Brian Andrews v. John H Bradshaw H Randell & Son Ltd [1999] Adj.L.R. 07/29

Court of Appeal, before Nourse LJ, Mantell LJ and Mance LJ. 29th July 1999.

LORD JUSTICE MANTELL: 29th July, 1999

1. This appeal arises out of an arbitration in a building dispute. It is the arbitrator's appeal against his removal for bias and against the partial disallowance of his fee. The orders challenged are those of His Honour Judge Knight, sitting in the Central London County Court, on 26th February this year.

Background

2. The protagonists are: John H Bradshaw, a chartered quantity surveyor (the arbitrator and appellant); . Brian Andrews, a builder (respondent in the arbitration and first respondent in the appeal); H Randell & Son Ltd, building contractors (claimant in the arbitration and second respondent in the appeal);

3. Other players include: Mr A J Hossack, a self-styled claim's consultant, who has represented Mr Andrews in the arbitration; Sharon Nicola Hazell, a solicitor, who has also intervened in the arbitration proceedings on behalf of Mr Andrews; Mr A R Brown, managing director of H Randell & Son Ltd, who has represented the company in the arbitration proceedings; Mr Jawaneer, employer of Randells under the main contract; Mr Cannon, solicitor and adviser to Mr Bradshaw. It will be less confusing all round if I refer to Mr Bradshaw as the arbitrator and to everyone else by name.

4. In about September 1994 Randells entered into a contract with Mr Jawaneer to design and build a new wing for a nursing home in south-east London. Randells subcontracted the demolition and associated ground works to Mr Andrews. Work continued throughout the remainder of 1994 and most of 1995. A dispute arose between Randells and Mr Jawaneer, the nature of which is not entirely clear, but which led to arbitration proceedings. Those proceedings were eventually either compromised, abandoned or allowed to go to sleep. By that time substantial costs had been incurred. It seems that Randells were concerned to recover some of those costs from Mr Andrews, whose defective workmanship, it was claimed, had led to the dispute between Randells and Mr Jawaneer.

5. The claim by Randells was first notified in August 1996. It was formally presented by way of a counterclaim in quite unconnected proceedings initiated by Mr Andrews against Randells in the Central London County Court. However, the subcontract between Randells and Mr Andrews was subject to an arbitration agreement. Mr Andrews asked for and obtained a stay of the counterclaim. Consequently, Randells resorted to the arbitration agreement. An application was made to the President of the Royal Institution of Chartered Surveyors for the appointment of an arbitrator. At that time Miss Hazell was acting for Mr Andrews and was shown as such in the application.

6. There were no pleadings in existence at that time and, as far as I know, there have been none since. However, the nature of the dispute is described in the application. At page 58 of the bundle, under the heading " ***Oatlands Retirement Home, 210 Anerley Road, London SE20*** ", this appears:
"This company claim for extensive costs of corrective action and works arising from defective works carried out by the Respondent together with a claim for repayment of monies overpaid for work not carried out or incomplete together with delay costs, liquidated damages and loss and expense arising from a delay in execution and completion of the works and their failure to diligently proceed in an organised manner with the said works."

   Then, importantly:
"In addition we claim extensive costs already incurred by the claimant, various experts, solicitors and barristers in establishing the full facts, evidence and valuations of the claimed defective works, delay and overpayment.
All in the approximate sum of £221,000."

   It is also clear from information supplied that Mr **Andrews** was claiming payment for work done under the subcontract.

7. The application for the appointment of an arbitrator was made on 18th February 1998. The appointment must have been made some time between that date and 9th March 1998 because on 9th March the arbitrator wrote to Mr Brown and to Miss Hazell recording his appointment. His letter included the following three paragraphs: "As the parties will be aware, the Arbitration Act 1996 came into force on 31 January 1997 and applies to proceedings commenced on or after that date, unless the parties agree otherwise. It is essential that the commencement date for arbitral proceedings be established and agreed, which will determine the legislation applicable [see Arbitration Act 1996, S14 and 84].

8. It will be necessary for me to call the parties and/or their Representatives to a Preliminary Hearing in order to deal with procedure, rules, timetable and other such matters. This should be held as soon as possible and I ask the parties to indicate date(s) preferred by them. So far as venue is concerned this address would probably be a ´central' location.

9. It will also be necessary for the parties to execute with me a Form of Agreement covering the Reference, in accordance with the enclosed terms. This should be signed by each party initialling all alterations. For the avoidance of doubt, the Minimum Fee under 4(a) is deemed to contribute towards initial costs and will be set ultimately against the actual time expended."

10. The reference to fees in that letter is not unimportant. The fees to be charged are set out in the form of agreement which was attached to the letter. They included:

11. "From each party a minimum fee of £250.00 which shall be paid to and retained by the arbitrator in any event."

12. By letter dated 25th March 1998 the arbitrator required the parties to attend before him at a preliminary hearing for the purpose of giving directions. The date set was 7th April. The parties duly attended on that date. Mr Brown was representing Randells and by this time Mr Hossack had come in for Mr Andrews. It appears from the papers that by then Miss Hazell was no longer "on the record".

13. What took place at that first hearing was tape recorded and we have a very full transcript. During the course of the hearing Mr Hossack made it plain that Mr Andrews was not a willing party to the arbitration and that consequently he was not prepared to sign the agreement or to provide the minimum fee of £250. That was the attitude of Mr Hossack, appearing for Mr Andrews, notwithstanding, as I have observed, that it had been Mr Andrews who had originally invoked the arbitration clause. I will refrain from characterising Mr Hossack's attitude as obstructive. At the same time, he was certainly not prepared to give the arbitrator an easy ride, and I strongly suspect that what transpired during that first meeting has had a bearing upon the subsequent history of this unhappy affair. I would also say that, as far as this meeting is concerned, and basing my judgment upon a reading of the transcript, it does seem that at this stage the arbitrator was concerned to progress matters as speedily, efficiently and cheaply as possible in the interests of both sides.

14. However that may be, it did emerge that, not unreasonably, Mr Hossack, for Mr Andrews, was anxious to find out what had become of the main contract arbitration. Was it really dead or might it be resurrected? Mr Brown, on the other hand, was concerned to know whether the material which had been put forward in the main contract arbitration would be admitted without further proof in the present proceedings. He was also anxious to know whether or not he was entitled to claim the costs of the main contract arbitration.

At one point it appears (p.20 of the transcript) that the arbitrator said:
"That does suggest to me a Preliminary Issue approach."

Mr Brown responded:
"Absolutely. Because, quite frankly, if you were to rule that we are not entitled to claim costs in the other Case then I might at that point decide that there is no point in proceeding. Now there is no point in going all over the extensive evidence and reports and documents again if in fact it's a dead issue. I think there are two or three fundamental points of principle involved here that may well resolve the issue entirely."

The arbitrator then asked this of Mr Hossack:
"If that were to happen, what would happen to your Counterclaim?"

Mr Hossack said that he would have to take instructions, although, from an exchange that occurred at a slightly later stage, it rather seems as though Mr Hossack was suggesting that, in the event of the claim not being pursued, the counterclaim would not be pursued either. The arbitrator then said:
"I am inclined to think that dealing with this, you have raised the term, Preliminary Issue, and I think it is quite a correct one possibly here, that I should address this at an early stage in order to see whether or not it is applicable that you bring forward these main contract Arbitration matters into this Reference before we go into any minutiae on the various other matters which flow from it. Therefore I think I initially seek the parties' reaction to that course of action."

15. Mr Hossack then asked for clarification, and the arbitrator said:

"The issue [is] really of whether he is entitled to bring forward matters that the Experts have discussed and apparently agreed for the main Arbitration in this Reference."

Neither side seems to have objected to the formulation of that particular preliminary issue. Before the directions hearing concluded, however, both sides did seek the opportunity to suggest further preliminary issues, and the matter was left on the basis that the parties were free to submit preliminary issues for consideration, with a plea by the arbitrator that they should be agreed if possible.

16. The resulting order dated 5th April was as follows:

"1. The Claimant shall provide to the Respondent a list of such documentation as he is seeking to rely [on] in this arbitration and arising from a previous arbitration conducted between themselves and the Employer under the Main Contract at Oatlands Retirement Home, 210 Anerley Road, London SE20. The Respondent shall seek to agree such list of documentation.

2. The above to be completed as soon as possible and in any event not later than 7 days from the date of this Order.

3. Each party shall proceed to prepare and submit Statements upon the documentation for the purpose of consideration as a Preliminary Issue of its applicability in this arbitration. The Claimant shall submit such Statement within 14 days of agreement under 1 above, and the Respondent shall do likewise within 14 days thereafter."

17. On 16th April Mr Brown wrote to the arbitrator setting out his proposed schedule of preliminary issues, including the matters discussed at the directions hearing. It is clear that the schedule was sent to Mr Hossack because he in turn wrote to the arbitrator on 30th April. In his response Mr Hossack made the point that none of the matters raised by Mr Brown were truly in the nature of preliminary issues. He proceeded, however, to make submissions in writing on all of them. He then put forward submissions on alternative potential preliminary issues as follows:

"1.1 It having been agreed that the main contract arbitration was ´compromised' prior to any final determination having been reached by the Arbitrator on any matter arising therefrom or in connection therewith on terms, inter alia, that each party bear their own costs of and incidental to those proceedings, are there any recoverable costs which could be determined by the Arbitrator and/or the High Court within the meaning of Sections 59 and 63 of the Arbitration Act 1996?

1.2 In the same circumstances can the Claimant rely on the provisions of clause 23 of the DOM/1 form of sub-contract to seek to exercise a right of set off in respect of amounts ´agreed or finally determined in arbitration or litigation'?"

The agreement referred to was the one which bound the parties to this arbitration hearing.

18. It seems to me that those alternative proposals overlap to a degree, but only to a degree, with the issue identified by the arbitrator at the directions hearing and the matters raised by Mr Brown in his submission. But the principal matters which arose as a result of the discussions at the preliminary hearing, the identification of a preliminary issue by the arbitrator and the submissions which were presented in consequence of that directions hearing, appear to be two in number:

(1) was it, as Mr Brown would have wished, open to him to present evidence and agreements accepted or agreed in the main arbitration without further proof, thus resulting in a considerable saving of costs; and

(2) was it open to Randells, Mr Brown's company, to recover in this arbitration relating to the subcontract costs which had been incurred in the main contract arbitration?

19. The arbitrator considered that he needed legal advice. He referred the matter to Mr Cannon of Wansbroughs Willey Hargrave, solicitors. That was on 12th May 1998. The arbitrator was clearly concerned as to which matters, if any, should be decided as preliminary issues. The advice he received is contained in Mr Cannon's letter of 21st May 1998. Mr Cannon advised the arbitrator that:

(1) it was appropriate for him to decide which of the proposed preliminary issues, if any, should form a preliminary issue in this matter;

(2) once he had decided what preliminary issue or issues should be determined, he should seek further submissions from the parties in relation to those issues;

(3) he should then decide on the issues, seeking legal advice if necessary; and

(4) once he had decided what the determination was, he should issue his order in relation to the issues and any other orders deemed necessary to progress the reference.

20. Accordingly, on 11th June 1998 the arbitrator wrote to Randells and Mr Hossack. Having apologised for the delay in taking the matter further, which he attributed to having taken a holiday, he proceeded:
"I determined that I would consider the relevance of the Main Contract documentation to these proceedings, for which purpose it should be available to the Respondent ..."

21. He referred then to his order and covering letter of 15th April and continued:
"It appears to me that the submissions of both parties extend beyond the scope of that considered at the Preliminary Hearing and made the subject of the subsequent Order. Referring to the submissions made, I have to agree with the Respondent when they state in para 1 of their Response ... that none of the matters of principle as previously identified by the Claimant are truly in the nature of the preliminary issue to be decided. On the other hand, the Respondent's ´submission on alternative potential preliminary issues' ... is relevant thereto."

22. In the letter the arbitrator further made it clear that he did not at that time intend to go beyond consideration of the preliminary issue which he had attempted to define previously. I think it is important to emphasise that in the letter the arbitrator appears to be agreeing with Mr Hossack's submission that Mr Brown had failed to identify suitable material to be covered as preliminary issues, whereas Mr Hossack's alternative proposals were indeed relevant.

23. On 29th July the arbitrator wrote to Mr Cannon seeking advice on certain matters. In this letter he made specific reference to the submissions contained in the letter from Mr Hossack just recited. He said:
"The Respondent submissions contained in the final page of BRM submission of 30th April are relevant and equate more or less to those of the Claimant Items 3 & 4. Therefore I believe these should be included as part of your advice."

24. Mr Cannon had already had sight of those submissions as contained in the submission of 30th April and therefore was in a position, should he think it appropriate, to offer advice in respect of those matters. But what is clear is that on 29th April the arbitrator was directly referring those matters to Mr Cannon for his view as to the relevant legal principles and inviting Mr Cannon to offer advice if he thought fit. (I might also mention, in parenthesis, that, for a reason which does not seem altogether satisfactory to me, that letter was never placed before His Honour Judge Knight. There were references to it made in the course of argument, in the affidavit evidence presented and also in the interim award which was in evidence before the judge, but the letter itself and in its terms was not before the judge.)

25. On 3rd August Mr Cannon replied offering advice. It is not necessary to go into the nature of that advice. For present purposes it is enough to say that Mr Cannon did not condescend to deal specifically with the two matters which had been raised by Mr Hossack in his submission of 30th April and referred to by the arbitrator in his letter of 29th July.

26. On the basis of the advice that was received, however, the arbitrator prepared an interim award. On 27th October 1998 the arbitrator wrote to both parties to say that his award on the preliminary issue was available for publication, but making it plain that it would not be published until his fees to date had been settled. In fact, the award was published the following January without settlement of the fees, for reasons which will become apparent.

27. The interim award recites the background to the matter and then proceeds to deal with both Mr Brown's and Mr Hossack's submissions. On the main questions, namely as to whether or not the experts' agreements in the main contract arbitration would be admitted in the instant case and with regard to whether or not it was open to Randells to claim the costs of the main contract arbitration, he rejected the submissions of Mr Brown and held in favour of Mr Andrews. However, his costs award, which has been criticised, was that each party should bear its own costs and share the costs of the award.

28. If that had been all, it is difficult to see how the arbitrator would have been deserving of condemnation or even of criticism. At most, it could be said that the correspondence was untidy and that there may have been some lack of focus in identifying the preliminary issues. Beyond that, however, he had moved the matter forward at a reasonable pace, without apparent injustice to either side, so as to produce a situation in which Randells would have to consider very carefully whether or not to take the matter further. Unhappily, that is not all there was. Concurrently with the correspondence to which I have referred, a number of letters had been exchanged between the parties from which it is apparent that the arbitrator was becoming increasingly resentful of Mr Hossack's didactic tone and Mr Andrews' refusal to fall in line with his, the arbitrator's, request for payment. I hope to be reasonably selective.

29. On 12th May the arbitrator wrote to both parties acknowledging receipt of Mr Hossack's letter of 30th April. The arbitrator's letter contained this paragraph:
"Meanwhile I remain very concerned over the previous view taken by the Respondent over payment of costs. I note that S59 and 63 of the Arbitration Act are included within the latest submission; I also draw attention to S28 at this time. I shall be addressing this issue further. Meanwhile costs have already well exceeded the minimum fee, so far not received from either party. I shall need to invoke the Surety provision on both parties should this unsatisfactory situation continue."

30. To that Mr Hossack responded on 13th May. Dealing with the power to order security for costs under section 38(3) of the Arbitration Act 1996, he made the no doubt valid point that whereas security could be ordered against Randells as claimants, it was not possible for such an order to be made in respect of Mr **Andrews** because in the absence of a counterclaim he was not a claimant, as defined by the Act. The letter was copied to Mr Brown, who wrote to the arbitrator on 15th May with a copy to Mr Hossack, stating that he had posted his initial fee cheque, but that he was concerned at the attitude displayed by the respondent in regard to payment of costs and offering to "*support your invocation of the security provisions if required"*. Mr Brown's letter also included this paragraph:
"I would initially express for the second time, you will remember that this occurred at the preliminary hearing, the respondent's unambiguous attempts to prejudice the hearing and your early thoughts by dragging issues into the arbitration that are beyond its scope and also by using the preliminary meeting and, now the response to preliminary questions, to argue the respondent's case and make prejudicial submissions to you."

31. On 16th June Mr Hossack wrote to the arbitrator making a number of further submissions and, in particular, requesting the arbitrator to use his powers under the Arbitration Act to direct that Randells provide a copy of the compromise agreement. That brought another letter from Mr Brown complaining that Mr Hossack was attempting to teach the arbitrator his job and to go outside the "remit of the preliminary issues discussed, your orders and the agreed manner of proceedings". Then in the same letter Mr Brown stated:
"This is a clear attempt at prejudice which we are sure you will note and recall in due course."

32. This three-way correspondence continued with a letter from Mr Hossack on 22nd June, another from Mr Brown on 24th June and then a further submission from Mr Hossack on 25th June. The same day the arbitrator replied to both sides. His letter was sweet reason itself:
"I am in receipt of correspondence from both parties relative to the agreement reached between the parties to the main arbitration and the request that I consider it as part of my determination. I shall decide its relevance in due course and will not need any further representation to be made.

Meanwhile I require the Direction contained within my 11 June letter to be given the necessary action. I have heard from BRM Project Management that they do not need to make further submission. I have not yet heard from the Claimant [Randells]."

33. Then on 29th June Mr Hossack wrote to complain that Randells had not complied with the directions contained in the arbitrator's letter of 11th June, which resulted, on 2nd July 1998, in a further letter in which the arbitrator apparently accepted the objection and indicated his determination to proceed upon the basis of documentation held unless there had been compliance by 10th July. On 24th August the arbitrator wrote apologising for the delay and inviting consideration of the legal advice he had received relating to the preliminary issues.

34. We now come to the sequence of letters which has led to this most unfortunate and, I would say, unnecessary piece of litigation. Mr Hossack wrote to the arbitrator making comments on the legal advice received. Paragraph 4 of the letter is the only one I need read: *"Notwithstanding your previous advice to the effect that you were of the opinion that our 'submission on alternative potential preliminary issues' is relevant to the reference (paragraph 3 of your letter dated 11th June 1998) we note that you have not taken advice with regard to same (submitted under cover of our response dated 30th April 1998 to the Claimant's 'Schedule of Matters') which, for ease of reference, is re-stated below:"*

35. Then Mr Hossack helpfully, given his understanding of the position, set out once again the submissions which had been contained in his letter of 30th April and which, as I have noted during the course of this

judgment, had been sent to Mr Cannon for his consideration and referred to in the arbitrator's letter of 29th July.

36. Although the arbitrator had by this time sought advice in relation to those matters and in due course was to deal with them specifically in his interim award, that was something which seemed to have escaped his recollection for the time being because, on 28th August, he replied:
"With regard to p.2 of the letter the issues you raise are new and consideration will be needed as to their inclusion as Preliminary Issues. You will be aware that the Order made and the accompanying letter were specific as to scope."

37. That brought a further response from Mr Hossack on 3rd September 1998, maintaining that the issues suggested were not new (and in that, of course, he was entirely correct) and suggesting that the arbitrator would be competent to deal with the questions at the same time as dealing with Mr Brown's submissions.

38. Then on 7th September the following letter was sent by the arbitrator to Mr Hossack:
"Reference your letter dated 3rd September 1998, I shall disregard its content. The parties are informed that I shall determine the scope of Preliminary Issue to be decided and will not be influenced by prescription from yourself. This is particularly so in view of the refusal of your Client so far to provide any costs in the Matter.
I currently await any comment from the Claimant upon the legal advice received. This is due for receipt by today and if not received I shall proceed."

39. Mr Hossack replied saying that he noted the contents of that letter from the arbitrator. That was followed on 14th September, by fax and by post, by a letter from Miss Hazell in which she referred to the letter of 7th September and said:
"Mr Andrews has asked us to write to you to express his amazement and dismay at the comments made in your first paragraph which, in our view understandably, have given rise to some concern that he may not be given a fair and impartial hearing in these proceedings.
Whilst we are sure that is not the impression you intended to convey we would be grateful if you would agree to retract your comments in their entirety and confirm that you are still able to act impartially in this matter, in which event our Client will be content to treat the correspondence as having never been sent or received."

The arbitrator replied to Miss Hazell by asking whether or not she was able to clarify her position in the affair since, as he understood it, she had ceased to be involved, but beyond that the letter contained nothing of importance. Miss Hazell replied on 18th September explaining how it was that both she and Mr Hossack were acting on behalf of Mr Andrews as and when Mr Andrews decided it was convenient to use their services and continued: "The content of your letter was of such concern to Mr Andrews that he felt it necessary to consult us as his legal advisers and thereafter to instruct us to write to you in the terms of our letter of 14th September."

40. In a separate letter the arbitrator was invited to retract that which he had said in his letter of 7th September, an invitation which he refused. However, on 7th October he did write directly to Mr Andrews asserting that his impartiality was beyond question, but repeating his concern that Mr Andrews had not thought fit either to sign the agreement or to pay the minimum fee.

41. Then came the application to have the arbitrator removed. No doubt because of that, in January 1999 the interim award was published, notwithstanding that the fees in settlement of the arbitrator's costs had still not been paid.

The hearing below

42. Section 24(1) of the Arbitration Act 1996 provides:
"A party to arbitral proceedings may (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) apply to the court to remove an arbitrator on any of the following grounds -
(a) that circumstances exist that give rise to justifiable doubts as to his impartiality; ...
(d) that he has refused or failed -
(i) properly to conduct the proceedings, or
(ii) to use all reasonable despatch in conducting the proceedings or making an award,
and that substantial injustice has been or will be caused to the applicant."

43. Section 24(4) provides:
"Where the court removes an arbitrator, it may make such order as it thinks fit with respect to his entitlement (if any) to fees or expenses, or the repayment of any fees or expenses already paid."

44. Such an application was made, and no point arises as to the form or manner in which it was done. The application was supported by an affidavit from Miss Hazell. The grounds for the application are set out at paragraphs 27 to 34 inclusive, or at least the matters are set out which were entertained by the judge below. In summary, the application was based upon the letter of 7th September and those that followed, the arbitrator's obsession with the payment of the minimum fee, the failure to properly identify the preliminary issue or issues, the failure to deal with Mr Hossack's suggested preliminary issues, and the time taken and expense incurred in progressing the arbitration to the point at which the interim award was made.

45. The evidence was contained in affidavits from Miss Hazell and the arbitrator. Exhibited to those affidavits was the bulk but not all of the correspondence to which I have so far referred. It is clear also that the transcript of the preliminary hearing was available.

46. In the course of what I took to be, and have now had confirmed was, an extempore judgment, the judge recalled the main features of the background and reminded himself of the observations of Lord Goff in **R v Gough [**1993] AC 646 at 670, those observations being made in reference to the equivalent provisions under the previous Act to those now contained in section 24 of the 1996 Act. In particular, the judge recited this passage:
"Accordingly, having ascertained the relevant circumstances, the Court should ask itself whether having regard to those circumstances there would be 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."

47. Applying that test, the judge came to the conclusion that the arbitrator had fallen short of the required standard in that his conduct gave rise to justifiable doubts as to his impartiality. The judge placed particular reliance upon the letter of 7th September and the subsequent correspondence. He remarked: *"It also seems to me that the correspondence from him which followed that was intemperate of nature and certainly objectively speaking would have dented the confidence of parties to an arbitration in his continuing impartiality."*

48. The judge was also unimpressed with the manner in which the arbitrator had dealt with the question of the preliminary issue. He said:
"I think that issue has been left in an unsatisfactory position and that again gives in my mind rise to doubts of the sort referred to in 24(1)(a) of the 1996 Act."

49. He took the view that the preliminary issue, as eventually presented, had not been formulated with sufficient clarity. That was a matter going to the proper conduct of the arbitration. But the judge did reject the submission that the arbitrator had failed to use all reasonable despatch.

50. Accordingly, he made an order removing the arbitrator and, after further argument, disallowed the arbitrator's fees as to 50% of such contribution for which Mr Andrews would otherwise have been liable.

51. For my part, I cannot agree that the preliminary issue or issues were inappropriately formulated or that the arbitrator failed to identify the issue or issues which might properly be determined in advance of a full hearing. As is apparent from the transcript of the preliminary hearing, if from nowhere else, the arbitrator had identified one question the resolution of which might have brought the arbitration to an end - a result which would have been wholly to Mr Andrews' benefit. It is perfectly true that at one point the arbitrator seems to have overlooked the fact that alternative proposals were being put forward on behalf of Mr Andrews; but, as can be seen from the correspondence and, in particular, from the letter of 29th July (which, as I have remarked, was not before the judge) and from the award itself, those matters were in fact considered and, so far as those matters were concerned, dealt with in a manner wholly favourable to Mr Andrews.

52. The order which the arbitrator made for costs has been criticised, and I can see some force in the criticism. If it be the case, as is advanced on behalf of the arbitrator, that all issues of any significance had been resolved in favour of Mr Andrews, why was it that he had to bear his own costs and half the arbitration costs to that date? But although the order is perhaps one which not every judge or arbitrator would have made in those circumstances, it is not so unusual, in my judgment, as to lead to the suspicion, let alone the conclusion, that the arbitrator was not acting impartially.

53. However, I view with greater concern the letter of 7th September and those which followed. It does appear to me that, egged on by Mr Brown, the arbitrator eventually ran out of patience with Mr Hossack. No doubt he was also irritated by the refusal of Mr Hossack to advise Mr Andrews to sign his form of agreement and pay the minimum fee. He allowed his irritation to show and, in the letter of 7th September, he certainly expressed himself badly.

54. But does that letter and those that followed, including that written to Mr Andrews personally, disclose any more than feelings of irritation? Does that letter and the refusal to retract indicate a real danger of bias against Mr Andrews? I think not. The outburst, if it is fair to so describe it, was directed in the main at Mr Hossack and was really no more than a strong statement of the arbitrator's correctly held belief that it was for him, and no one else, to determine what the preliminary issues should be. The reference to the unpaid fees was unfortunate, but I, for one, can well understand the arbitrator's irritation at being dictated to, as he saw it, by someone who was not prepared to advise his client to comply with his, the arbitrator's, terms of engagement. So whilst I am a long way from approving the arbitrator's conduct in this case, I do not myself consider it such as to justify removal.

55. I appreciate that I have taken a different view from the judge on the facts. I have not done so lightly. However, I have had all the material which was available to the judge and some more which was not, and I therefore feel justified in substituting my own view.

56. Accordingly, I would allow this appeal both in relation to the order for removal and also with regard to the order disallowing costs.

LORD JUSTICE MANCE:

57. I find this a more difficult and finely balanced case than my Lord, but, ultimately, I do not dissent from the view that the court should not, in the particular circumstances as they now stand, intervene and set aside the arbitrator's appointment. I therefore also think that the appeal should be allowed. In view of the difference in emphasis, however, I will state my view of the case.

58. The test we have to apply is that of **R v Gough** : whether in all the circumstances of the case there was, or is, a real danger of bias on the part of the arbitrator in the sense that he might unfairly regard or have regarded with favour or disfavour the case of one party to the issue under consideration by him (see [1993] AC 646, 670F). When speaking of real danger, the court is thinking in terms of possibility rather than probability of bias (see per Lord Goff at p.670E-F). When referring to all the circumstances, the court includes all relevant circumstances appearing on the evidence before it, whether or not they would have been available to any observer of the relevant proceedings at the time (see p.670E).

59. Here the arbitrator was appointed by the President of the Royal Institute of Chartered Surveyors under an arbitration clause in relatively standard form, of which we have been shown a copy, which provides for any dispute or difference as to the subcontract *"or any matter or thing of whatever nature arising thereunder or in connection therewith"* to be referred to arbitration. Then in clause 38.12 there is a provision that the arbitration be conducted in accordance with the JCT Arbitration Rules current at that date, which in turn provide, in rule 9.1, that the parties shall be *"jointly and severally liable to the Arbitrator for the payment of his fees and expenses"* and, in rule 9.2, that:

"In an arbitration which continues for more than 3 months after the Notification Date the Arbitrator shall be entitled to render fee notes at no less than 3-monthly intervals and the same shall be payable 14 days after delivery."

In fact, the arbitrator did not render any fee notes until 27th October 1998, but he did give considerable other attention to fees.

60. At the very outset there was a preliminary meeting on 7th April 1998, which the transcript indicates was conducted sensibly and efficiently by the arbitrator. One problem, however, arose relating to his fees which has dogged the arbitration to date. He asked both parties to accept a draft form of agreement which provided for different terms to those of the JCT Arbitration Rules under which he had been appointed. They provided for an immediate minimum fee, albeit only of £250; they provided for hourly, daily and booking rates; and they provided for cancellation fees - all in fixed amounts. The claimant (Randells) was prepared to, and did, sign on the spot and at some point appears to have paid the minimum fee. The respondent (Mr **Andrews**/B A Contractors) made clear it had been involved in the arbitration against its will and saw no reason to accept any such commitment in an appointment which had been made by a

third party. No doubt this may represent a somewhat unusual situation for an arbitrator in the context of consensual arbitration, but it occurred.

61. On the face of it, although this was not a point pursued directly as a matter of complaint before us, it was unwise and inappropriate for the arbitrator, after accepting appointment by the President of the Royal Institute of Chartered Surveyors, to enter into a one-sided agreement of this nature and to receive any payment under it from only one party (see **K/S Norjarl A/S v Hyundai Heavy Industries Co Ltd [**1992] 1 QB 63 and **Turner v Stevenage Borough Council [**1998] Ch 28). The latter authority indicates that an arbitrator could, under the old legislation, have rendered interim fee notes for reasonable fees from time to time and expected them to be paid, and there can be no reason why this does not also apply under sections 28(1) and 64(1) of the Arbitration Act 1996. Under the present arbitration, paragraphs 9.1 and 9.2 of the JCT Arbitration Rules in any event crystallise a somewhat similar right. But a detailed agreement, providing for minimum fees, fixed hourly, daily and booking fees and cancellation fees, is a quite different matter (considered in detail in the **Norjarl** case), which the present arbitrator had no basis for insisting upon. He was, of course, quite entitled to ask both parties whether they would agree to such an agreement, but he should not, I think, have entered into such an agreement with only one party once the other refused to do so (see, in particular, per Staughton LJ in **Turner v Stevenage Borough Council** at p.37C-D, with whom Mummery LJ agreed at p.39C, and, as I read it, with whom Pill LJ probably agreed on that point too).

62. Unfortunately, although this course of events is, as I have said, not directly in issue before us (and it is one with which, moreover, the respondent acquiesced without protest), it is one which in my view has relevance when considering subsequent events. The arbitrator repeatedly reverted to the question of the respondent's attitude to costs. My Lord has read or referred to the correspondence.

63. In particular, on 15th April 1998 the arbitrator wrote referring to the preliminary meeting and to the draft security deposit letter which he had handed to each party saying that he might at some future date require this. He added with regard to that:
"... this gives me cause for concern inasmuch as at the present the Form of Agreement has been executed by the Claimant but not by the Respondent. Should this situation persist I shall have no alternative but to order security for costs under S38(3) of the Arbitration Act 1996; I must also draw attention to JCT Rule 9 and remind that these Rules are in force."

The latter observations were, of course, appropriate, save in so far as section 38(3) actually only refers to a claimant.

64. On 12th May 1998 the arbitrator wrote again, saying that he remained very concerned over the previous view taken by the respondent over payment of costs and referring to various sections of the Arbitration Act, including section 28. Mr Hossack replied for the respondent, and the claimant also replied expressing its extreme concern at the attitude displayed by the respondent.

65. One then comes to the critical exchanges in the context of the proposed preliminary issues and of this application. On 24th August the arbitrator disclosed legal advice which he had received, which appeared to relate only to preliminary issues which had been suggested by the claimant. Not surprisingly, on 26th August the respondent pointed out that the arbitrator appeared not to have sought legal advice on the alternative preliminary issues which the respondent had proposed. The respondent pointed out that the arbitrator had himself, on 11th June, indicated his view that the claimant's preliminary issues were not, and the respondent's alternative preliminary issues were, relevant to the basic question which he had in mind as a preliminary issue concerning use of main contract documentation. He had identified that basic question by an order No. 2 made on 15th April 1998.

66. The arbitrator's response to this letter by the respondent was misconceived. He suggested that the issues raised were new. He went on (appropriately, of course, if they were new) to say that consideration would be needed as to their inclusion as preliminary issues.

67. Mr Hossack, for the respondent, returned to the charge in a further detailed letter which quoted specifically the arbitrator's previous letter of 11th June which had said that the alternative issues were relevant. Mr Hossack re-expressed his concern that it appeared that only the claimant's proposed preliminary issues had been referred to the arbitrator's legal adviser. He said that he saw no reason, unless the arbitrator now decided that further legal advice was required, why the alternative preliminary issues could not be dealt

with by the arbitrator at the same time as he ruled with regard to the claimant's issues on which legal advice had been received. Mr Hossack concluded:

"... we hold the view that the advice received from your legal adviser will prove to be most useful to you in the determination of the proper procedures to be adopted for the conduct of this reference (in particular compliance with the legal maxim ei incumbit probatio qui dicit)."

Apart from the length and the perhaps tiresome Latin reference, this was in substance a well-founded letter.

68. It received another misguided, to say the least, response on 7th September 1998, which my Lord has read, in which the arbitrator said that he would disregard the content of Mr Hossack's letter; that he would determine the scope of the preliminary issue and would not be influenced by prescription from the respondent, and that:

"This is particularly so in view of the refusal of your Client so far to provide any costs in the Matter."

69. On the face of it, not only must the arbitrator have decided to disregard the contents of Mr Hossack's letter, he cannot even have digested it because, if he had, he would have seen that he himself had not been talking sense. He had completely misunderstood and forgotten what he had previously said. The reference to "prescription" was also, I think, an unfairly pejorative choice of words. The sentence relating to costs is the most concerning of all. In my judgment there is cause in that letter by itself to be concerned about the risk that the arbitrator's view of the respondent's attitude to costs was clouding his judgment. That would, of course, have been quite inappropriate in determining the scope of the preliminary issue; although I would add that an inappropriate attitude to a single decision is not, I think, to be equated with bias or apparent bias.

70. There is cause for further concern in the arbitrator's reaction to the letter which Hazell & Co, solicitors instructed by the respondent following the arbitrator's letter, then wrote to him. Hazell & Co's letter dated 14th September 1998 gave the arbitrator a very reasonable opportunity to reconsider and correct his attitude. Instead, he replied questioning Hazell & Co's position. I agree with the judge that that was a wholly unnecessary letter to write and an unnecessary attitude.

71. After further correspondence, however, the arbitrator did write his letter of 7th October 1998. I would accept that the reference in it to the second sentence of paragraph one of his letter of 7th September should have been to the third sentence dealing with costs and that it therefore amounts to a concession that, although correct factually, what he said about costs should not have been included and was not, in other words, relevant to any decision he had to make. The letter went on to affirm his impartiality, but then, somewhat unwisely, as it seems to me, reverted immediately to the same subject of the respondent's failure to enter into the arbitrator's form of agreement regarding costs. It included, in that context, a comment about that failure demonstrating *"a lack of fairness towards the claimant"*. What it demonstrates is a continuing misapprehension of the entitlement of an arbitrator in his position. If anything, it was the claimant who should not have entered into such an agreement unless the respondent also did so, and it is the arbitrator who should not have allowed that to happen.

72. Finally, on 27th October the arbitrator repeated yet again his *"extreme concern"*, as he put it, about the position relating to costs; but he indicated that he had made an interim award, which would be available for publication upon full settlement of his attached fee note. His award, although clearly prepared at a time when he was unaware of any application to set aside his appointment, was not actually issued until 5th January 1999, when it was disclosed without his fee having been paid, and it was relied upon by him to demonstrate his impartiality. That appears from paragraphs 5 and 30 of his affidavit of 5th January 1999.

73. Certainly the interim award appears generally favourable, on matters of substance, to the respondent, although quite how far it goes may be open to argument. There are evidently problems about deciding whether a subcontract claim is bound to fail, in so far as it may refer to main contract documentation or agreements or circumstances relating to a main contract, before one has defined the basis upon which the main contractor seeks to hold the subcontractor liable. That was a point that Mr Hossack actually made at the original preliminary meeting back in April. However, generally the interim award grapples with the issues in a detailed, apparently objective way and decides, as I have said, favourably on the whole to the respondent. It also, very fairly, detects and recognises the error which the arbitrator made in August and

September 1998 in treating the respondent's two additional issues then as new issues, when he had previously been informed of them and had, on 11th June 1998, accepted them as relevant.

74. The costs order, on the other hand, is, as my Lord has pointed out, on its face curious. There are three reasons given for determining that each party shall bear its own costs. The first is that it appeared to the arbitrator that some considerable degree of costs should fall upon the respondent by virtue of the additional issues raised and his findings upon them. Since, so far as one can see, he decided the additional issue or issues mostly in favour of the respondent, as well as the original claimant's issues in favour of the respondent, the respondent would appear to have been generally successful. On the face of it, therefore, on that basis one would expect the respondent either to have its costs or at least that costs should in some way be in the cause.

75. The second reason given was that the submissions were the cause of the need for legal advice to be obtained. On the face of it, that does not seem correct. The arbitrator's own letter of 29th July 1998, as now disclosed, indicates, as one would expect, that legal advice was sought primarily on the claimant's proposed preliminary issues. The respondent's issues were dealt with in a sweep-up way, and the arbitrator himself said that they appeared to effectively duplicate some of the claimant's issues.

76. The third reason given was that, bearing in mind the evident differential in costs incurred by the parties over submissions, it was determined that each party should bear their own costs. That seems very odd. Why deprive a party of any costs simply because they have incurred more costs? One might have thought the opposite approach would apply.

77. But all these matters seem to me to be, if anything, for a different type of application to the present. It may be that in consequence of them the arbitration award does not leave me with the impression that the arbitrator adopted an approach which was quite so favourable to the respondent as he sought to suggest in his affidavit. But I agree with my Lord that one certainly cannot read into the award any positive inference of bias, or even a real danger of such bias, from an apparent misguided costs order.

78. I turn to the core issue which I set out at the outset of this judgment. Standing back, the points which, as is evident, most concern me are the following:

79. The first is the arbitrator's repeated references to the respondent's failure to sign any form of agreement, particularly in his letters of 15th April and 27th October 1998, where there are express references, but also, by implication, in his references to the respondent's attitude to costs in his other letters of 15th May and 7th September 1998. On the other hand, the arbitrator also drew attention in his letters of 12th May and 27th October 1998 quite appropriately to JCT rule 9, less appropriately to section 38(3) of the Arbitration Act 1996 and quite appropriately to section 28 of the Arbitration Act. He pointed out, as must have been the case, that his minimum fee had in any event been far exceeded within quite a short time after the original preliminary hearing, although he did not get around to submitting interim fee notes until 27th October 1998. The general gist of what he was saying was that he expected the respondent to contribute to fees and, in general terms, that was not an unfair attitude, although he was not entitled, as I have indicated, to insist on any form of agreement. The position is that the respondent never volunteered any willingness at any point to meet even interim fees.

80. The second matter which has concerned me is the clear possibility that irritation about the respondent's attitude influenced the arbitrator, first, in his failure to digest the respondent's letters dated 26th August and 3rd September 1998; secondly, in his letter dated 7th September 1998 and in the interlocutory communication; and thirdly, in his response when Hazell & Co first came on the scene. But this point must, it seems to me, be viewed in conjunction with his next letter dated 7th October recognising the irrelevance of the respondent's attitude to costs to any decision he had to make, and also in conjunction with his interim award, which, as I have indicated, on its face dealt with the matter objectively and also voluntarily recognised his own prior error relating to the novelty of the respondent's additional issues.

81. Should the arbitrator's appointment now be set aside on the basis that there is a real danger of bias on his part in the sense that he might unfairly have regarded with favour or disfavour the case of the respondent? With some doubt, as I have indicated earlier, I have come to the conclusion that what took place in September 1998 can be discounted as the unfortunate culmination of a misconception regarding the appropriate course which the arbitrator could expect the respondent to follow. First, as I have indicated,

the arbitrator's letter of 7th October does expressly recognise the irrelevance of his observation relating to costs. Secondly, there is no reason to view the interim award as other than a conscientious effort to address the issues before the arbitrator, however right or wrong the award on costs may itself have been. Thirdly, the arbitrator, if only as a result of the interchanges in this court, now fully appreciates that he was not entitled, and is not entitled, to require the respondent to enter into this form of agreement. He must live with the fact that he is appointed as an arbitrator under the JCT Arbitration Rules and that that is all he is entitled to insist upon. Fourthly, viewing the matter today, it seems to me that there is no reason to think that the lack of balance, as I would regard it, which manifested itself in August and September 1998, in the perhaps somewhat unusual situation then pertaining relating to the form of agreement for costs which he was keen to have signed, was any more than a temporary lack of balance, or that the arbitrator would not now perform his role impartially.

82. In the circumstances, however the matter might have stood on the immediate application back in September 1998, I have come to the conclusion that the court should not now act under section 24 with regard to the matters I have so far identified, and that the appeal should to that extent succeed.

83. It is unnecessary in the circumstances to consider in any detail the judge's other grounds for setting aside the appointment, since I agree with my Lord's observations. As to the first, that the arbitrator failed to take legal advice on the preliminary issues, or may have done, that is now explained and shown to be wrong and does not seem to me to support any case on apparent bias. The second relates to a failure promptly to conduct proceedings and an application under section 24(1)(d)(i), which also involves the requirement that substantial injustice has been or will be caused to the applicant. The complaint there, which the judge accepted, relates to the scope and handling of the preliminary issues. But, having reviewed the circumstances, it does not seem to me that there is anything in the arbitrator's definition or handling of the preliminary issues to fall within that section, certainly not to show that substantial injustice has been or will be caused to the applicant. One may criticise the preliminary issues, or the resolution of them, for some lack of definition, but that seems to me to be a long way from misconduct within section 24(1)(d)(i), and still further from causing substantial injustice within that section.

84. In the circumstances it seems to me that, in so far as the judge based himself on those two grounds, the appeal should also be allowed. It follows that the arbitrator should resume office.

LORD JUSTICE NOURSE:

85. I agree with the judgment of Lord Justice Mantell.

86. I also agree with Lord Justice Mance's view of the arbitrator's letter to Mr **Andrews** of 7th October 1998. Had it not been for the third sentence of the arbitrator's letter of 7th September 1998, I could not have believed either that an application to remove him would have been made or, if it had been, that it would have succeeded before the judge. However, for the arbitrator to have expressed himself in such a way as to suggest that his decision as to the scope of the preliminary issue or issues was based, at least in part, on Mr **Andrews**' refusal to date to pay him any fees was most regrettable. The court could not condone such conduct and I do not do so.

87. But that is not the question we have to decide. The question we have to decide is whether, in all the circumstances as they are now known, a case has been made out which passes the test formulated by Lord Goff of Chieveley in **R v Gough** [1993] AC 646. In my judgment, Mr Snowden's well-sustained argument notwithstanding, that case has not, for the reasons stated by Lord Justice Mantell, been established. Even assuming that the arbitrator ran out of patience with Mr Hossack and harboured some resentment towards Mr **Andrews** for refusing to pay him any fees, on a view of the case as a whole I am not satisfied that there is any real danger of the arbitrator's having been biased towards Mr **Andrews** in the discharge of his arbitral duties or of his being so biased in the future.

The appeal is allowed. Order: appeal allowed with costs; paras 1 and 4 of the judge's order discharged;

MR D SEARS (instructed by Messrs Berrymans Lace Mawer, London EC2) appeared on behalf of the Appellant First Respondent (the Arbitrator).
MR S SNOWDEN (instructed by Messrs Hazell & Co, Sawbridgeworth, Herts) appeared on behalf of the Respondent Applicant (Mr Andrews).
The Second Respondent (Randells) was not represented.