Case in Brief:

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Newcomer arbitrator put under lights in case of apparent bias

A recent decision out of the English High Court, *H1 & Anor v W & Ors*,[1] has captured some of the tell-tale signs that an arbitrator is displaying apparent bias. The decision explains the concept of apparent bias and its importance, and highlights the fact that even the mere possibility of bias can undermine the arbitral process.

Background

In 2018, a stunt on a filmset backfired dramatically when the stuntman accidentally set themselves on fire. The producer (the **insured**) took out a claim under their insurance policy, but the insurer disagreed that the incident was covered. Unable to come to an agreement, the parties went to arbitration. The parties selected an arbitrator known as an expert in the entertainment insurance industry but who did not have any experience in arbitration.

1 *H1 & Anor v W & Ors* [2024] EWHC 382 (Comm).

The arbitration

During the arbitral proceedings, the arbitrator made comments implying preference for the insured in a range of ways. In the insurer's view, the most concerning comments came in the form of:

- the arbitrator suggesting that the expertise of the insured's expert witness meant that the insurer's expert witness could not add anything insightful; and
- the arbitrator using awkward language to describe the motivation of one of the insurer's expert witnesses.[2]

The insurer argued that while they did not believe the arbitrator was actually biased, these comments were examples of apparent bias. The perception of these comments as biased was fuelled by the arbitrator's known long-standing professional relationship with the insured's expert witness.

The insurer went to the High Court seeking an order under section 24(1)(a) of the Arbitration Act 1996 for the removal of the arbitrator.

Predisposition vs predetermination

Predisposition

The Court explained that there is a class of statements an arbitrator can make which indicate a predisposition towards a certain outcome. Such a predisposition will not necessarily amount to apparent bias. The statements suggest that the arbitrator merely has a suspicion of how the result may turn out, but crucially – the arbitrator is open to having their mind changed.

Predetermination

On the other side of this are statements which can be seen as displaying predetermination. These statements indicate that the arbitrator already has a decision in their mind. It is prejudicial. Their process is not fair as they are not putting appropriate weight into the evidence of arguments of the other party.

This judgment is a useful guide between the two frames of mind. In this case, the arbitrator had made statements suggesting both predisposition and predetermination.

To be acquainted is no indication of bias

The Court emphasised that close relationships are to be expected in relatively small industries, such as entertainment insurance, and the professionals have seasoned histories in those fields. These relationships cannot be said to be indications of apparent bias.

As the awkward language concerned the statements about the efficiency of the insurer's expert witness, it was more a by-product of the inexperience of the arbitrator. The Court described these comments as "unfortunate and misguided" but acknowledged that they occurred by way of misguidance from the insured's lawyer.[3]

2 The arbitrator seemed to suggest that the insurer's expert witness would be compromised by their working relationship with the insurer.

3 *H1 v W*, above n 1, at [72].

An unhealthy preference

Other comments made by the arbitrator in relation to the insurer's expert witnesses cast further doubts on the arbitrator's impartiality.

In response to a call by the insurer for further evidence to be heard by the arbitrator, the arbitrator stated, *I will of course reserve my judgement but I have read the statements and I know the professionals. I can say now what I think*.

In the Court's view, this was a clear example of the arbitrator showing apparent bias.[4] It was communicating to a fair-minded and informed observer that the arbitrator valued their personal relationship with the insured's expert witness over the objective and relevant value of the insurer's evidence.

Keeping the arbitrator anonymous

Finally, the Court deliberated on whether to grant anonymity to the arbitrator. The Court identified open justice as being an imperative. The opportunity for public scrutiny enables confidence in the courts. However, there will be *exceptional* times when the Court can and will protect the information presented to it. The Court held the following factors to be relevant in deciding to grant anonymity:

- The industry was *tightly knit*.
- No public statement about the identity of the arbitrator had previously been made.
- The complete inexperience of the arbitrator. They did not advertise themselves as having a long-established reputation in arbitration and their appointment essentially amounted to *a one-off*.

Conclusion

H1 v W contains lessons for arbitrators learning their trade. Comments, no matter how innocuous their intentions, can easily disrupt the one of the key foundations of arbitration – impartiality. While the courts in England and New Zealand are wary of interfering with the arbitral process, there will be times when they are left with no choice.

4 *H1 v W,* above n 1, at [76].