investors ('litigation funders') who are not a party to a dispute invest for profit in legal proceedings and pay legal and other expenses, in exchange for a share of any eventual award) is a growing practice which could, if properly regulated, be used more often as a tool to support access to justice and ensure appropriate corporate accountability.

However, it identified various issues, including the possibility that litigation funders may act in their own economic interest and pursue an outcome that pays them the greatest return and in the shortest amount of time, rather than act in the interest of a claimant to ensure that the actual victim receives adequate damages. It also stated that litigation funders may demand a disproportionate share of the proceeds that exceeds the typical returns of other types of investments. There was also a "regulatory vacuum" which may, inter alia, result in courts making awards to claimants without realizing that a share of the award, which might sometimes be disproportionate, will subsequently be redirected to litigation funders at the expense of claimants.

Accordingly, the Resolution made various recommendations in relation to regulation and supervision, ethical issues, incentives and limits on recovery, and disclosure and transparency.

Key Recommendations

The Annex to the Resolution sets out the contents of a proposed Directive which is described as follows: "minimum rules applicable to commercial third-party litigation funders and their authorised activities, and provides a framework to support and protect funded claimants and intended beneficiaries, including, where relevant, those whose interests are represented by qualified entities, in proceedings financed entirely or in part by third-party litigation funding. It lays down safeguards to prevent conflicts of interest, abusive litigation as well as the disproportionate allocation of monetary awards to litigation funders, while ensuring that third-party litigation funding appropriately allows claimants and intended beneficiaries to access justice, and ensuring corporate accountability." It includes:

- The creation by Member States of a system for the authorisation and monitoring of the activities of litigation funders, which includes an independent supervisory department (Article 4). Conditions for authorisation are set out in Article 5.
- Powers for the supervisory body to take decisions necessary to grant or deny authorisation to any applicant litigation funder, to withdraw any authorisation, or to impose conditions, restrictions or penalties upon any authorised litigation funder (with such decisions to be published on their website) (Article 8).
- Requirements for the contents of litigation funding agreements, including details of the costs and expenses to be covered, the share of any recovery, risks to the claimant and a declaration of no conflict of interest (Article 12).
- Transparency requirements and provisions for the avoidance of conflicts of interest (Article 13).
- Details of invalid agreements and clauses, including those which (i) grant a litigation funder the power to take or influence decisions in relation to proceedings; (ii) limit the liability of a litigation funder in the event of an order for adverse costs following unsuccessful proceedings; (iii) permit recovery by the litigation funder of more than 40% of an award (save in exceptional circumstances); and (iv) allow for recovery by the litigation funder before the claimant (Article 14).
- A prohibition on terminating funding agreements without claimant's informed consent except in certain circumstances (Article 15);
- Requirements to disclose funding arrangements to courts (including an unredacted copy of the funding agreement), and disclosure of the existence of a third party funding agreement and the identity of the funder to the defendant (Article 16).
- Provisions regarding the responsibility for adverse costs (Article 18).

The Resolution is available here.

SOUTH AFRICA NOT ENTITLED TO STATE IMMUNITY IN "TREASURE HUNTER" CASE

Argentum Exploration Limited v The Silver (and All Persons Claiming to be Interested in and/or to Have Rights in Respect of, the Silver) v Secretary of State for Transport, The Receiver of the Wreck [2022] EWCA Civ 1318 (11 October 2022)

Introduction

In *Argentum Exploration Limited v The Silver* [2022] EWCA Civ 1318, the English Court of Appeal held that the Republic of South Africa was not entitled to state immunity in the context of a claim relating to 2,364 bars of silver recovered from the seabed of the Indian Ocean.

Background

In 1942, the SS Tilawa, while sailing from Bombay to Durban during the Second World War, sank after being hit by Japanese torpedoes. The SS Tilawa's cargo included 2,364 uninsured bars of silver owned by the Republic of South Africa (the vessel itself was insured by the UK Government, and remains the property of the UK Government). At the time of the sinking, the wreck (and cargo) was regarded as unsalvageable; however, following advances in technology, the Silver was salvaged by Argentum, and brought to Southampton where it was delivered to the Receiver of Wreck, to whose order it is held, pursuant to s. 236 of the Merchant Shipping Act 1995.

Argentum, as claimed salvor, brought proceedings in rem against the silver in the Admiralty Court seeking a declaration that it was the owner of the Silver or, in the alternative, a salvage award (later accepting that South Africa was the owner of the silver, and dropping this part of its claim). The Republic of South Africa sought to have the claim struck out or permanently stayed on the basis that the proceedings attracted state immunity.

At first instance, Sir Nigel Teare dismissed the application, holding that the proceedings fell within the exception to immunity in s. 10(4)(a) of the State Immunity Act 1978, which provides: "*(4) A State is not immune as respect (a) an action in rem against a cargo belonging to that State if both the cargo and the ship carrying it were, at the time when the cause of action arose, in use or intended for use for commercial purposes*..."

The Republic of South Africa appealed to the Court of Appeal. The issue on appeal was whether the silver and the vessel fell within the words "both the cargo and the ship carrying it were, at the time when the cause of action arose, in use or intended for use for commercial purposes."

Decision

By a majority, the Court of Appeal dismissed South Africa's appeal.

Lord Justice Popplewell (with whom Lady Andrews agreed) delivered the main judgment of the majority.

The appropriate time for determination of the use or intended use of the cargo was "the point of time at which the relevant aspect of the cause of action for salvage in maritime law arises, not when the cause of action is complete with the occurrence of the last ingredient." That time was the point of time when the goods have the status as "cargo", before salvage takes place. Accordingly, on the facts of the present case, the use and intended use of the vessel and silver which it was necessary to examine were those at the time the vessel sank in 1942, when the silver was a cargo.

As to the use of the vessel in 1942, it was common ground that it was for commercial purposes. As to the use of the cargo by the Republic of South Africa in 1942, Popplewell LJ agreed with the Judge that the silver was in use by South Africa for commercial purposes when it was on board the vessel. In coming to this conclusion, Popplewell J considered that the relevant activity was the (i) entering into a contract of purchase on fob terms for the silver to be delivered on board the vessel; and (ii) entering into the contract of carriage with the owners of the vessel for it to be carried by sea to South Africa. Both aspects were non-sovereign activity under customary international law, and both were activity for commercial purposes within s. 3(3)(a) of the 1978 Act, and consequently within s. 10(4)(a).

Lady Elisabeth Laing delivered a dissenting judgment, in which she, inter alia, disagreed with the majority's interpretation of Section 10(4)(a). In summary, while agreeing with Popplewell LJ's conclusion that the relevant time of inquiry was the time when the maritime circumstances giving rise to the claim for salvage arose, she did not agree that when the ship sank, the silver was 'in use' by RSA for commercial purposes: on the contrary, she considered it was not in use for any purpose and it was intended for use for a non-commercial purpose. A cargo could not be "in use" during transport; rather, the question was the intended use.

UPDATE ON RUSSIAN SANCTIONS AND IMPACT ON PROVISION OF LEGAL SERVICES

Sanctions and implications for provision of legal services

The UK's Russia-related sanctions are made pursuant to the Sanctions and Money Laundering Act 2018 (SAMLA 2018), and specifically under the Russia (Sanctions) (EU Exit) Regulations 2019, as amended by subsequent regulations. The Regulations apply to anyone when they are on UK territory and "UK persons" (UK nationals/incorporated companies) anywhere in the world. The sanctions involve a range of financial, trade and immigration measures, including, inter alia a prohibition on making funds or economic resources available for a designated person or for their benefit. A special licence to enable sanctioned persons or entities to pay "reasonable professional fees for the provision of legal services" may be granted (Schedule 5, Part 1, para 3). On 30 September 2022, a prohibition preventing Russian access to "transactional legal advisory services" was announced by the UK Foreign Secretary.

A number of issues relating to access to justice arose as a result of the imposition of sanctions and implications for the provision of legal services, including difficulties in obtaining legal representation (either when facing a dispute or as a result of being de-lawyered mid-dispute), making payments relating to a dispute (such as filing fees or arbitrator costs), engaging other professional services, and issues in enforcing judgments or awards.

However, in recent months, a number of steps have been taken to try and resolve some of those access to justice difficulties:

- In July 2022, the EU made an 'access to justice' carve-out from its sanctions regime related to Russia for "*transactions which are strictly necessary to ensure access to judicial, administrative or arbitral proceedings in a Member State, as well as for the recognition and enforcement of a judgment or an arbitration award rendered in a Member State and if such transactions are consistent with the objectives of [Regulations (EU) 833/2014 and 269/2014]*".
- On 17 October 2022, the London Court of International Arbitration ("LCIA") announced in a press release (available here) that OFSI had issued General Licence INT/2022/1552576 which would cover cases administered by the LCIA pursuant to the LCIA Rules, and allow for "*payments to the LCIA by [DPs] … and extends to registration fees, deposits, arbitrator fees and expenses and LCIA charges, as well as fees and expenses of tribunal secretaries and experts appointed by the tribunal, pursuant to the LCIA Schedule of Arbitration Costs*". It did not extend to DPs' other payment obligations such as payments to their legal representatives or third parties for services related to the arbitration. OFSI also issued a Publication Notice alongside the General Notice (available here)
- On 28 October 2022, OFSI issued General Licence INT/2022/2252300 (the "Legal Fees General Licence") which was granted "*to permit the payment of legal fees owed by individuals and entities designated under [the UK's Russia/Belarus sanctions regimes]*" up to 28/04/2023, subject to certain conditions (e.g. legal fees only up to £500,000 for that period). OFSI also issued guidance alongside the General Licence (available here)

***VTB Commodities Trading DAC v JSC Antipinsky Refinery* [2022] EWHC 2795 (Comm) (04 November 2022)**

In 2019, VTB obtained worldwide freezing order and mandatory injunction under Section 44 AA1996 regarding 6 LCIA arbitrations against Antipinsky. The injunction required Antipinsky to deliver an oil cargo to VTB. Petraco claimed it was entitled to delivery of that cargo. Thus an issue arose as to whether VTB was liable to Petraco pursuant to the 'undertaking in damages'. VTB became a "designated person on 24 February 2022. Petraco sought security for costs. Foxton J made important observations on OFSI and its 28/10/2022 General Licence, *inter alia*:

- "*The application of the limits in case in which the law firm or counsel undertake different, or separate but related, matters for the same client is unclear*" (para 31(vii))
- "*The operation of the limits in a case in which a new counsel is instructed by solicitors acting under a pre-designation engagement is unclear*" (para 34)
- "*…the result of exceeding the figures in the General Licence would appear to take the entire legal matter outside the scope of the General Licence*" (para 36)
- "*It has been necessary to adjourn this case in part because of the time required to obtain OFSI licenses. That has involved a significant disruption to the case, and I am keen to avoid any repetition, including in complying with any costs order made*" (para 76).

The decision is available here.

RARE SUCCESSFUL CHALLENGE TO ARBITRATOR IN DEUTSCHE LUFTHANSA V VENEZUELA

Deutsche Lufthansa AG v Bolivarian Republic of Venezuela, PCA Case No. 2022-03 (10 October 2022)

Introduction

In a rare successful challenge to an arbitrator, Dr. Wolfgang Peter was disqualified as an arbitrator in the proceedings between Deutsche Lufthansa AG and Bolivarian Republic of Venezuela.

Background

On 21 June 2021, Deutsche Lufthansa commenced arbitration against Venezuela under a bilateral investment treaty between Germany and Venezuela, conducted under the UNCITRAL Rules.

The Claimant appointed Dr. Wolfgang Peter as its arbitrator, with Dr. Peter filing his Declaration of Acceptance, Availability, Impartiality, and Independence, which stated, inter alia, that "*[t]o the best of my knowledge, there are no circumstances, past or present, likely to give rise to justifiable doubts as to my impartiality and independence*."

The Respondent filed a challenge to Dr. Peter on two separate grounds, either of which, in its view, gave rise to justifiable doubts as to his impartiality and independence to act as arbitrator in the present proceedings:

(a) the purported "*controversy*"' between Venezeula and Mr. Kap-You Kim (who is a partner of Peter & Kim along with Dr. Peter) regarding the latter's conduct and subsequent voluntary withdrawal as a member of the annulment committee in the case *ConocoPhillips Petrozuata B. V., ConocoPhillips Hamcica B. V. and ConocoPhillips Gulf of Paria B. V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30; and

(b) the involvement of Prof. Pierre Tercier, another member of the Peter & Kim law firm, as president of the tribunal in *Air Canada v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/(AF)/17/1 (the "Air Canada Case"), in which, according to the Respondent, "*an award was rendered in relation to similar factual and legal issues as those presented by Lufthansa in its Notice of Arbitration*".

Decision

The Secretary-General of the PCA, Mr. Marcin Czepelak, accepted the challenge brought by the Respondent, finding that the involvement of Prof. Tercier in the Air Canada Case and his professional relationship with Dr. Peter constituted a sufficient basis to uphold Venezuela's challenge.

The Parties agreed that the legal standard applicable to the challenge was that set out in Article 10(1) of the UNCITRAL Rules, which provides that an arbitrator may be challenged if "*justifiable doubts*" exist as to the arbitrator's impartiality or independence. This is an objective standard.

A superficial analysis of the facts and issues raised in the present proceedings and the Air Canada case showed clear similarities, such that it appeared that the Air Canada Case is the only other investment treaty arbitration to overlap with the present arbitration in this manner, involving claims against the same respondent for the same effects caused by the same measures to similarly-placed actors in the same industry.

The Secretary-General considered that because Prof. Tercier is the only presiding arbitrator to have ruled on a case with these characteristics, the selection of his law firm colleague to serve on this tribunal would appear as more than a coincidence to a reasonable and informed third party. The appointment of Dr. Peter would be perceived as being motivated by the influence that Prof. Tercier's decisions in the Air Canada Case would hold for Dr. Peter, and the fact that Dr. Peter would potentially have to call into question the judgment of a close colleague in order to come to a different result on a substantially similar factual and legal pattern.

The Secretary-General emphasised that there were no concerns as to Dr. Peter's professionalism, legal ability, or intention to serve with the utmost integrity, or any evidence of actual bias. However, the appearance of bias was sufficient to raise justifiable doubts.

The decision is available here.