CA on appeal from Commercial Court (Mr Justice Lnogmore) before Woolf LJ MR; Potter LJ; May LJ. 15th May 2000.

LORD WOOLF MR :

Introduction

1. This is an appeal by AT&T Corporation *("AT&T")* and Lucent Technologies Inc. *("Lucent")* (collectively called "AT&T" unless the context otherwise requires) from the judgment of Mr Justice Longmore delivered on 13 October 1999. The judge dismissed AT&T's application for the removal and revocation of the appointment of Mr L Yves Fortier QC as third arbitrator and chairman of an ICC Tribunal ("the Tribunal") and the setting aside of three Partial Awards by the Tribunal in favour of the respondents Saudi Cable Company ("SCC"). The Partial Awards were dated as follows: First Partial Award, 4 September 1996; Second Partial Award, 2 July 1998; Third Partial Award, 15 September 1999.

2. The grounds of the application were that, at all relevant times before 29th November 1998, AT&T was unaware that Mr Fortier was a non-executive director of a competitor company of AT&T. The competitor is Nortel of Canada ("Nortel"). Nortel was not simply a commercial rival of AT&T in the field of telecommunications. It had also been a disappointed bidder for the contract out of which the disputes being arbitrated arose and could be a competitor for further contracts.

The Facts

3. AT&T has a vast telecommunications business. Nortel is a substantial Canadian company active in the same field. Both companies were among seven international telecommunication companies selected by the Saudi Arabian Ministry of Post Telephone and Telegraph ("the Ministry") to submit bids for the Saudi Kingdom's sixth telecommunications expansion project ("TEP-6"). The project was valued at about US$ 4.6 billion. It was a requirement of the Ministry that cable required for TEP-6 should be acquired from SCC. In 1993, prior to the submission of bids, SCC approached each bidder with a view to establishing a commercial relationship for the supply of cable for TEP-6 in anticipation of such bidder being ultimately successful. On 10 August 1993 AT&T and SCC signed a Pre-Bid Agreement ("PBA"). The arbitration concerns a dispute or disputes arising out of that agreement and, in particular, out of paragraph 6 of the PBA which provided as follows: *"... upon award of any cable related contract to AT&T in connection with TEP-6, ... [the parties shall] meet promptly and negotiate in good faith mutually satisfactory agreements essential to carrying out both parties responsibilities, e.g. supply and service agreements (as applicable)."*

4. The PBA also provided that any disputes arising out of or in connection with the PBA should be finally settled by arbitration. The arbitrators decided that the PBA was governed by the law of New York which recognises the provision quoted above as a binding contractual obligation. The arbitration clause contained in the PBA provided for submission of disputes to the International Chamber of Commerce ("ICC"), the place of arbitration being London. Accordingly English law is the proper law of the arbitration agreement.

5. The tender for the TEP-6 project was fiercely contested, because of its great value and strategic significance. The contract was awarded to AT&T after high level political lobbying on the part of the competitors. There was considerable criticism of the process by which AT&T was awarded the contract both in the industry and in the press. Nortel was especially aggrieved because it had terminated a 55-year old preferential supply arrangement with Bell Canada in return for a promise of US Government support.

6. Between 22 August and 1 September 1994, AT&T and SCC met to negotiate supply and service agreements as provided for in paragraph 6 of the PBA. The negotiations were inconclusive and, on 10 November 1994, AT&T sent a letter to SCC terminating the PBA on the basis that the parties could not mutually agree in good faith. On 3 February 1995, AT&T filed a request for arbitration with the ICC claiming, inter alia, a declaration that the PBA was validly terminated. On 6 March 1995, SCC filed its Answer claiming that the contract had not been validly terminated and asking for an order that AT&T comply with the agreement and negotiate in good faith.

The Appointment of the Arbitrators

7. The ICC Rules of Conciliation and Arbitration 1988 ("the ICC rules") permit each party to a dispute to nominate its own arbitrator subject to confirmation by the ICC. In addition there is to be a chairman also subject to such confirmation. AT&T nominated Maitre Michael Schneider, a German lawyer practising in Geneva. SCC nominated Mr Robert Von Mehren, a partner in a New York law firm. They were both confirmed in due course. The parties and their arbitrators had lengthy discussions to see if they could agree on a chairman of the Tribunal for confirmation by the ICC.

8. After a number of names had been canvassed and rejected, the name of Mr Fortier, who is an eminent Canadian lawyer practising in Montreal with very considerable experience as an arbitrator, was suggested. Negotiations for his appointment took place principally between Mr Beechey of Clifford Chance in London on behalf of AT&T and Mr Hamilton of White and Case in New York on behalf of SCC. On 17 March, Mr Beechey faxed Mr Fortier's office in Montreal asking him if he would be available to act as chairman of the Tribunal, telling him something of the dispute and requesting him to forward a curriculum vitae ("CV").

9. On 20 March Mr Fortier telephoned Mr Beechey who was in the midst of various meetings in Paris and a conversation took place about which there is dispute between the parties. It is not in dispute that Mr Fortier said that there were no facts or circumstances which would call into question his independence as an arbitrator. He also maintains that he "mentioned" his connection with Nortel. Mr Beechey, who did not make a note of the conversation, does not recollect this. He suggests that it is unlikely he would have instigated any discussion of the

directorship or Nortel, being aware of neither. He also asserts that, even if it had been mentioned by Mr Fortier, he would not have been in any position to say that the directorship would pose a problem. In his affidavit, Mr Fortier acknowledges that any mention of the directorship would not have been made in the context of making disclosure, but merely to indicate that he had some experience of the telecommunications industry. He states that he is not surprised that Mr Beechey cannot remember the matter being raised. He (Mr Fortier) at no time regarded his directorship as raising any problem or embarrassment. So far as disclosure is concerned, he simply said that his CV would be forthcoming. When Mr Beechey returned to London, he found a copy of the CV waiting for him, dated 20 March 1995.

10. Owing to what is agreed to have been a most unfortunate secretarial error, no mention appeared in the CV of Mr Fortier's directorship of Nortel among the number of directorships which were mentioned. By way of unhappy contrast, on the same day Mr Fortier caused a copy of his CV to be sent to Mr VV Veeder QC of Essex Court Chambers in London for an unrelated purpose, which copy did record his directorship of Nortel. The explanation is that Mr Fortier had both an administrative assistant and a secretary. One CV was sent from the computer file operated by the word processor of one and one CV was sent from the word processor operated by the other. It is not clear why the CVs were not the same in content. The probability is that one copy held on one computer file had part omitted in the course of an updating operation, while the other copy held on another computer file did not have the same omission. Whatever the reason, it is accepted between the parties that the omission was due to secretarial error and was not intentional. It is doubly unfortunate that the ICC, whose standard practice, once an arbitrator's nomination is confirmed, is to send copies of his CV to the parties together with a signed Statement of Independence, did not do so on this occasion. The ICC already held a copy of Mr Fortier's CV which did list his directorship of Nortel. However, on this occasion a copy of Mr Fortier's CV was not sent to the parties. It is AT&T's case that, had it been aware that Mr Fortier was a non-executive director of Nortel, it would not have consented to his appointment.

11. The ICC rules concerning the *"independence"* of the parties appear in Article 2 which concerns the constitution of Arbitral Tribunals. Articles 2.7, 2.8 and 2.9 provide as follows:

"7. *Every arbitrator appointed or confirmed by the Court must be and remain independent of the parties involved in the arbitration.*

Before appointment or confirmation by the Court, a prospective arbitrator shall disclose in writing to the Secretary General of the Court any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties. Upon receipt of such information, the Secretary General of the Court shall provide it to the parties in writing and fix a time-limit for any comments from them.

An arbitrator shall immediately disclose in writing to the Secretary General of the Court and the parties any facts or circumstance of a similar nature which may arise between the arbitrator's appointment or confirmation by the Court and notification of the final award.

8. A challenge of an arbitrator, whether for alleged lack of independence or otherwise is made by the submission to the Secretary General of the Court of a written statement specifying the facts and circumstances on which the challenge is based.

For a challenge to be admissible, it must be sent by a party either within 30 days from receipt by that party of the notification of the appointment or confirmation of the arbitrator by the Court; or within 30 days from the date when the party making the challenge was informed of the facts and circumstances on which the challenge is based, if such date is subsequent to the receipt of the aforementioned notification.

9. The court shall decide on the admissibility, and at the same time if need be on the merits, of a challenge after the Secretary General of the Court has afforded an opportunity for the arbitrator concerned, the parties and any other members of the arbitral tribunal to comment in writing within a suitable period of time."

12. Article 2.13 of the ICC Rules states that the decision of the ICC as to any challenge of an arbitrator shall be final and the reason for its decision shall not be communicated.

13. The parties agreed on Mr Fortier as the chairman of the Tribunal subject to ICC approval and the ICC asked Mr Fortier (as well as the other arbitrators) to sign a Statement of Independence on a standard printed form. The form required him to declare to the ICC his willingness to act as an arbitrator and to check one of two boxes. The text beside the first box reads: *"I am independent of each of the parties and intend to remain so; to the best of my knowledge, there are no facts or circumstances, past or present, that need to be disclosed because they might be of such nature as to call into question my independence in the eyes of any of the parties."*

The text beside the second box reads: *"I am independent of each of the parties and intend to remain so; however, in consideration of Article 2, paragraph 7 of the ICC Rules of Arbitration, I wish to call your attention to the following factors and circumstances which I hereafter disclose because I consider that they might be of such a nature as to call into question my independence in the eyes of any of the parties.* (Use separate sheet if necessary)."

14. The instruction on the form as to which text to complete was in these terms: *"The choice of which box to check will be determined after you have taken into account, inter alia, whether there exists any past or present relationship, direct or indirect, with any of the parties, their counsel, whether financial, professional or of another kind and whether the nature of any such relationship is such that disclosure is called for pursuant to the criteria set out below. Any doubt should be resolved in favour of disclosure."*

15. Mr Fortier put a cross in the first box and signed the document on 28 March 1995. He was then confirmed by the ICC as the third arbitrator and chairman of the Tribunal. The judge stated that he was satisfied that, when Mr Fortier signed the document, he considered himself to be independent of the parties, that he intended to remain so and it never occurred to him that his non-executive directorship of Nortel could call into question his independence in the eyes of either of the parties.

16. It emerged in the course of the proceedings that, in addition to his directorship of Nortel, which was a non-executive directorship, Mr Fortier also held 474 Nortel shares in accordance with his practice of acquiring a shareholding in any corporation on whose board he sat. It also appears that within his share portfolio he held 300 "*common*" shares in AT&T. Neither shareholding was disclosed prior to his appointment. However, the substance of AT&T's complaint relates to Mr Fortier's directorship of Nortel, rather than to his small (and effectively insignificant) shareholding.

The Course of the Arbitration

17. Between 8 and 19 January 1996 the Tribunal met to discuss the question of the legal status of the PBA. On 4 September 1996, the Tribunal issued its First Partial Award. In that award it concluded that the terms of the PBA were legally binding and that the parties were obliged to meet promptly and negotiate in good faith. It found that the PBA had not been validly terminated. That decision, like all subsequent Tribunal decisions, was reached by a process of collegiate interchange between all members; all such decisions were unanimous.

18. Negotiations then took place between the parties as directed by the Tribunal, in the course of which a number of rulings were made by the Tribunal, including rulings in relation to the nature of commercially sensitive information and documents which AT&T should disclose in the course of such negotiations, particularly in relation to AT&T's own profit margins. That was for the purpose of attempting to reach agreement on a fair price for the cables to be bought from SCC. While provision was made for redacted versions of some of the documents to be provided to SCC, the Tribunal received unredacted versions. Throughout the process of the arbitration, AT&T made known its concerns about disclosing such confidential information, given the risk that it might fall into the hands of competitors. After a number of meetings between the parties, no agreement was reached and in June 1997 SCC submitted a claim to the effect that AT&T had failed to negotiate in good faith. After further hearings, on 2 July 1998, by its Second Partial Award, the tribunal held that AT&T had not negotiated in good faith.

19. Further hearings were held in October and November 1998 at which expert evidence and closing arguments were heard on the quantum of damages flowing from the Second Partial Award.

AT&T's Challenge

20. In Autumn 1998, the Saudi Telecom Company, a privatised part of the Ministry, invited bids for a project known as TEP-8. Both Nortel and Lucent (now hived off from AT&T) were invited to tender bids. On 29 November 1998 Mr Heindel, President of Lucent's Saudi Arabian Branch, while undertaking research into Lucent's competitors in relation to that bid, reviewed Nortel's Internet site. He noticed that Mr Fortier was listed in Nortel's Annual Report as a director. He immediately informed Lucent's lawyers, who wrote to Mr Fortier. In reply, Mr Fortier offered to resign his directorship. However, AT&T rejected such offer, and, following further communication between AT&T's lawyers and Mr Fortier, AT&T issued a challenge pursuant to Article 2.8 of the ICC Rules.

21. On 24 February 1999, the ICC dismissed AT&T's challenge without reasons. On 15 September 1999, the Tribunal published its Third Partial Award on the question of quantum. It awarded SCC US$30,000,000 (plus interest) as partial compensation for AT&T's breach of the PBA.

22. Following the ICC's dismissal of AT&T's challenge, AT&T commenced legal proceedings pursuant to sections 1 and 23 of the Arbitration Act 1950 for an order that AT&T be at liberty to revoke and make void the appointment and authority of Mr Fortier and have him removed and for the Partial Awards to be set aside.

23. On 20 September 1999 Mr Fortier wrote a letter to both solicitors which speaks for itself. It is in the following terms :

    "Upon reading the Skeleton Arguments of the parties over the weekend, it occurs to me that there is one point which may perhaps require clarification.

    Reference is made in both Skeleton Arguments to the contract known as TEP-8. I pointed out in my affidavit of 12 July 1999, (paragraphs 29-31) that matters such as submissions or tenders for contracts in the ordinary course of Nortel's business are not brought to the attention of the Board of Directors or its committees and that I was entirely unaware of the TEP-8 project until I received Clifford Chance's letter of 3 December 1998.

    In the interest of completeness and to avoid any possible misunderstanding I should add that at the time I was approached to act in this arbitration, I had no knowledge whatever of the TEP-6 project and I learned of it only through the arbitration process."

24. The letter from Mr Fortier was sent together with a covering letter which stated that, although time was very short, Mr Fortier was prepared to provide a second affidavit dealing with his letter. At the hearing in the court below SCC relied on this letter. Sir Sydney Kentridge QC, on behalf AT&T, submitted that no weight should be attached to the contents of the letter, primarily because of the absence of any opportunity to cross-examine Mr Fortier. However, the offer of Mr Fortier to provide an affidavit was not taken up and an examination of the transcript of the proceedings in the court below makes clear that the letter was part of the evidence before the judge. Sir Sydney Kentridge's contention was that the judge should attach no weight to the contents of the letter and this was the approach adopted by the judge.

25. Longmore J heard the application. By his order dated 29 October 1999 he dismissed AT&T's applications with costs. He granted permission to AT&T to appeal to this court.

The Judgment Below

26. The judge accepted the submission of Mr Pollock QC for SCC that, while Article 2.13 could not exclude an enquiry whether Mr Fortier was biased according to common law rules, it did preclude enquiry into whether there was any breach by him of an obligation to disclose the facts which might call his independence into question under the Rules of the ICC. The judge held that any question of breach of contract by reason of non-disclosure in relation to the contractual concept of *"independence"* under those rules could not be revisited in the light of Article 2.13 which was a finality provision. He therefore resisted what he described as *"the temptation to say whether, in my view, Mr Fortier was in breach of the ICC obligations of disclosure"*. He held that whether or not the award should be set aside depended upon whether the arbitrator was, or must in law be presumed to have been, biased on the basis of common law principles.

27. Having recorded that AT&T did not suggest that Mr Fortier was consciously biased, the judge considered the claim that there was an appearance of bias or at least a risk that Mr Fortier was unconsciously biased against them. The judge adopted the approach to the doctrine of bias in ***R v Gough*** [1993] AC 646 at 670 per Lord Goff of Chieveley, ***R v Inner West London Council, ex parte Dallaglio*** [1994] 4 All ER 139 at 151 per Lord Justice Simon Brown and ***R v Bow Street Metropolitan Stipendary Magistrates, ex parte Pinochet (No.2)*** [1999] 2 WLR 272 at 281-2 per Lord Browne-Wilkinson. Longmore J described the position in these terms:

"There is an automatic disqualification for any judge who has a direct pecuniary interest (such as owning shares) in one of the parties or is otherwise so closely connected with the party that he can truly be said to be judge in his own cause; apart from that, if an allegation of apparent or unconscious bias is made, it is for the court to determine whether there is a real danger of bias in the sense that the judge might have unfairly regarded with favour or disfavour the case of a party under consideration by him or, in other words, might be pre-disposed or prejudiced against one party's case for reasons unconnected with the merits of the issue ...

It also emerges from the judgments in the ***Dallaglio*** *case that the use of the phrase "apparent" bias is inapt; unconscious bias is a more suitable phrase than apparent bias; and as Simon Brown LJ said at page 152: "... by the time the legal challenge comes to be resolved, the court is no longer concerned strictly with the appearance of bias but rather with establishing the possibility that there was unconscious bias."*

28. The judge went on to hold that the rule as to automatic disqualification for bias did not apply, because Mr Fortier had no disqualifying interest in or close connection to a party to the arbitration. Nor was his connection such as to make him a judge in his own cause.

29. So far as the test for unconscious bias was concerned, he rejected the submission of Sir Sydney Kentridge that arbitrators were different from judges and that, by reason of the consensual nature of arbitration, a different test should be applied, based on "reasonable apprehension" of bias. The judge held that the relevant test was that there had to be a real likelihood (in the sense of a real danger) of bias.

30. Applying those principles to the facts of the case, he held that there was no real danger of unconscious bias, nor indeed was there reasonable apprehension of bias, on the part of Mr Fortier for the following reasons :

(1) Mr Fortier's position as a non-executive director of Nortel was an incidental rather than vital part of his professional life; he was in function and in fact independent of management and did not sit on the Executive Committee of the Board, having neither the time nor inclination as a member of the bar and an international arbitrator to involve himself in the day to day commercial decisions of Nortel.

(2) His shareholding of 474 common shares in Nortel was sufficiently small to be of no consequence. Having observed that Mr Fortier had not apparently considered his investment portfolio when he accepted his nomination as Chairman, the judge said: *"I am not concerned to decide whether Mr Fortier was casual; I am concerned to ask whether there was a real danger of Mr Fortier being pre-disposed against AT&T; in my view, it is absurd to think of Mr Fortier being pre-disposed against AT&T by reason of his non-executive directorship or his shareholding in Nortel as it would be to think he might be pre-disposed against SCC because he owned three hundred shares in AT&T."*

(3) Mr Fortier's role as a Queen's Counsel of distinction and an experienced legal arbitrator meant that he must be well aware of his obligations of impartiality.

(4) The actual evidence of unconscious bias was no more than Mr Fortier's non-executive directorship and his small shareholding in Nortel. Nothing that he had said or done in the arbitration proceedings had shown any bias of any kind. The judge rejected the submission that, even if there were no ground for complaint in relation to the First Partial Award, Mr Fortier should have excused himself at the later stages when confidential information was ordered to be disclosed. He held that, even if (which the judge did not accept) there was a danger of Mr Fortier disclosing confidential information to the board of Nortel, that was a discrete matter which did not advance the case of unconscious bias in relation to the Second and Third Partial Awards.

The Grounds of Appeal

31. Sir Sydney Kentridge advanced before us two broad grounds of appeal, the strands of which were on occasion interwoven but which are appropriately kept separate under the heads of Bias and Misconduct. The first is based on common law principles and the second on the failure of Mr Fortier to comply with the ICC Rules governing the arbitration.

32. So far as *misconduct* was concerned, Sir Sydney Kentridge's submissions were as follows:
(i) The judge erred in law in holding that, in the context of applications under sections 1 or 23 of the Arbitration Act 1950, finality provisions in any rules of an arbitral body, and in particular Article 2.13 of the 1988 ICC Rules, prevent parties from relying on, and the courts considering, breaches of the arbitral rules in question. The purpose of Article 2.13 is to prevent further recourse to the ICC Court of Arbitration in order to revisit decisions once made as to appointment, challenge, etc, but it does not restrict a party from relying on breaches of rules in the context of applications properly made to the Court under sections 1 or 23 on the grounds of misconduct.
(ii) The judge erred in law in failing to recognise any duty of disclosure on the part of arbitrators in general and Mr Fortier in particular. Sir Sydney Kentridge submitted that a failure to disclose in accordance with the ICC rules on the part of an arbitrator amounts to misconduct for the purposes of the 1950 Act and that, in any event, the judge was wrong to fail to recognise a duty of disclosure on the part of an arbitrator independent of the ICC Rules both as a matter of common law and as a matter of contract between the arbitrator and the parties. In the circumstances of the case, the gravamen and the effect of Mr Fortier's error of non-disclosure was to deprive AT&T of its right to have an arbitrator of their choice, a result which would be manifestly unfair to it and prejudicial to its interest.
(iii) In this connection, Sir Sydney Kentridge submitted that, whatever the position as to secretarial error in relation to Mr Fortier's CV (of which he was unaware), Mr Fortier made a personal error of non-disclosure at three distinct stages. First, when he signed the Statement of Independence, stating that there were no facts or circumstances that might be of such nature as to call into question his independence in the eyes of the parties. Second, when early in the arbitration it became apparent that Nortel had been involved as a disappointed bidder. Third, when it became apparent that AT&T was concerned to protect the confidentiality of various documents required to be disclosed to SCC in the arbitration.
(iv) The judge was wrong to hold that whether or not a failure to disclose on the part of an arbitrator amounted to misconduct for the purposes of the 1950 Act, so as to justify the setting aside of an arbitral award and/or removal of the arbitrator, depended upon the rules of "assumed bias". He failed to acknowledge that the appellants' complaint consisted of the two separate issues, namely misconduct and bias, and that Mr Fortier's failure to disclose his connection with Nortel constituted misconduct even if it was insufficient in itself to found an allegation of actual or assumed bias.

33. On *bias*, Sir Sydney Kentridge again made clear that there was no allegation of actual bias against Mr Fortier. However, he submitted that the judge was wrong to hold that Mr Fortier's connection with the parties and the subject matter of the dispute (a) did not breach the rule that no one should be a judge in his own cause (and hence merit automatic disqualification) and (b) did not amount to apparent bias. He was also wrong to investigate the state of mind of Mr Fortier, in the sense that he assessed whether Mr Fortier was or might be actually unconsciously biased. The judge should have held that, by reason of his directorship and interest in Nortel, Mr Fortier was not independent of the parties or of the subject matter in dispute between them or disinterested in the outcome of such dispute.

34. Sir Sydney further submitted that, in approaching the question of apparent bias on the part of an arbitrator, this court should not apply the *"real danger"* test propounded in ***R v Gough*** and elaborated in ***ex parte Dallaglio*** but should apply the test of *"reasonable suspicion"* or *"reasonable apprehension"* of bias. This would reflect the broad approach of the courts in cases prior to ***R v Gough*** and would reflect the test internationally recognised in arbitration cases. He submitted that *"reasonable apprehension"* of bias is the test or standard appropriate to cases where the identity of the adjudicator depends upon the consensual choice of the parties. Finally, whichever test or standard was appropriate, the judge should have held that apparent bias was established in this case.

Conclusions

Bias

35. It is possible to deal with the contention of presumed bias or automatic disqualification shortly. Sir Sydney Kentridge with his usual realism recognised that before this Court, he was in considerable difficulty. The decision in ***Locabail (UK) Ltd v Bayfield Properties Limited and Another*** [2000] 1 All ER 65 confirms the correctness of the decision of the judge.

36. On the facts, there are two difficulties in the way of AT&T relying on disqualification. First of all, Nortel was not a party to the arbitration and therefore Mr Fortier had no direct personal interest in its outcome. The second difficulty is that, while it was argued that Mr Fortier had an indirect interest because of his shareholding in Nortel, even projects on the scale of TEP-6 and TEP-8 could not have been of any material benefit to Mr Fortier. It is unrealistic to suggest that Mr Fortier could be said to be in a position where he was either directly or indirectly acting as *"a judge in his own cause"*. This Lord Browne-Wilkinson said in ***ex parte Pinochet (No. 2)*** is *"the rationale of the whole rule"* (see [1999] 2 WLR 272 at 283). I see no reason to differ from the judge on this aspect of the appeal.

37. So far as bias is concerned, the serious argument which Sir Sydney Kentridge advances is based on apparent or unconscious bias. Here it was central to his submissions that we should not apply the test laid down in the House of Lords in ***R v Gough*** [1993] AC 646. In that case Lord Goff of Chieveley, having set out the various different tests which have been laid down by the various English authorities, went on to emphasise that in this jurisdiction the correct test to apply in considering a case of alleged unconscious bias is the real danger test. In ***Locabail*** (at p.73)

the court pointed out that whatever were the merits of competing tests the law was now settled in England and Wales by the House of Lords in ***Gough.*** In doing so, the court referred to *"two brief extracts"* from Lord Goff's speech and I repeat them here. The first is where he said : *"In my opinion, if, in the circumstances of the case (as ascertained by the court), it appears that there was a real likelihood, in the sense of a real possibility, of bias on the part of a justice or other member of an inferior tribunal, justice requires that the decision should not be allowed to stand. I am by no means persuaded that, in its original form, the real likelihood test required that any more rigorous criterion should be applied. Furthermore, the test as so stated gives sufficient effect, in cases of apparent bias, to the principle that justice must manifestly be seen to be done, and it is unnecessary, in my opinion, to have recourse to a test based on mere suspicion, or even reasonable suspicion, for that purpose."*

The second passage is : *"In conclusion, I wish to express my understanding of the law as follows. I think it possible, and desirable, that the same test should be applicable in all cases of apparent bias, whether concerned with justices or members of other inferior tribunals, or with jurors, or with arbitrators. Likewise, I consider that, in cases concerned with jurors, the same test should be applied by a judge to whose attention the possibility of bias on the part of a juror has been drawn in the course of a trial, and by the Court of Appeal when it considers such a question on appeal. Furthermore, I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time. Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him ..."*

38. As was pointed out in ***Locabail*** (at p.74) the ***Gough*** approach has not commanded universal approval elsewhere. In Scotland, Australia and South Africa, there has been preference for the reasonable suspicion or reasonable apprehension test, *"which may be more closely in harmony with the jurisprudence of the European Court of Human Rights"* (see ***Locabail*** at p.74f). While ***Gough*** is binding on courts in this jurisdiction, Sir Sydney Kentridge argues that the test laid down in ***Gough*** is not strictly binding where it is an arbitrator conducting an arbitration, particularly an international arbitration, who is involved. Sir Sydney Kentridge urges this court not to extend an approach which has been rejected in other jurisdictions in relation to arbitrators when there is no need to do so. He contends that reasonable apprehension or suspicion of bias provides a better test. He points out that the test in the new Arbitration Act of 1996, s.24, was introduced in order to conform with article 12 of the Uncitral Model Law (it omits the word "*independent*"). In addition, he submits that the test of *"justifiable doubt"* contained in section 24 of the 1996 Act is closer to the concept of "*reasonable suspicion*" than the "real danger" ***Gough*** test.

39. In ***Laker Airways Inc v FLS Aerospace Limited*** [1999] 2 Lloyds Report 45 at pp.48/49, Rix J applied the Gough test in an arbitration case. He was right to do so. Lord Goff had stated in categoric terms that the real danger test should apply to bias on the part of arbitrators (see p.669H-670D). He had indicated that it was desirable that that test should be applicable to all cases of apparent bias, *"whether concerned with justices or members of other inferior tribunals, or with jurors or with arbitrators"*. Lord Goff did not deal separately with international arbitrations, but there is no principle on which it would be right in general to distinguish international arbitrations from the other categories of situations to which Lord Goff referred, when the arbitration is, as here, governed by English Law.

40. Sir Sydney Kentridge's arguments for applying what he argued was a lower threshold to arbitrations lacked conviction. Assuming, without accepting, that the reasonable suspicion test provides a lower threshold than the real danger test, it would be surprising if a lower threshold applied to arbitration than applied to a court of law. The courts are responsible for the provision of public justice. If there are two standards I would expect a lower threshold to apply to courts of law than applies to a private tribunal whose *"judges"* are selected by the parties. After all, there is an over-riding public interest in the integrity of the administration of justice in the courts. It is justice in the courts to which Lord Hewart CJ was referring in ***R v Sussex Justices, ex parte McCarthy*** [1924] 1 KB 256, 259, when stating his famous aphorism, which is accepted throughout the common law world, that it is *"of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done"*.

41. The different phrases which have been used to describe the correct test are all trying to give effect to this principle identified by Lord Hewart. This is why the application of any of the different descriptions of the threshold are likely, in practice, to produce the same result. The word *"real"* is linked to *"danger"* so as to distinguish between a real and a fanciful danger. The word "*reasonable*" is linked to the word *"suspicion"* for the same reason. In both cases it is appreciated that there is a need to avoid quashing or invalidating decisions when there is no reason to do so. As is apparent from the facts of this case, where millions of dollars have already been incurred in the costs of the arbitration and there have been three decisions, it would achieve injustice not justice if the arbitration awards were to be set aside if such a course were not justified. It is not to be forgotten that SCC is an entirely innocent party and it is entitled to have its interests considered when deciding whether to set aside the awards. In ***ex parte Dallaglio*** Simon Brown LJ helpfully identified nine propositions which are relevant to the application of the ***Gough*** test. In the seventh he indicated that the court *"is no longer concerned strictly with the appearance of bias but rather with establishing the possibility there was actual although unconscious bias"* (at p.152).

In the same case Sir Thomas Bingham MR, at p.162 stated that the ***Gough*** decision shows: *"that the description `apparent bias' traditionally given to this head of bias is not entirely apt, for if despite the appearance of bias the court is able to examine all the relevant material and satisfy itself there was no danger of the alleged bias having in fact caused injustice, the impugned decision will be allowed to stand. The famous aphorism of Lord Hewart CJ .... is no longer, it seems, good law, save of course in the case where the appearance of bias is such as to show a real danger of bias".*

42. Sir Sydney Kentridge criticised both of these statements. Mr Pollock is more accurate when he submits that both the real danger and the reasonable suspicion tests subsume the test laid down by Lord Hewart. Unless there is some foundation for saying that justice has not been done, it is seen to be done. We do not understand the statements in ***ex parte Dallaglio*** which are criticised to be seeking to say anything different. The important point for this appeal which Simon Brown LJ identified is that, when deciding whether bias has been established, the court personifies the reasonable man. The court considers on all the material which is placed before it whether there is any real danger of unconscious bias on the part of the decision maker. This is the case irrespective of whether it is a judge or an arbitrator who is the subject of the allegation of bias.

43. Was there a real danger here, viewing the matter objectively, that Mr Fortier was predisposed or prejudiced against AT&T because he was a non-executive director of Nortel? As to this, adopting our role of personifying the reasonable man, I consider that Longmore J was entitled to come to the decision which he did for the reasons he gave. In coming to my conclusion, I take into account that:
(a) Mr Fortier is an extremely experienced lawyer and arbitrator who, like a judge, is both accustomed and who can be relied on to disregard irrelevant considerations. In saying this we make it clear we do not attach any importance to the fact that Mr Fortier at all times believed himself to be acting appropriately. He must be judged by objective standards.
(b) There is no reason to reject Mr Fortier's statements in the letter of 20 September 1999 that he was entirely unaware of the TEP-8 project until December 1998 and the TEP-6 project until he became involved in the arbitration process. Until he was aware of the projects there could, of course, be no possibility that they could prejudice him and so no obligation to disclose his connections with Nortel.
(c) Any benefit which could indirectly accrue to Nortel as a result of the outcome of the arbitration would be of such minimal benefit to Mr Fortier that it would be unreasonable to conclude that it could influence him.
(d) Mr Fortier's involvement with Nortel as a result of his non-executive directorship was limited. It was accurately described as an incidental part of his professional life. The role of non-executive directors can differ but the nature of Mr Fortier's directorship is well illustrated by his letter of 20 September 1999.
(e) Mr Fortier did not attach importance to his involvement with Nortel. This is illustrated by his readiness to resign his directorship when he was challenged by AT&T.
(f) Mr Fortier conducted himself in the course of the arbitration in a manner which provided no support for any suggestion that he was prejudiced and the contrary has not been suggested.

44. It was extremely unfortunate that the mistake about the directorship meant that it was not disclosed, but, on the evidence which is available, that innocent non-disclosure provides the flimsiest of arguments that the indirect interest of Mr Fortier in Nortel would or might affect the way he performed his responsibilities as an arbitrator. I therefore reject the criticism of the judge's decision on bias.

Misconduct

45. S.23(1) and (2) Arbitration Act 1950 provide:
(1) "Where an arbitrator or umpire has misconducted himself or the proceedings the High Court may remove him.
(2) Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the High Court may set the award aside."

46. It will be noted from the terms of s.23, that the High Court is given a *discretion* to remove an arbitrator and to set aside an award subject to it being established that the arbitrator has misconducted himself or the proceedings. Misconduct can take many forms. For there to be the necessary misconduct to enable the court to exercise its powers under s.23, there need not be any culpable or blameworthy behaviour on the part of the arbitrator. It can be sufficient if there is a "*procedural mishap*".

47. What is relied upon here by AT&T is an asserted non-compliance by Mr Fortier with the terms of the arbitration agreement. In particular the failure to comply with Article 2.7 of the ICC Rules, to which we have already referred. Non-compliance with the terms of an arbitration agreement can amount to misconduct. (See the judgment of Diplock J in ***Margulies Brothers Limited v Dafnis Thomaides & Co (UK) Limited*** [1958] 1 Lloyds Rep 250 at 253 where he reiterated that "*misconduct"* of an arbitrator includes any failure by the arbitrator to comply with the terms, express or implied, of the arbitration agreement.)

48. It is arguable that s.23 refers only to *"misconduct"* after the arbitrator has been appointed. Here the initial complaint of non-disclosure relates to Mr Fortier's conduct before he was appointed. However, this is of no practical significance because the obligation to disclose is a continuing obligation and AT&T is entitled to rely on non-disclosure at any one of the three stages to which I have already referred identified by Sir Sidney Kentridge.

49. Turning to the express provision of the ICC Rules which provides that a decision of the ICC Court should be final, I do not accept the view of Longmore J that the finality provision means that the English courts have no power to

review the decision of the ICC Court. The finality provision does not operate to exclude the English court's jurisdiction under s.23 of the 1950 Act. Accordingly, Longmore J was entitled to consider whether there had been "misconduct" by breaching the terms of the arbitration agreement. When doing so the court, if required to interpret the ICC Rules, would naturally pay the closest attention to any interpretation of the ICC Rules adopted by the ICC Court, but the English courts retain their jurisdiction to determine whether the ICC Rules have been breached when entertaining an application to remove for alleged misconduct.

50. In this case, the decision of the ICC Court provides no assistance because the decision was not a reasoned one. We do not know the basis upon which the complaint of AT&T was dismissed.

51. Article 2.7 and the arbitrator's declaration refer to "*independence*" and do not refer to *"impartiality"*. This is in contrast to the Unicitral Model Law on international commercial arbitration as adopted by the United Nations Commission International Trade Law of 21 June 1985. Article 12 of the Model Law requires the person approached with regard to a possible appointment as an arbitrator to "disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence". In most situations it will be because of a connection or other relationship with a party that the appointment of an arbitrator will be capable of challenge on the grounds of a lack of impartiality. Where this is the situation, the potential arbitrator will not be independent of the parties and will therefore clearly be subject to the express requirement of Article 2.7. I do not consider that it would be right to approach the interpretation of Article 2.7 in a narrow and restrictive manner. However, in this case it is not necessary to express any concluded view as to the application of Article 2.7 to a potential arbitrator whose alleged lack of independence is due to a connection with a third party. If, as I consider the position to be here, Mr Fortier is not disqualified from acting as an arbitrator on the grounds of bias at common law, I cannot see how he can be said to lack the necessary independence to which Article 2.7 refers.

52. AT&T's primary complaint about Mr Fortier is that they would not have selected him as an arbitrator because they would not have wished to disclose confidential information to even a non-executive director of a competitive rival. Sir Sydney Kentridge stressed in his submissions the dangers to AT&T of information being made available to Mr Fortier when he owed the duties of a non-executive director to Nortel. If an arbitrator disclosed confidential information to a competitor of a party to an arbitration in the course of the proceedings, he would certainly be open to a charge of misconduct. But this misconduct would not involve a breach of any obligation to be *'independent'*. As Sir Sydney developed his submissions, it became increasingly clear that, while AT&T were complaining of bias, their concerns were equally, if not more strongly, focused on their need to preserve confidentiality. Article 2.7 and the arbitrator's declaration are not addressing this need. The need for confidentiality, which can be critical in an arbitration, does not depend on Article 2.7, but on the duty of any arbitrator not to breach the obligations of confidence which he owes to the parties to the arbitration.

53. Mr Fortier was under the impression he had given a complete CV. Because of the error AT&T was not aware of his connection with Nortel. This connection was obviously a matter of which AT&T would have wished to be aware before it agreed to Mr Fortier's appointment. If it had been, it would have been perfectly reasonable for AT&T to indicate that it would prefer an arbitrator who was not a non-executive of Nortel because of its concerns as to confidentiality. AT&T was deprived of this opportunity, but the ICC Rules do not provide any support for an allegation that Mr Fortier was guilty of misconduct because of the error in the CV.

54. In any event, Mr Fortier having been appointed an arbitrator and the arbitration having reached the stage it has, it would be inappropriate, in the absence of bias, to set aside the awards or to remove Mr Fortier. Furthermore, although AT&T's concerns as to the need to preserve confidentiality are understandable, in the case of an arbitrator as experienced as Mr Fortier, the risk of his actually making disclosure of confidential information to Nortel, consciously or unconsciously, is sufficiently remote to be ignored. In any event, Mr Fortier offered to resign his non-executive directorship but, no doubt recognising the reality of the situation, AT&T did not accept this offer. That being so, I find this allegation to be lacking in conviction.

55. AT&T is unable to show any grounds for setting aside the awards or removing Mr Fortier based on bias or misconduct. This appeal is, accordingly, dismissed.

LORD JUSTICE POTTER :

56. Save in the minor respect referred to at paragraphs 67-71 below, I agree with the judgment of the Master of the Rolls and would merely add some observations of my own.

Bias

57. The question has been raised on this appeal as to whether in English law the test to be applied on a complaint of bias against an arbitrator in respect of an award should be different from that applied to judges and tribunals in respect of decisions made by them in the course of the public administration of justice. So far as I am aware, it is the first time that an argument that the tests should diverge has ever been advanced. It arises following the decision of the House of Lords in ***Gough*** which considered the question of bias in the context of the public administration of justice, but in which Lord Goff of Chieveley expressed the firm opinion that "the same test should be applicable in all cases of apparent bias, whether concerned with justices or members of inferior tribunals, or with jurors or with arbitrators."

58. I respectfully agree with that opinion. It seems to me that, whatever the test should be, and it is clearly laid down in ***Gough*** in terms of the *"real danger"* test, it is desirable that it should apply universally in cases before the English court, where such cases fall to be decided according to English law and no different statutory or

contractual test is applicable. Adjudication upon an application to the English court brought under its statutory powers of supervision and intervention in relation to the conduct of arbitrators is itself an aspect of the public administration justice. The fact that the tribunal over which the supervision is being exercised is one whose appointment depends upon the agreement of the parties does not deprive it of that character. There are many persons or bodies who adjudicate in matters of discipline or private dispute, or who otherwise resolve complaints, whose jurisdiction depends on agreement, whether under bilateral agreements, or multilateral agreements such as the rules of clubs, associations, sporting bodies, etc. All such persons or bodies, whether performing judicial or quasi-judicial functions, have a duty to act without bias and, in principle, there seems to me every reason why, absent some differing test or formula expressly or impliedly agreed between the parties, a universal test of bias should be applicable.

59. We have not been referred to any reported decision prior to ***Gough*** which suggests that the English court, when faced with an allegation of bias or apparent bias on the part of an arbitrator, has considered that a different test from that said to be appropriate in the case of publicly constituted courts or tribunals should be applied. It is true that, for the reasons, and having regard to the decisions, which troubled the House of Lords in Gough, judges dealing with applications to set aside arbitrations for misconduct on the grounds of bias have faced difficulty in formulating the objective test to be applied: see, for instance, ***The "Elissar"*** [1984] 2 Lloyd's LR 84 per Ackner LJ at 89; ***Bremer Handelsgesellschaft -v- Ets Soules et Cie*** [1985] 1 Lloyd's LR 160 per Mustill J at 164-5 and [1985] 2 Lloyd's LR 199 per Ackner LJ at 201-2; ***Tracomin S.A. -v- Gibbs*** [1985] 1 Lloyd's LR 586 per Staughton J at 595-6.

60. In that last-mentioned case, following a review of the relevant authorities, Staughton J observed:

*"In many if not most cases it will make no difference which test is applied. That is so in the present case, and I am content to adopt real likelihood, which appears to lay the heaviest burden on the person alleging bias. But I do not, with great respect share the view of Lord Justice Cross (in **Hannam's** case) and Lord Justice Ackner (in the **Liverpool City Justice's** case) that there is little if any difference between the two tests. If it had been necessary to decide the point, I would have followed what was said by Lord Justice Edmund-Davies in the Metropolitan Properties case [1969] 1 QB at p.606:*

With profound respect to those who have propounded the "real likelihood" test I take the view that the requirement that justice must manifestly be done operates with undiminished force in cases where bias is alleged and that any development of the law which appears to emasculate that requirement should be strongly resisted. That the different tests, even when applied to the same facts, may lead to different results is illustrated by Reg. -v- Barnsley Licensing Justices itself, as Devlin LJ made clear in the passage I have quoted. But I cannot bring myself to hold that a decision may properly be allowed to stand even although there is reasonable suspicion of bias on the part of one or more members of the adjudicating body."

61. I am bound to say I agree with the observations of Staughton J in relation to the authorities as they then stood and it seems to me that, in propounding the `real danger' test in ***Gough,*** Lord Goff was seeking so far as possible to strike the right balance between the `real likelihood' and `reasonable suspicion' tests. Sir Sydney Kentridge argues that in that respect Lord Goff has not avoided a practical dilution of the principle proclaimed by Lord Hewart CJ that justice must manifestly be seen to be done, whereas to have adopted the test of reasonable apprehension or suspicion would not have had such effect.

62. It may well be that adoption of the reasonable suspicion test would afford more comfort to those concerned to preserve the sanctity of Lord Hewart's dictum. However, as it seems to me, the real danger test is intended to be a working test designed to give effect to that dictum, while having regard to substance as well as appearance. In that respect, the remarks of Slade J in ***R -v- Camborne Justices ex parte Pearce*** [1955] 1 QB 41 at 52 are salutary: *"Whilst endorsing and fully maintaining the integrity of the principle reasserted by Lord Hewart, this court feels that the continued citation of it in cases to which it is not applicable may lead to the erroneous impression that it is more important that justice should appear to be done that it should in fact be done."*

Whether or not that is so, I agree with the realism of the post-***Gough*** assessment of Sir Thomas Bingham MR in ***Ex parte Dallaglio*** at 162, that the famous aphorism of Lord Hewart now requires qualification in the light of the real danger test. Equally, however, I consider that the need for concern in that respect is more illusory than real.

63. It is not in dispute that reasonable apprehension of bias is a test in which reasonableness is judged by the standards of the reasonable objective observer. That is, in reality, the court itself, embodying the standards of the *informed* observer viewing the matter at the relevant time, which is of course the time when the matter comes before the court. That last qualification is important because, in judging whether there is bias or apparent bias, the court approaches the matter on the basis of an observer informed as to the facts upon which, and the context in which, the allegation of bias is made. As Lord Goff observed in ***Gough:*** *"The law has first to ascertain the real circumstances from the available evidence, knowledge of which would not necessarily be available to an observer at court".*

64. This, enables the court to consider the matter on the basis of whether or not the particular matters relied on in support of an allegation of bias were or were not known to the person or tribunal against whom the allegation of bias is made. In observing as he did, Lord Hewart was deploying a maxim which is predominantly concerned with principles of openness and fairness in connection with trial procedures, which entitle a party to impugn the proceedings if breach of such procedures can be demonstrated. If a party alleges reasonable suspicion or real danger of bias as similarly affording a reason to set aside a decision, it is right that the court should investigate

the factual basis for the allegation in order to see whether there is any real cause for concern. The time at which to judge whether there is real danger or reasonable suspicion of bias is the time at which the investigating (appellate) court sets out the facts upon which its conclusion is based. It is only by that process that the objective observer, who may earlier have been suspicious for what appeared to be good reason at the time, is in a position to judge whether real danger or reasonable grounds for suspicion in fact exist.

65. Upon that basis I have no doubt that the allegation of apparent bias or the possibility that there was actual, though unconscious, bias (see ***ex parte Dallaglio*** at 152) on the part of Mr Fortier fails.

Misconduct

66. Having failed to establish a case of bias or apparent bias, it was necessary for AT&T to establish some other ground of misconduct on the part of Mr Fortier if it wished to invoke the court's jurisdiction to order his removal. In this respect, Sir Sydney relied upon an asserted failure by Mr Fortier to comply with Articles 2.7, 2.8 and 2.9 of the ICC Rules and a separate act of non-disclosure by putting his cross in the first box of the signed Statement of Independence.

67. So far as those three Articles are concerned I do not consider that any breach of them has been established. The only matters which they require the arbitrator to declare are matters going to his "*independence*" of the parties, or anything which might call that independence into question in the eyes of any of the parties. (Sir Sydney conceded that the word "*reasonably*" needed to be read in, as qualifying any calling into question of such independence.) *"Independence"* connotes an absence of connection with either of the parties in the sense of an absence of any interest in, or of any present or prospective business or other connection with, one of the parties which might lead the arbitrator to favour the party concerned. It is the most frequent and obvious ground upon which the court will infer the possibility of antecedent bias, but it is by no means co-extensive with it. The suggestion that, by reason of some other event or circumstance unrelated to independence, the arbitrator has or may have an antecedent predisposition against one of the parties may give rise to a sustainable allegation of bias but it is not one based on absence of independence.

68. Nor, in my view, is there reason to suppose that the ICC intended to impose a specific obligation of disclosure on a wider basis than that of independence: c.f. the wording of Article 12 of the UNCITRAL Rules relating to disclosure which provides:

"(i) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence." (emphasis added)

69. It is also of interest to note that s.24(1)(a) of the Arbitration Act 1996 provides that a party to arbitral proceedings may apply to the court to remove an arbitrator on the ground that: *"Circumstances exist that give rise to justifiable doubts as to his impartiality"*

70. In that respect the draftsman appears to have followed the wording of the UNCITRAL Rules but omitting any reference to independence, no doubt on the grounds that the greater includes the less. The question of whether, by that provision in the 1996 Act, the legislature has introduced a statutory definition of bias different in effect from the real danger test in relation to applications brought under s.24(1)(a) remains for future argument.

71. I consider that, outside the field of "independence" covered by the disclosure obligations in Article 2.7, 2.8 and 2.9 and the form of the Statement of Independence, the ICC should be taken as having left the question of disclosure of any matter of possible concern, and in particular the possibility of bias, to the good faith and judgement of the arbitrator. The recognition of antecedent bias or partiality is well recognised as a disqualifying factor going much wider than the issue of independence and is no doubt one which would be recognised by the ICC if any challenge to an arbitrator's impartiality were mounted on that ground. Article 8 permits challenge of an arbitrator to the Secretary-General of the ICC "whether for an alleged lack of independence *or otherwise*". Thus, it is not in my view necessary to interpret Article 2.7 as extending to a complaint of bias in any wider sense than lack of independence for the purpose of enabling a challenge to be made to the Secretary-General under Article 8 and for the arbitrator to be disqualified by the ICC if such challenge is accepted. Thus, insofar as AT&T invites the court to find misconduct or procedural mishap on the basis of a breach by Mr Fortier of the ICC Rules, I consider it has failed to make out its case.

72. Nonetheless, if I am wrong in that respect, and breach can be demonstrated, it does not seem to me to be one which could possibly justify the removal of Mr Fortier as an arbitrator, or the setting aside of any of the awards made. So far as the non-disclosure of Mr Fortier's directorship of Nortel was concerned, it was entirely inadvertent. Furthermore, as we have held, no suggestion or real danger of partiality arises or has been substantiated. Nor has any disadvantage in the course of the arbitration been demonstrated.

73. Pressed upon the question of what prejudice AT&T had in fact suffered as a result of the non-disclosure, Sir Sydney was obliged to assert what he called the "general prejudice" of having had the matter arbitrated by an arbitrator whom AT&T would not have chosen had it been aware of the matter inadvertently not disclosed. While, no doubt, the purpose of the disclosure rules is designed to enable the parties to confirm their choice of arbitrator on a fully informed basis, the fact that such purpose may have been inadvertently defeated is not in itself sufficient to justify removal of the arbitrator once appointed or the setting aside of awards duly made and untainted by bias. In such cases the court will only take such a step where justice demands it. In my view, no such consideration arises in this case. There is no suggestion that Mr Fortier has acted or would act in breach of confidence, which, as the Master of the Rolls has pointed out, appears to be the principal basis (as opposed to the

likelihood of bias), on which AT&T would have objected to Mr Fortier. To set aside the partial awards or to replace Mr Fortier at this stage would be both a costly inconvenience and a substantial injustice to the respondents.

74. I too would dismiss this appeal.

LORD JUSTICE MAY :

75. I agree that this appeal should be dismissed for the reasons given by Lord Woolf M.R. Essentially and in short, the reasons which lead me to this conclusion are that, in my judgment:

(a) the test under English law for apparent or unconscious bias in an arbitrator is the same as that for all those who make judicial decisions and is that to be found in the opinion of Lord Goff of Chieveley in ***R. v. Gough*** [1993] A.C. 646. On this test, bias was not established in this case against Mr Fortier, and that by a long margin.

(b) even if the test propounded by Sir Sydney Kentridge were to be applied, bias would not be established in this case against Mr Fortier, and that by a long margin.

(c) if there was a procedural mishap such as to enable the court to consider whether to exercise its discretion under section 23 of the Arbitration Act 1950, the case on the facts for removing Mr Fortier as arbitrator, or setting aside the awards which he and his fellow arbitrators unanimously made, was so weak that I consider that the court should not do so.

76. I express the third of these reasons in the way that I have, because I thought at one stage during the submissions that the academic case that there was a procedural mishap was quite strong. Lord Woolf M.R. has set out the terms of Article 2.7 of the ICC rules in paragraph 11 of his judgment and the text of the printed Statement of Independence in paragraph 13. I agree that Mr Fortier's non-executive directorship of Nortel may be seen as not calling in question his independence. I also agree that a main plank of AT&T's case concerned the possible disclosure of confidential information to a non-executive director of a competitor, rather than Mr Fortier's independence as arbitrator. But it did seem to me that there was a reasonably persuasive general case that his non-executive directorship "*might be of such a nature as to call into question [his] independence in the eyes of [one] of the parties*". If AT&T had known of this directorship at the outset, an objection by them to his acting as arbitrator would, in my view, probably have been regarded as reasonable and would have been sustained. They did not know, and I was inclined to think that his unwitting failure to tick the second box in the Statement of Independence could be seen as a procedural mishap. But I do not think that it is necessary to reach a conclusion on this point because, even if it were a procedural mishap, I do not consider that the court should now exercise a discretion in AT&T's favour under section 23 of the 1950 Act.

Sir Sydney Kentridge QC and Mr Toby Landau (instructed by Clifford Chance, London EC1A 4JJ for the appellants)
Gordon Pollock QC and Mr David Scorey (instructed by Freshfields, London EC4Y 1HS for the respondent)