



Neutral Citation Number: [2019] EWHC 122 (Comm)

CL-2018-000255 & CL-2018-000530

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**QUEEN'S BENCH DIVISION**  
**COMMERCIAL COURT**  
**IN AN ARBITRATION CLAIM**

Royal Courts of Justice,  
Rolls Building, 7 Rolls Buildings  
Fetter Lane, London, EC4A 1NL

Date: 30 January 2019

**Before:**

**Sir William Blair**

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**Between:**

**(1) KOSHIGI LIMITED**  
**(2) SVOBODA CORPORATION**

**Claimants**

**- and -**

**(1) DONNA UNION FOUNDATION**  
**(2) ULMART HOLDINGS LIMITED**

**Defendants**

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**Christopher Parker QC and James Clifford** (instructed by **Fladgate LLP**) for the Claimants  
**Edmund King QC** (instructed by **Bryan Cave Leighton Paisner LLP**) for the First Defendant  
The Second Defendant did not appear and was not represented.

Hearing dates: 17 January 2019

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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....  
SIR WILLIAM BLAIR (SITTING AS A HIGH COURT JUDGE)

**Sir William Blair:**

1. The issue for decision relates to the liability for costs in respect of two discontinued Arbitration Claims brought under s. 68 Arbitration Act 1996 (which deals with serious irregularity). The claimants (respondents in the arbitration) are Koshigi Limited and Svoboda Corporation (the KS Shareholders), and the first defendant (claimant in the arbitration) is Donna Union Foundation (DUF).
2. In view of the limited nature of the present issue, it is not necessary to explain in detail the complex background. The arbitration concerns a shareholders' dispute in respect of the second defendant, a Maltese company called Ulmart Holdings Limited (UHL). DUF is a minority shareholder in the company, and the relief it sought in the arbitration was an order under the provisions of the Maltese Companies Act requiring the KS Shareholders to buy out its shares on the basis of their allegedly oppressive and unfairly prejudicial conduct towards DUF.
3. All three members of the Tribunal were selected by the LCIA Court, including the Tribunal Chair, who (it is not in dispute) is a well-known and very experienced international arbitrator. The liability hearing took place over nine days between 25 September and 5 October 2017. Towards the end, the KS Shareholders raised questions as to what they alleged was non-disclosure on the part of the Chair. Following the conclusion of the hearing, the lawyers for the KS Shareholders continued to investigate matters which in their view compromised his independence and wrote further letters to the Tribunal in this regard.
4. On 21 March 2018, the Tribunal issued its award on liability finding substantively for DUF, and making an award to the effect that the KS Shareholders were obliged to acquire the DUF shares in UHL at a price to be determined by the Tribunal (this was the first award). Shortly afterwards, their solicitors wrote to the Tribunal to the effect that the KS Shareholders would be applying to set aside the award on the grounds of serious irregularity, including bias. They invited the Chair to recuse himself, which the Chair declined to do.
5. The hearing on valuation took place on 10 and 11 April 2018. On 18 April 2018, the KS Shareholders issued proceedings under s. 68 Arbitration Act 1996 challenging the first award. This is the first of the two discontinued arbitration claims in respect of which costs issues now fall to be determined.
6. The grounds of the claim were that the Tribunal:
  - “(i) failed to comply with its general duties under Section 33 of the Act to act fairly and impartially as between the parties, because the Tribunal’s Chairman breached his duty to act fairly and impartially and was biased; (ii) failed to conduct the arbitration in accordance with the procedure agreed by the parties, because the Tribunal referred to documents that had not been admitted into the evidential records in accordance with the procedure that had been agreed between the Tribunal and the parties; and (iii) failed to deal with the issues that were put to it, because it failed to address a number of the Claimants’ arguments.”

The KS Shareholders relied on the second and third grounds in support of their case on bias, but also as independent grounds on which to challenge the awards.

7. On 20 June 2018, DUF issued an application for security for costs in relation to the claim in the sum of US\$526,415.39.
8. On 16 July 2018, the Tribunal issued its second award, ordering the KS Shareholders to buy DUF's shares in UHL for US\$67,159,546. This involved a process by which the share certificate/s were to be exchanged for the amount of the purchase price. The prescribed procedure was (in summary) that the purchase price was to be paid to DUF's solicitors to be held by them in escrow, and DUF was to deliver to the KS Shareholders' solicitors the share certificate/s and transfer forms to be held by them in escrow.
9. This was supposed to happen by mid-August 2018. However, by the end of August the purchase price had not been paid, and the KS Shareholders maintain that DUF was in breach of its obligations to deliver the shares. The purchase price has still not been paid, and it is evident that the KS Shareholders do not intend to pay it.
10. Meanwhile, on 8 August 2018 the KS Shareholders issued further proceedings under s. 68 Arbitration Act 1996 challenging the second award. This was based on the first of the grounds of the previous claim, in other words bias on the part of the Chair. This is the second of the two discontinued arbitration claims in respect of which costs issues now fall to be determined.
11. On 10 September 2018, Notices of Discontinuance of the s. 68 claims were served on DUF's solicitors. The KS Shareholders' case is that they discontinued because there was no need to continue with the claims because the awards had become unenforceable. This was because, they say, the prescribed mechanism failed because of what they contend was DUF's failure to deliver the shares, and that since the Tribunal having delivered its award is *functus*, no other mechanism can now be substituted.
12. DUF's application for security for costs came before Judge Waksman QC on 12 September 2018. Live issues included the question of costs in respect of the discontinued claims, and the fact that DUF was considering applying to set aside the Notices of Discontinuance. This was on the basis that it should not be exposed to the contentions raised in the s. 68 claims in other proceedings. Those issues were adjourned.
13. On 17 September 2018, the KS Shareholders issued an application for an order that DUF is to pay the costs of the discontinued claims, alternatively that there be no order as to costs. That has been their case at this hearing.
14. On 9 October 2018, the parties entered into a consent order by which the KS Shareholders undertook that they would not rely on any facts and matters which are the same or substantially the same as those relating to the s. 68 claims in any proceedings in any jurisdiction. On that basis, DUF agreed not to apply to set aside the Notices of Discontinuance.

15. On 10 October 2018, DUF issued an application for an order that the KS Shareholders pay the costs of the discontinued s. 68 claims on an indemnity basis. The KS Shareholders say that they gave the undertaking in the consent order in the belief that there would be no further costs incurred in these matters. It is a legitimate comment made by the KS Shareholders that the indemnity costs application followed immediately after the consent order was signed. On the other hand, if they had not given the undertaking, the KS Shareholders faced an application to set aside the Notices of Discontinuance which they have avoided.
16. In any case, DUF's position is that its costs should be paid on an indemnity basis, and that has been their case at this hearing.
17. To complete the picture, various applications continued to be made by the parties to the Tribunal. Further, on 2 January 2019, the KS Shareholders applied to the LCIA for the revocation of the appointment of all three members of the Tribunal on the ground that circumstances exist that give rise to justifiable doubts as to its impartiality and/or independence. That matter apparently remains to be dealt with, but it was said on behalf the KS Shareholders at the hearing of the present matter that the application would have no effect on the awards one way or the other.
18. In their application to the LCIA, the KS Shareholders stated their belief that the final hearing in front of the Tribunal fixed for 14 January 2019 should be adjourned. That did not happen, and among other things, the question of the costs of the arbitration was dealt with at that hearing. The result is not yet known. The Tribunal has made it clear that it will be the last hearing in the arbitration.

#### The issues for decision

19. The issues presently for decision are –
  - (1) Which party is to pay the costs of the discontinued s. 68 proceedings including those of the hearing in front of Judge Waksman QC, and the present hearing. As noted, DUF's case is that the KS Shareholders should pay, whereas the KS Shareholders' case is that DUF should pay, or alternatively that there should be no order as to costs.
  - (2) If the court decides that issue in favour of DUF, whether costs should be awarded on a standard basis, or, as DUF submits, on an indemnity basis.
  - (3) The appropriate amount of the interim payment, there being no dispute that an interim payment should be ordered.

#### The legal test on discontinuance

20. There is no dispute as to the applicable test. The usual or "default" rule is that upon discontinuance of a claim the claimant pays the costs, but there are exceptions. The principles were set out in *Brookes v HSBC Bank plc* [2011] EWCA Civ 354 and it is common ground that they apply equally to proceedings under s. 68 Arbitration Act 1996.
21. In *Brookes v HSBC Bank plc* at [6], Moore-Bick LJ said as follows:

“(1) when a claimant discontinues the proceedings, there is a presumption by reason of CPR 38.6 that the defendant should recover his costs; the burden is on the claimant to show a good reason for departing from that position;

(2) the fact that the claimant would or might well have succeeded at trial is not itself a sufficient reason for doing so;

(3) however, if it is plain that the claim would have failed, that is an additional factor in favour of applying the presumption;

(4) the mere fact that the claimant's decision to discontinue may have been motivated by practical, pragmatic or financial reasons as opposed to a lack of confidence in the merits of the case will not suffice to displace the presumption;

(5) if the claimant is to succeed in displacing the presumption he will usually need to show a change of circumstances to which he has not himself contributed;

(6) however, no change in circumstances is likely to suffice unless it has been brought about by some form of unreasonable conduct on the part of the defendant which in all the circumstances provides a good reason for departing from the rule.”

#### The incidence of costs on discontinuance in the present case

22. The claimants contend as follows. DUF should pay the costs, alternatively there should be no order as to costs, because DUF has acted unreasonably in prosecuting the arbitration at vast expense only to decline to comply with the obligation to hand over the share transfer documents in escrow by the deadline of 13 August 2018 set by the Tribunal. They characterise the share certificate proffered by DUF which they eventually saw as a “forgery” fabricated by two of the six directors.
23. In these circumstances, the KS Shareholders contend that their challenge to the two awards has been rendered otiose. The commercial purpose of the challenge was, by having the awards set aside, to avoid having to buy DUF’s shares in UHL for more than the KS Shareholders believed them to be worth. As a result of DUF’s failure to comply with the terms of the second award, it is contended, the KS Shareholders do not have to buy DUF’s shares in UHL. The second award is now incapable of enforcement alternatively it is likely to be unenforceable on the balance of probabilities.
24. In response, DUF contends that all these contentions are in dispute. Its case is that the award is fully enforceable, and that the enforceability of the sum ordered to be paid by the Tribunal has the support of an expert opinion of a Maltese lawyer (UHL being a Maltese company) and an opinion of Lord Hoffmann applying English law principles.
25. However, DUF’s basic contention is that it is sufficient on a costs application that the unenforceability of the award is in dispute. This is not a matter that can be resolved on

such an application, it contends, and it would be wrong to do so, because the question of the enforceability of the award will have to be considered in another court and jurisdiction.

26. In reply submissions, Mr Christopher Parker QC for the KS Shareholders sought to meet this point by reference to sub-paragraphs (5) and (6) of the judgment of Moore-Bick LJ in *Brookes* quoted above. He contended that the KS Shareholders have demonstrated a reasonable belief that the award was unenforceable at the time of the Notice of Discontinuance, and that such unenforceability was a result of unreasonable conduct on the part of DUF to which the KS Shareholders had not contributed, namely the failure on the part of DUF to produce the share certificate, and ultimately proffering the “forgery”. On this basis, he contends that circumstances exist for departing from the usual rule.
27. The court’s view on this issue is as follows. It has to be kept in mind that the burden is on the claimant to show a good reason for departing from the usual rule, and it is a high one (*Nelson’s Yard Management Co v Eziefula* [2013] C.P. Rep 29 at [30]). As both parties accept, the *Brookes* case makes clear that if a claimant is to succeed in avoiding liability for costs, it will usually need to show a change of circumstances to which it has not itself contributed brought about by some form of unreasonable conduct on the part of the defendant.
28. The question arises as to the correct approach to ascertaining the facts. Doubtless there will be cases in which change of circumstances and unreasonable conduct can be demonstrated without an extensive examination of the facts. That was the situation in *Dhillon v Siddiqui* [2010] EWHC 14400 (Ch) mentioned in *Nelson’s Yard* at [36]. But the court cannot on a costs application embark on what would amount to a hearing of the case on the merits and on the evidence – see *Nelson’s Yard* at [37] (Beatson LJ).
29. The present case is completely different from *Dhillon v Siddiqui*. Virtually every aspect of the KS Shareholders’ submissions is disputed by DUF and vice versa. This is not a case in which the court is familiar with the issues having considered them at trial and considering the costs position after judgment. The court would have to conduct *de novo* a hearing on highly contentious matters requiring the assessment of evidence including evidence of Maltese law in order to proceed on the basis of the KS Shareholders’ submission that the award is unenforceable. That is clearly not possible or permissible on a costs application in respect of a discontinued s. 68 claim in respect of the award (see *Nelson’s Yard* at [37]). It would also be to usurp the function of any court which ultimately has to decide enforcement proceedings.
30. This conclusion cannot be avoided merely by asserting a reasonable belief on behalf of the KS Shareholders that the award was unenforceable at the time of the Notice of Discontinuance as a result of unreasonable conduct on the part of DUF. This submission effectively acknowledges that the facts are in dispute. This is not a dispute which can be resolved on a costs application, and the reasoning of the court in *Nelson’s Yard* at [32] – [34] shows that it would be wrong in principle for the court to embark on such an exercise.

31. For the same reasons, there can be no question of making an order that DUF should pay the costs, or alternatively making no order as to costs. The KS Shareholders must pay the costs of the s. 68 claims because this is the rule that applies when claims are brought and subsequently discontinued. This includes the costs before Judge Waksman QC and the present hearing.
32. DUF sought to argue that the weakness of the bias and other allegations raised in the s. 68 claims is an additional factor in favour of applying the presumption (i.e. the third sub-paragraph of *Brookes* quoted above). This is relevant to the issue as to standard or indemnity costs. However, for reasons already set out, there is no need to consider these allegations as forming an additional factor under this head.
33. DUF's solicitors sent the court a copy of a decision handed down by the BVI Court of Appeal the day after the hearing which they say makes clear that the KS Shareholders contributed to the supposed invalidity of the share certificate. This was answered by the solicitors for the KS Shareholders, and indeed DUF's solicitors accept that there is what they say is a "typo" in the judgment of the BVI Court of Appeal. The court has considered this and subsequent correspondence, but considers that it is to be disregarded on a costs application on the principles set out above.

#### Indemnity or standard costs – the principles

34. As to whether the costs should be on a standard or indemnity basis, there is no dispute as to the principles. In *Simms v The Law Society* [2005] EWCA Civ 849; [2006] 2 Costs L.R. 245, Carnwath LJ said,

“16 ... when considering an application for the award of costs on the indemnity basis, the court is concerned principally with the losing party's conduct of the case, rather than the substantive merits of his position”.
35. When a party discontinues a claim, the normal order is that he should pay the costs on the standard basis: *Jarvis v PriceWaterhouseCooper* [2001] BCC 670, Lightman J at [16]. In *Excelsior Commercial & Industrial Holdings Limited v Salisbury Hammer Aspden & Johnson (A Firm)* [2002] EWCA Civ 879; [2002] C.P. Rep. 67 the Court of Appeal said at [32],

“... before an indemnity order can be made, there must be some conduct or some circumstance which takes the case out of the norm. That is the critical requirement”.
36. In *Whaleys (Bradford) Ltd v Bennett* [2017] 6 Costs LR 1241, it was however made clear by the Court of Appeal that it is not necessary for the conduct to be exceptional.
37. The submission on behalf of the KS Shareholders is that there is nothing here to take the case out of the norm, and that the appropriate order is for costs on the standard basis. In response to the case of DUF, the KS Shareholders contend that they had good grounds for making the challenges (among them being what they emphasise is an allegation of apparent, rather than actual, bias), and the allegations were not waived.

38. DUF's submission is that the bringing, and then abandoning, of what it contends were "thoroughly bad" allegations of bias that were waived by the KS Shareholders' subsequent conduct of the arbitration is not something that should be expected in ordinary litigation, and is "out of the norm" in that sense. These were serious allegations that are akin to ones of dishonesty, in that they are allegations with serious consequences for professionals that are not to be made lightly. Accordingly, DUF asks the court to order that costs be paid on the indemnity basis.

Indemnity or standard costs – the KS Shareholders' case as to bias

39. The KS Shareholders' case as to bias on the part of the Chair is summarised as to its main constituents in paragraph 44 of the KS Shareholders' skeleton argument, and in the annexes to the skeleton argument, as amplified in counsel's oral submissions. The factual case is set out in detail in the 1<sup>st</sup> Witness Statement of the KS Shareholders' solicitor dated 18 April 2018.
40. It is based (primarily) on what are said to be the Chair's connections with the QC acting for DUF. The case of the KS Shareholders is that at the time of his appointment, the Chair was sitting as a co-arbitrator with the QC in at least two arbitrations, and had recently sat as a co-arbitrator with the QC in one other arbitration. In mid-August 2016, he had approached the QC to act as adviser to the Board of an international arbitration centre, of which he was Chairman, and had subsequently appointed him.
41. Reliance is also placed on the Chair's connections with the DUF's solicitor. The Chair had worked with him at an international law firm between 2005 and 2008 and, apparently, it is said, he continues to have a "warm and friendly relationship" with him.
42. If he was aware of it, reliance is also placed on the Chair's connections with the Head of Legal at A1 who worked at the law firm between 2004 and 2008 when both the Chair and DUF's solicitor were there. A1 is both a funder and an adviser to DUF, so it has a real, and significant, stake in the outcome of the arbitration – its position, the KS Shareholders contend, is akin to that of a party.
43. Reliance is also placed on non-disclosure, it being contended that the Chair should have, and failed to, disclose:
- i) his connections with the QC before he was appointed as an arbitrator on 30 August 2016. If the QC was not actually appointed as Legal Adviser to the Board of the until after 30 August 2016, the Chair failed to disclose the fact of the QC's appointment as soon as it occurred;
  - ii) his connections with DUF's solicitor before he was appointed as an arbitrator on 30 August 2016;
  - iii) if he was aware of it, his failure to disclose his connections with the Head of Legal at A1 when he became aware of the involvement of A1, or at the latest, once A1's involvement had become an issue in the case;



- iv) his connections with the QC and DUF's solicitors and (if he was aware of it) the Head of Legal at A1 after he was asked in the KS Shareholders' Solicitors' letters of 4 and 5 October 2017 "to give full disclosure now of all "circumstances currently known to you likely to give rise in the mind of any party to any justifiable doubts as to your impartiality and independence"".
44. The KS Shareholders' case is that they found out about the connection between the Chair and DUF's QC through a Google search during the hearing which they say that the Tribunal failed to conduct in accordance with the procedure agreed by the parties by referring to documents that had not been admitted into the evidential records in accordance with the procedure that had been agreed between the Tribunal and the parties (ground (ii) of the first s. 68 application).
45. Thereafter, it is said that the Chair made an "inappropriate response" at the hearing on 4 October 2017 "to the suggestion that there should be or should have been disclosure", reference being made to "the "aggressive" and "unapologetic" terms in which his explanations were expressed which suggested that he had concluded that something had gone wrong and that "attack was the best form of defence", and his "inappropriate response" thereafter, including his continuing failure to explain his various connections and his failures to disclose them.

The case as to bias – discussion and conclusion

46. The principles that apply to the question of bias on the part of arbitrators has been recently considered by the Court of Appeal in *Halliburton Co v Chubb Bermuda Insurance Ltd* [2018] 1 W.L.R. 3361. There, an arbitrator accepted appointment in another arbitration as appointee of the party to first arbitration. The appointment was not disclosed to other party to the first arbitration.
47. The Court held that the mere fact that an arbitrator accepts appointments in multiple references concerning the same or overlapping subject matter with only one common party does not of itself give rise to an appearance of bias. The test under English law is that disclosure should be given of facts and circumstances known to the arbitrator which, in the language of s. 24 of the Act, would or might give rise to justifiable doubts as to his impartiality. Under English law this means facts or circumstances which would or might lead the fair-minded and informed observer, having considered the facts, to conclude that there was a real possibility that the arbitrator was biased (see at [71]).
48. In the result, it was held that the arbitrator should have disclosed his appointments in the related arbitration, but that the non-disclosure taken together with other relevant factors would not have led the fair-minded and informed observer to conclude that there was in fact a real possibility that the arbitrator was biased. An application to remove the arbitrator pursuant to s. 24(1)(a) of the Arbitration Act 1996 accordingly failed.
49. The IBA Guidelines are important in giving practical guidance to arbitrators in respect of what can be difficult questions of judgment. In this regard, the Court of Appeal also approved the analysis of Popplewell J at first instance who said in *H v L* [2017] 1 W.L.R. 2280 at [16] that, "The International Bar Association Guidelines on Conflicts of Interest in International Arbitration, 2014 ed ("the IBA Guidelines") may provide

some assistance to the court on what may constitute an unacceptable conflict of interest and what matters may require disclosure. However, they are not legal provisions and do not override the applicable legal principles which have been identified, as they expressly recognise in para 6 of the introduction; if there is no apparent bias in accordance with the legal test, it is irrelevant whether there has been compliance with the IBA Guidelines ...”. (And see *Av B* [2011] 2 Lloyd's Rep 591 at [73], Flaux J; *W Ltd v M Sdn Bhd* [2016] EWHC 422 (Comm), Knowles J.)

50. Finally, the court approaches the question of the appearance of bias on an objective basis, the fair-minded observer test being intended to ensure that there is a measure of detachment, which is particularly important in a hard-fought case in which a party may genuinely have a sense of grievance (see *H v L* at [16]).
51. The question in *Halliburton v Chubb* arose in the context of an application to remove the arbitrator. The present application arises in the context of costs liability in respect of a discontinued claim under s. 68 of the 1996 Act. There is no dispute that the same legal principles apply. It is however necessary to keep in mind that the court is not deciding the bias and non-disclosure issues, which were not pursued, and pursuant to the consent order of 9 October 2018 cannot now be relied on in any proceedings in any jurisdiction. The issue is whether it can fairly be said that the circumstances give rise to some conduct or some circumstance which takes the case out of the norm so as to justify the making of an order for indemnity costs. This requires the court to take a view on the strength of the allegations without deciding them.
52. The factual case as set out in the 1<sup>st</sup> Witness Statement of the KS Shareholders' solicitor is extensive. The following are the main points as identified in the KS Shareholders' skeleton argument. The issue which sparked the allegations of bias was a Google search by the KS Shareholders. The arbitration centre website showed the Chair as the Chairman of the centre, and the DUF's QC as adviser to the board. This was raised with the Chair the following day (the 8th day of the hearing). At the end of the day, the Chair explained the position. He said that he had been appointed by the Government concerned to chair the board, and that the appointment appears on his updated c.v. held by the LCIA. He had asked the DUF's QC to help draw up the panel of arbitrators, but the QC had no formal role. Save for that initial contact, he had not spoken to the QC in his capacity as Chairman.
53. Following this explanation, the transcript shows the KS Shareholders' QC thanking the Chair and expressing appreciation for the quickness of his response. Although the KS Shareholders' evidence describes the explanation as having been given in a "tone of rebuke", the transcript does not give this impression. The Chair's response cannot properly be described in any way as "aggressive" or "inappropriate". The issue was raised and answered, and the explanation shows why disclosure was not given or required – in the court's view, this is very unlikely to have given rise to circumstances which would or might have led the fair-minded and informed observer, having considered the facts, to conclude that there was a real possibility that the Chair was biased.
54. As regards the other arbitrations identified by the KS Shareholders on which the Chair and the DUF's QC serve or have served as co-arbitrators, it has not been suggested that these are connected to the present arbitration, which is a point of distinction from

*Halliburton v Chubb* (in which as has been noted it was held that disclosure was required). Under the IBA Guidelines, the fact that, “The arbitrator and counsel for one of the parties previously served together as arbitrators” appears on the Green List. The “Green List is a non-exhaustive list of specific situations where no appearance and no actual conflict of interest exists from an objective point of view. Thus, the arbitrator has no duty to disclose situations falling within the Green List”. Although as has been explained above, this is in no sense binding on the court, it is a useful indication of what is accepted as international best practice. Again, in the court’s view, the fact that the Chair and the QC for DUF have served, or serve, as co-arbitrators in unconnected arbitrations, was very unlikely without more to have given rise to bias in the legal sense, or to have required disclosure.

55. The other contentions are that the Chair had worked with the DUF’s solicitor between 2005 and 2008, and with the Head of Legal at A1 between 2004 and 2008, when they were at the international law firm where he was head of arbitration – the Chair left the firm in 2008 to take up a post at an arbitral institution. Apart from any other considerations, this is well outside the three-year period identified in the Orange List of the IBA Guidelines, and it was accepted in oral submissions on behalf of the KS Shareholders that disclosure was not required under the Guidelines. Reference is made to a “warm and friendly relationship” with DUF’s solicitor but this is a long way from the “close personal friendship” referred to in the Orange List. Again, in the court’s view, these relationships were very unlikely to have given rise to bias in the legal sense, or to have required disclosure.
56. DUF further contends that the KS Shareholders lost the right to object, because they knew of many of their complaints by the end of the hearing, but continued to participate in the arbitration, and there was no reason why they could not with “reasonable diligence” (s.73(1) Arbitration Act 1996) have discovered then what they found out from internet searches later.
57. In *ASM Shipping Ltd of India v TTMI Ltd of England* [2006] 1 CLC 656 it was held at [49] that the effect of s. 73 Arbitration Act 1996 is that a claimant alleging bias on the part of the arbitrator must come to court and seek the arbitrator’s removal, or let the matter drop. It cannot take the position that if the award is in its favour it will drop its objection, but make it in the event that the award goes against it. The decision is cited in leading textbooks (e.g. *Russell on Arbitration*, 24<sup>th</sup> edn, para 7-132, Merkin & Flannery, *Arbitration Act 1996*, 5<sup>th</sup> edn, p. 358). However, there is a factual dispute in this regard in that the KS Shareholders contend that there was no waiver because their investigations were continuing. In view of the court’s above conclusions on bias and non-disclosure, there is no need to reach a conclusion on this issue.
58. For the same reason, it is unnecessary to comment on the KS Shareholders’ second and third grounds of challenge, namely that the Tribunal failed to follow the procedure agreed by the parties because it referred to documents that had not been admitted in accordance with the agreed procedure, and that it failed to address a number of their arguments.
59. The court’s conclusion is as follows. For the reasons set out above, this was a very weak case of bias and non-disclosure. Advancing such a case under s. 68 Arbitration Act 1996 may well in itself justify the court awarding indemnity costs. Here,

however, there is an additional consideration, in that the s. 68 claims were discontinued shortly before the hearing of DUF's application for security for costs. (The KS Shareholders' case as to their reasons for doing so is discussed above.) There is no doubt that security for costs would have been ordered, almost certainly in a substantial amount. It is the combination of factors in this case that takes the case out of the norm. In the circumstances, DUF is entitled to an order for indemnity costs. That is to include costs of the security for costs hearing, and the costs of this hearing.

**Interim payment**

60. Given the court's conclusion, DUF's right to an interim payment on account of costs is not in dispute. Each of the parties have put in substantial bills of costs in US dollars and pounds sterling respectively, DUF = US\$527,000 and the KS Shareholders = £355,000. On an indemnity basis, DUF asks for an interim payment of 80%, whereas the KS Shareholders submit that 70% is the appropriate figure. In the light of the size of the amounts claimed, and the fact that the s.68 claims were discontinued, the order will be for 70% of US\$527,000. This must be paid in fourteen days in the usual way.
61. The parties should draw up the order. The court is grateful for their assistance.