CA on appeal from Central London County Court (Mr Justice Morison) before Simon Brown LJ; Morritt LJ; Waller LJ. 21st February 1997.

LORD JUSTICE WALLER:

1. The Applicants (Marflet) are applying for leave to appeal from an order made by Morison J whereby he dismissed certain motions which Marflet had brought relating to an arbitration between Marflet and the Respondents (Effjohn).

2. Under a joint venture agreement made between Marflet and Effjohn, pursuant to a clause of that agreement disputes were referred to arbitration. Marflet appointed as their arbitrator Mr Bruce Harris and Effjohn appointed Mr Mark Hamsher. Those arbitrators (in case of disagreement) wished to appoint Mr Michael Howard QC as a third arbitrator, or alternatively (if not empowered to do so as an arbitrator) as an umpire whom they thought it would be desirable to have present at the hearings. That latter desire was to save the parties from the cost of having to commence matters all over again in the event of disagreement. Marflet challenged the right of the arbitrators to appoint a third arbitrator, and challenged the entitlement to appoint an umpire to be present at the hearings. Before Tuckey J they were successful in their challenge to the arbitrators appointing a third arbitrator but unsuccessful in challenging the appointment of Mr Michael Howard QC as an umpire. (see ***Fletamentos Maritimos S.A. v Effjohn International B.V.*** [1995] 1 Lloyd's Rep. 311). Leave to appeal from Tuckey J's decision was refused in trenchant terms by Evans L.J.

3. At this stage Marflet were represented by Messrs Herbert Smith, as they were throughout the conduct of the arbitration, in so far as it related to liability under the joint venture agreement. Liability was the subject of an interim final award dated 13 July 1995. By that interim final award the arbitrators found in favour of Effjohn, holding that Marflet were obliged to contribute their proportionate share of the debts, leaving the question of quantum to be resolved thereafter. In concluding as he did, Tuckey J, at page 313 of the above report, set out the position well known to those who act as umpires and arbitrators as follows:- *"It is common ground that until the two arbitrators have disagreed the umpire has no jurisdiction to be involved in the determination of the disputes between the parties. That is well known and need hardly be stated in this judgment. It is underlined by s8(2) of the Act which states that: Unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference [that is a reference to the appointment of an umpire] be deemed to include a provision that if the arbitrators have delivered to any party to the arbitration agreement, or to the umpire, a notice in writing stating that they cannot agree the umpire may forthwith enter on the reference in lieu of the arbitrators*."

4. This encapsulates the role of the umpire. He is not to participate in the decision-making process until such time as the two arbitrators have disagreed. They then become functus and he enters on the reference in place of them to decide the dispute."

5. In coming to the view he did however that by implication the arbitration agreement empowered the arbitrators to appoint an umpire to be present, he had in mind what is the well understood but normally consensual and cost saving practice. This is that the umpire attends the proceedings and often chairs the same and retires with the arbitrators when they deliberate so as to be aware where disagreements occur. It seems that following Tuckey J's ruling Mr Michael Howard QC fulfilled the traditional role of the umpire as above described without further protest. At interlocutory hearings and during the main hearing on liability there was no protest from those representing Marflet about, for example, his presiding and asking questions or his retiring with the arbitrators while they considered their ruling on some aspect or another.

6. Following the interim award Marflet has attempted to challenge the award unsuccessfully, and has further attempted to challenge the further award in relation to costs. None of those challenges involved further allegations in relation to the role of the umpire.

7. The present matter arises out of an interlocutory hearing before the arbitrators with Mr Michael Howard QC the umpire acting as Chairman which took place on 14 May 1996. Marflet were at this stage represented by Messrs Zaiwalla & Co and it is important to refer here to the situation in which Messrs Zaiwalla found themselves when asked in March 1996 if they were prepared to act in the remainder of the arbitration in place of Messrs Herbert Smith.

8. It would seem that when Mr Zaiwalla came to consider whether his firm should accept the instructions from Marflet he discussed with his clients what he perceived to be a potential problem arising out of the following events. In December 1993 Mr Zaiwalla had commenced proceedings against certain Defendants (totally unconnected with these proceedings), alleging breaches of the Race Relations Act 1976. The allegation was that instructions had been given to transfer the conduct of a case to an assistant of Mr Zaiwalla on racialist grounds. The Defendants' case was that the motives for wishing the transfer were purely ones based on their view of who would do the case most competently, and with the best prospect of success having regard to the way in which the case was likely to be conducted.

9. As a result of witness statements having been exchanged in the Race Relations Act proceedings, Mr Zaiwalla was aware that Mr Harris had provided a witness statement to the Defendants. That statement was uncomplimentary about the way in which Mr Harris felt that Mr Zaiwalla had performed his task as a solicitor in cases where Mr Harris had acted as arbitrator. It also described what Mr Harris felt was the view of other arbitrators as to the way Mr Zaiwalla ran cases. Mr Zaiwalla had conducted correspondence during March and April 1995 with Mr Harris on receipt of Mr Harris' witness statement in which he had tried to persuade Mr Harris of the inaccuracy of

parts of his statement. The letter from Mr Zaiwalla indeed contained a threat that he would consider reporting Mr Harris to his professional body The London Maritime Arbitrators' Association unless (by clear implication) Mr Harris was prepared to alter his statement. It is now accepted that however strongly Mr Zaiwalla felt about the inaccuracy that threat should not have been made, but this is not the place to comment further on that. In the result Mr Harris was not prepared to alter what he was prepared to say in any material respect, and it was clear that Mr Harris (a) held the views expressed in the witness statement and (b) would thus be likely to be called as a witness adverse to Mr Zaiwalla in the Race Relations Act proceedings.

10. Mr Zaiwalla informed his proposed clients of the position which existed as between him and Mr Harris. Mr Zaiwalla considered that whatever view Mr Harris held of him as a solicitor Mr Harris would conduct any arbitration fairly, and would in no way have a predilection to be adverse to one of Mr Zaiwalla's clients. Marflet were content, and asked (indeed, so we were informed at the very end of the hearing before us, insisted) that Messrs Zaiwalla act and indeed that Mr Zaiwalla himself should argue matters on their behalf so far as he was able to do so.

11. The hearing of 14 May 1996 was convened for the purpose of giving directions for the forthcoming hearing on quantum. Messrs Zaiwalla were put on notice by Messrs Stephenson Harwood representing Effjohn, that if Marflet wished to make any discovery application they should do so at that hearing. Notice of the precise discovery requirements was given only on the morning of the hearing, and they were of a very extensive nature. Neither in correspondence prior to the hearing, nor at the hearing, was any reference made either by Messrs Zaiwalla, or by Mr Harris, to the fact of Mr Harris having provided a witness statement, or to the contents of that statement. It follows that no-one other than Mr Zaiwalla, his clients Marflet, and Mr Harris knew of the statement and its contents. It also follows that Mr Zaiwalla made no protest whatever on behalf of his clients in relation to their arbitrator continuing to sit, albeit it is perhaps right to add that Marflet had made some complaint about other aspects of Mr Harris' conduct in the liability proceedings (see letter of 14 February 1996 p.458).

12. It is also right to say that in relation to the position of Mr Michael Howard QC, no suggestion was made by Mr Zaiwalla that he should act any differently from the way in which he had acted previously, chairing the proceedings, asking questions, and ultimately retiring with the arbitrators while they considered their decision.

13. Thus during argument Mr Harris and Mr Michael Howard QC asked some questions. We were shown a note of the hearing and none of the questions asked by either would suggest bias, or in the case of Mr Howard QC that he was attempting to enter into the decision making process. The arbitrators then retired and Mr Howard QC retired with them. It is accepted unreservedly that Mr Howard QC did not during the retirement enter into the decision making process. He would know the rules, and he says that he did not enter into that process, and it is thus not surprising that Mr Pickering QC accepted the position as he did.

14. The decision of the arbitrators was announced by Mr Howard QC to the effect that the arbitrators were not prepared to order any further discovery, and that they ordered Marflet to bear the costs of the hearing.

15. Despite the lack of any protest to the way Mr Howard QC was obviously proposing to act, and had acted, at the forefront of the Originating Motion then issued was an attack on Mr Howard QC for having acted as he did, and on the arbitrators for allowing him to act as he did. It is said that the point was thought of by Counsel (not Counsel appearing in this appeal) and not Mr Zaiwalla. It is of interest that at this stage there was no attack made on the basis of any apparent bias so far as Mr Harris was concerned.

16. Thus Marflet by their originating motion
    1. sought the removal of the umpire and the arbitrators under Section 23(1) of the Arbitration Act 1950 on the ground that they had misconducted themselves in the one case by interfering with the decision making process of the arbitrators and in the other case by allowing their decision making process to be interfered with by the umpire;
    2. alternatively, an order setting aside the ruling under S.23(2) of the 1950 Act
    3. alternatively, a remission of the matter under S.22(1) of the 1950 Act, or S.1(5)(b) of the 1979 Act.

17. The matter of substance which the judge was being asked to consider when the hearing commenced before him, was whether either the umpire or the arbitrators had misconducted themselves in the manner outlined. He was also however being asked in the alternative to review the decision of the arbitrators in relation to their order that no further discovery should be given on the grounds of there being a procedural mishap even if misconduct could not be established. On this application for leave to appeal, the point I have described as the matter of substance for the judge to consider was, at the very end of the submissions of Mr Pickering QC, abandoned on the simple basis that there is no answer to the point that Marflet, having agreed time after time to Mr Howard QC retiring with the arbitrators and taking part in the hearing as he did, and taking no point prior to or at the hearing on 14 May 1996, must be taken to have accepted that he should be entitled to perform that role at the hearing of 14 May 1996.

18. The latter aspect of the matter relating to review of the order refusing discovery was also not pursued because, by virtue of the history to which I will turn in a moment, any grounds for complaint that discovery had not been ordered has been removed by an order made on 2 December 1996 by Mr Howard QC once he entered on the reference.

19. But it is right to comment at this stage that in relation to points 2 and 3 above, the judge seemed to take the view that he had the power to review, and, if necessary, remit the interlocutory ruling to the arbitrators if there had been some form of procedural mishap. He thought that he had that power under S.22(1) of the 1950 Act. He may have been tempted into that view by the fact that although Mr Schaff for Effjohn was taking the point that it was only at an award stage that the court would have the power to review the fairness of any interlocutory directions not in the form of an award, he rather wanted the judge's view on the merits at this stage so that further difficulty would not arise at the award stage. Obviously the matter has not been fully argued out and Mr Pickering QC made clear that he would have attempted to support the judge's view as being right in "*exceptional circumstances*". I am bound to say that I do not believe that the judge's view was right. I have always understood the position to be that there are no circumstances which could give rise to a power to review an interlocutory direction not made in the form of an award. Basically the position is, as I understand the authorities, that the Court has never had some general power to supervise arbitration and review interlocutory decisions. The power which it does have comes from the Arbitration Acts. It follows that there can be an examination as to whether there has been misconduct at any stage which may lead to the arbitrator being removed. But the power to review and remit under Section 22 applies to awards. (see Donaldson J (as he then was) in ***Exormis Shipping v Oonsoo*** [1975] 1 LLR 432; ***Three Valleys Water v Bunnie*** (1990) 52 BLR 47, a decision of Steyn J (as he then was); and Lord Donaldson M.R. in ***King v McKenna*** [1991] 2 QB 480 at 490B-C). In so far as the judge relied on S.22(1) (which speaks of matters rather than awards), as providing the power to review and remit a decision not in the form of an award, it seems to me with respect his view is inconsistent with well established authorities.

    The point is in any event academic as the history shows.

20. In so far as Marflet sought to attack the decision of the arbitrators refusing discovery, Effjohn accepted that a further application could be made and ultimately an application was made. The history of that application is as follows. A pre-trial review of the quantum hearing (then scheduled for 2 December 1996) was held on 1 November 1996. Marflet had sought to avoid any further progress in the reference pending the determination of an application for leave to appeal from Morison J's judgment. Thus, they had taken no steps to make a fresh discovery application before the arbitrators at this stage.

21. On 31 October 1996 Marflet purported to hold Effjohn in repudiation of the arbitration agreement on grounds of failures in discovery and to terminate the arbitration agreement on that basis, indicating that thereafter they would continue to participate in the reference but only under reserve. This point disappeared during the hearing before us and is no longer a live issue.

22. Marflet, through Mr Zaiwalla, objected to the presence of the umpire Mr Howard QC, and the arbitrators thus had to decide whether Mr Howard QC should continue to attend. The arbitrators disagreed whereupon they became *"functus"* and Mr Howard QC entered on the reference. There is no dispute that Mr Howard QC has entered on the reference subject only to the question whether there is an arguable case that he should be removed.

23. Directions for the hearing on 2 December 1996 were made by Mr Howard QC. Marflet applied for an adjournment of the hearing and for further discovery and that application was heard by Mr Howard QC on 2 December 1996. Mr Howard QC did order an affidavit of documents held by Effjohn in their own right and considered that, not-withstanding Marflet's dilatory conduct, the interests of justice were best served by allowing Marflet one final opportunity to inspect documents in the possession of the joint venture company. He accordingly granted an adjournment of the quantum hearing until March 1997 for that purpose. He ordered Marflet to bear all the costs thrown away by that adjournment and held that he did not have any power to review the costs order made by the arbitrators at the hearing on 14 May 1996.

24. The fact that Mr Howard QC has now entered on the reference and the arbitrators are to play no further part enables me to put into context the major point on which Mr Pickering QC has relied in seeking to obtain leave to appeal. The point as now made has evolved out of a point which itself only emerged gradually whilst the matter was before Morison J.

25. At the end of the first day of the hearings before Morison J on 16 July 1996 reference was made by Mr Zaiwalla to the fact that Mr Harris was due to give evidence for the Defendants and had provided a statement to the Defendants in the proceedings brought by himself and The Commission for Racial Equality. The judge wanted to see the pleadings in that case and to have more details. The matter was pursued further at the second hearing on 24 July 1996 and ultimately, after the hearings were concluded, an amendment was allowed to the Originating Motion. That amendment was in the following terms;

    "(1) Mr Harris has given a witness statement in the CRE proceedings on behalf of the Defendant in those proceedings. Mr Zaiwalla was notified on 16 July 1996 by the solicitors for the Defendants in the CRE proceedings that Mr Harris will be giving evidence at the forthcoming trial of the CRE proceedings.

    (2) Mr Harris failed to disclose at the hearing for directions on 14 May 1996 that he was going to be a witness at the CRE hearing and give evidence against Mr Zaiwalla.

    (3) In the circumstances there is evidence of actual or the risk of likely bias on Mr Harris' part.

    (4) Mr Harris by agreeing to give evidence in his capacity as a maritime arbitrator against a practising maritime solicitor seriously undermines his suitability to act as an Arbitrator."

26. I have to say that I for my part would have thought that in the light of the history that I have previously set out, the amendment put the matter in a misleading way. It suggests that Mr Harris failed to disclose at the hearing on 14 May 1996 that he was to be a witness and that Mr Zaiwalla and Marflet only learned that Mr Harris was going to be a witness on 16 July 1996 after Messrs Zaiwalla had accepted instructions and during the currency of the hearing before Morison J. The truth was that Mr Zaiwalla did appreciate that Mr Harris was likely to be a witness having regard to the correspondence conducted with Mr Harris in March/April 1995. He had discussed the matter with Marflet before taking instructions and merely received confirmation from Warner Cranston by their letter of 16 July 1996 of the fact that Mr Harris was to be called.

27. Ultimately the judge ruled that because Mr Zaiwalla knew of the statement and drew the problem to the attention of his clients before ever taking on the case in succession to Herbert Smith, it was not open to Marflet to complain about any apparent bias. Furthermore, he pointed out that it would still be open to Marflet to change lawyers at this stage. Finally he examined with care whether there were any indications that Mr Harris, during the course of the hearing, had acted with any bias against Mr Zaiwalla and concluded there was not. As he himself had said a fair minded judge can divorce his personal views of an advocate from the merits of a party's case.

28. Mr Pickering QC has sought to persuade us that the judge was wrong in the view he took. He was not however seeking to do so to persuade us that a court would now remove Mr Harris. He accepted that since Mr Harris is no longer an arbitrator there was no point in pursuing this point for that purpose. What he sought to persuade us was that it was arguable that this provided an independent ground on which Mr Howard QC should be removed, on the grounds that he was tainted by the alleged bias, having retired with Mr Harris to consider the original discovery application. Having accepted that Mr Howard QC did not enter into the decision making process, what Mr Pickering QC was forced to submit was that Mr Howard QC's tainting comes from having simply heard the discussion between the arbitrators. Mr Pickering QC stressed that he was not alleging actual bias in Mr Howard QC but was alleging that there was apparent bias in that it would appear to a reasonable person that Mr Harris was biased and that Mr Howard QC, by apparently taking part, would be tainted. Thus there are two stages in the argument if one adopts the language of Lord Goff in ***Reg v Gough [***1993] A.C. 646 and remembering it is not appropriate to require the court to look at the matter through the eyes of the reasonable man because the court itself personifies the reasonable man (see 670 D-E). Is there a real danger of bias on the part of Mr Harris in the sense that he might have unfairly regarded with disfavour Marflet's application for discovery? If so, is there a real danger that Mr Harris' bias has infected Mr Howard QC in relation to the matters on which he has ruled or will have to rule?

29. We know, and it is accepted, that Mr Howard QC did not take part in the decision making process, and thus the word apparently in that context is inapposite. The argument simply has to be that having listened to a discussion during which the arbitrators decided that no order for discovery should be given, there is a real danger that Mr Howard QC would have a predilection to take an adverse view of Marflet thereafter because of the views expressed by Mr Harris on presumably Mr Zaiwalla and/or Marflet. The argument seems far fetched even if one assumes some bias against Mr Zaiwalla on the part of Mr Harris. Furthermore, events following Mr Howard QC entering on the reference would indicate that he has (as one would expect) acted without any hint of bias against Marflet. He revisited the discovery question and postponed the hearing. He did so in order that, despite their own shortcomings in the speed with which they have acted in attempting to get discovery or obtain inspection of documents in the hands of the joint venture company, Marflet should have the opportunity to see those documents which they are entitled to see. In other words, moving straight to the second stage, there seems absolutely no danger whatever, even if for this purpose it was assumed there was any force in the points made in relation to the first stage.

30. But the argument in any event falls at the first stage for a variety of reasons. First, the statement of Mr Harris expresses views on Mr Zaiwalla as a solicitor; it expresses no view at all, never mind one suggesting any animosity, on Marflet. It is really unthinkable that a person exercising a judicial role should have to disclose views he has formed in relation to previous cases about the advocate now appearing. It was Mr Zaiwalla's view originally, and obviously the correct view, that an opinion formed of the advocate in previous cases in no way establishes any animus towards the client.

31. Second, it is accepted by Mr Pickering QC that if Mr Harris had either in correspondence or at the hearing "disclosed" that he had provided the statement, and had disclosed the adverse view he had expressed of Mr Zaiwalla, and if everyone including Marflet had been content to continue with Mr Harris as arbitrator, no complaint would be tenable. This is important, because it is not being alleged that Mr Harris was affected by something which would make him biased and which disclosure could not cure. The strange thing however is that if he had made disclosure, Mr Zaiwalla for his clients would probably have protested. Marflet were content for Mr Harris to continue with Mr Zaiwalla acting, and would, one assumes, have preferred it if no mention whatever was made of Mr Harris' views of Mr Zaiwalla on the basis that (as they clearly believed) those views would not have any relevance to any decision the arbitrators were going to take. But, in any event, the object of disclosure usually is to draw to the attention of a party something that he does not know which he might reasonably, if he comes to learn of it after a decision has been taken, assume had some influence against him. Here Marflet and Mr Zaiwalla knew what Mr Harris knew. Furthermore they were in as good a position as Mr Harris to draw it to the attention of the other arbitrator or Effjohn, if they were concerned that in some way the award might be put at risk if those parties discovered the facts at a later date. It is furthermore of relevance that what is being suggested is that if there had been disclosure and a protest, the appropriate course would have been for Mr

Harris to have stepped down. In many cases, if a matter affecting the independence of the arbitrator is disclosed, the only and proper answer will be, if there is no waiver, for the arbitrator to step down. But, in the circumstances of this case where Mr Harris has been arbitrator throughout chosen by Marflet, and it is Marflet who are seeking to change their lawyers, Effjohn would have had an overwhelming case for saying it is for Marflet to make up their mind whether they wanted to continue with Mr Zaiwalla, or go to different lawyers, or make sure that Messrs Zaiwalla instruct Counsel so that any problem that may exist between Mr Harris and Mr Zaiwalla personally is avoided. The suggestion that Marflet would be entitled to insist on changing their lawyer to someone in the middle of an arbitration so as to force the resignation of one of the arbitrators is quite unacceptable. Of course persons are on the whole entitled to have the lawyer of their choice, but the principle is not absolute. If the lawyer has good reason why he should not act or why it would be better for the client to go elsewhere, the client cannot insist on the lawyer acting. If, as in the situation which existed in this case, where it is not just Marflet's interests which have to be considered but those of Effjohn as well, and a balancing of interests has to be conducted, if fairness dictates that the party should change to a different lawyer rather than an arbitrator having to resign, justice would require that the principle does not apply.

32. It seems to me that if Effjohn were complaining that neither party had been made aware of some fact which might cast doubt on the independence of one of the arbitrators that might be one thing. But Marflet cannot complain of any non-disclosure firstly because, as far as they are concerned, they knew the fact, and secondly, because as far as disclosure to anyone else was concerned, they knew no disclosure was being made and were content with that position and indeed almost certainly preferred it. Furthermore, they are in fact in precisely the equivalent position as if there had been disclosure; that is to say they would have been faced not with being entitled to insist on any resignation of Mr Harris, but in having to make up their own minds whether they continued to instruct Messrs Zaiwalla with Mr Zaiwalla acting for the firm, or whether they chose some different method of representation.

33. In my view it is of no surprise that this point relating to Mr Harris formed no part of the original challenge to the decision of the arbitrators of 14 May 1996, and it is most unfortunate that it was ever raised at all. Mr Zaiwalla and his clients never thought there was any danger of bias; there never was any danger of bias; nothing has demonstrated in the way Mr Harris conducted himself during the hearing that there was any danger; and the remedy lay in Marflet's own hands both previously and now if they perceive any risk. It follows that in so far as Mr Pickering QC seeks to rely on this point as giving some right to attack any order made on 14 May 1996, or to found a basis for removing Mr Howard QC, he must fail.

34. That, in the light of the appreciation of the inadequacy of any other points, disposes of any application for leave. But I would just like to add two points in relation to the judgment of Morison J. First, he added a paragraph as an afterthought, no doubt well intentioned, relating to the Marine Arbitration Community generally. The paragraph is however a strange one. It might be thought, and according to Mr Schaff indeed it has been thought, that some issue had arisen before the judge which gave cause to doubt whether the Maritime Arbitration Community in London welcome persons of different racial origins. That was simply not the case. No suggestion had been made by anyone that there lay behind any challenge made by Mr Zaiwalla on behalf of Marflet an assertion of racial discrimination or that the Marine Arbitration Community had in any way been other than welcoming to persons of any nationality, race or creed. It is of course true that Mr Zaiwalla does believe that a client has discriminated against him on racist grounds. That is the subject of the proceedings which he has brought. It is contested by the Defendants against whom the allegation is made. It is a very serious matter and nothing should be said to pre-judge the issues in that case.

35. Second, Morison J also suggested that the points before him were properly made. I doubt very much whether he would have formed that view if he had seen the way that matters have developed since his decision. The first point of substance before him has been abandoned on the obvious basis that there was consent to Mr Howard QC acting in the way that he did. The point in relation to discovery has been rectified by an application before Mr Howard QC but still flickered quite unmeritoriously in the background to the arguments made by Mr Pickering QC. The point relating to Mr Harris which had troubled Morison J was no longer relevant to the position of Mr Harris himself, but was deployed in a most tenuous fashion in relation to Mr Howard QC. Mr Zaiwalla's clients may be grateful for the deployment of points which appear to be designed to obstruct the arbitration, but I have to say that I have at times been doubtful whether the pursuit of some of the points taken by Mr Zaiwalla was consistent with his duty to the Court as an officer of the court.

LORD JUSTICE MORRITT:

36. I agree. I add a few words of my own because of the importance of the issue of bias alleged against Mr Harris. In the circumstances which Waller LJ has recounted on 3rd February 1995 Mr Harris gave a witness statement to the Solicitors acting for the defendants in the proceedings under the Race Relations Act brought by Mr Zaiwalla and the Commission for Racial Equality. To avoid the inaccuracies, if only of emphasis, inherent in any paraphrase it is necessary to quote the material parts of the statement. Omitting the details of particular cases, which Mr Zaiwalla contends are wrong, and what Mr Harris had been told by others, which Mr Zaiwalla objects to as inadmissible hearsay, they are:

"*5. I recall on a number of occasions being upset by Mr Zaiwalla's style of conduct of arbitrations in which I was involved, (frequently with co-arbitrators). Subject to what I say below, I cannot recall any specific instances now (because the occasions were long ago) but in general he would badger tribunals and opponents on procedural points and complain about rulings made by tribunals sometimes suggesting (for example) that there was no power*

to make a particular ruling and sometimes questioning the partiality of individual arbitrators or whole tribunals. It was never clear whether this was a character trait, or a deliberate approach designed perhaps, to wear tribunals down, or to make them bend over backwards to be favourable or lose control so that they could be accused of misconduct. Whatever the cause was, the phenomenon was constant and well-known. ....

13. *I do not think Mr Zaiwalla's general approach to the cases I saw was practical or commercial. The kind of matters I have mentioned above tend to lead to delay and to increase costs which is seldom in the clients' interests. As indicated, I do not think it wise to fall out with a tribunal. If I had to sum up what seemed to me to be his professional shortcomings in a single phrase it would be "lack of judgment".* ....

15. *If I was now working for a Club, I would never voluntarily instruct Mr Zaiwalla, and if a member asked that Mr Zaiwalla be used on a particular case, I think I would try to dissuade that member (although ultimately I doubt whether we would refuse to instruct him). That would be because, from my experience of Mr Zaiwalla, I would think it likely that a substantial amount of unnecessary and commercially unjustifiable costs would be incurred, and that I, as the Club representative, would probably have to work rather hard if I had wanted to curb what I would see as being Mr Zaiwalla's excesses. I would expect any Club with experience of him to take such a view, and I think that he was sufficiently well known amongst Clubs and other solicitors in our field that this approach would be fairly regarded as pretty general."*

37. Counsel for Marflet did not suggest that those views were not honestly held by Mr Harris. His submission was that the statement displayed an animosity towards Mr Zaiwalla such as to constitute bias against Marflet. Morison J, though left with a sense of unease, did not accept this submission. He observed that "*the fact that a judge thinks ill of an advocate, and shows it, does not prevent him doing justice between the parties. A fair minded judge can divorce his personal views of the advocate from the merits of the dispute*".

38. I am content to adopt the description of bias relied on by counsel for Marflet, namely "*a predisposition to decide for or against one party, without proper regard to the true merits of the dispute*" - Mustill & Boyd, Commercial Arbitration 2nd Ed. 250. In my view the statement of Mr Harris contains no evidence of such a predisposition against Marflet. It is inevitable that judges and arbitrators will form opinions as to the professional skills and integrity of those who appear before them; they are bound to find some advocates easier to listen to, and likely, therefore, to be more persuasive, than others. But the existence of such views, whether held privately or, as in this case made known to others, cannot, without more, be sufficient to constitute bias against that advocate's client. Were it otherwise then not only would

39. Mr Harris be disqualified from hearing an arbitration in which one party had instructed Mr Zaiwalla but those judges and arbitrators who gave the statements commending his skills on which Mr Zaiwalla relies would be likewise disqualified from hearing cases which came before them in which Mr Zaiwalla had been instructed.

40. Of course if there are other circumstances to indicate that the judge had failed to divorce his personal views of the advocate from the merits of the dispute between the parties then the combination of the evidence as to those views and the other circumstances may establish bias. Counsel for Marflet suggested that at the hearing on 14th May, as disclosed by the notes of what occurred, Mr Harris made three remarks which were "untoward". I disagree. The first was a suggestion that Marflet might be required to put up security for the full amount of the claim as a condition of allowing them to look at all the accounts. Mr Harris asked Mr Zaiwalla what he thought of that suggestion. The second was a suggestion made by

41. Mr Harris that the whole thing was a fishing expedition. The third was a question from Mr Harris to Mr Zaiwalla whether "basically what he wanted was everything". All three comments or questions arose in the context of an application for discovery of documents which Effjohn was submitting and the arbitrators eventually held to be unjustifiably wide-ranging. It follows that in my view the appeal for which leave is sought has no prospect of success. But the matter does not end there.

42. On 3rd February 1995 the witness statement of Mr Harris was served on Mr Zaiwalla in anticipation of the trial of his claim under the Race Relations Act then due to start on 7th February 1995. On 23rd March 1995 Mr Zaiwalla wrote to Mr Harris asserting that in certain respects his statement was, as he knew or ought to have known, untrue. He also saw fit to add *"I am concerned that you, as an active arbitrator, should have been party to an inaccurate statement (made recklessly or not), especially when you hold yourself out as an International Arbitrator. I will consider in due course whether the fact of this inaccurate statement in a witness statement should be brought to the attention of the International Arbitration bodies, including the London Maritime Arbitrators Association.*"

43. Not only is that letter open to the construction that Mr Zaiwalla was improperly seeking to dissuade Mr Harris from giving evidence in court but it was written nearly a year before Mr Zaiwalla accepted instructions from Marflet to act for them against Effjohn in the arbitration before Mr Harris.

44. Zaiwalla & Co. were instructed to act for Marflet in February 1996. Mr Zaiwalla told Morison J, which the judge accepted, that he Mr Zaiwalla had informed Marflet of the problem, as he saw it, with Mr Harris but that Marflet were content for him to continue to act. We were told by counsel for Marflet, on the instructions of Mr Zaiwalla, that when originally retaining Zaiwalla & Co. as their solicitors Marflet had also insisted that Mr Zaiwalla should appear in the arbitration as their advocate. In February and March 1996 there was further correspondence between Marflet and Zaiwalla & Co. on the one hand and Mr Harris on the other in which the former complained about the conduct of the latter in dealing with the arbitration. No reference was then made to the witness statement given by Mr Harris.

45. At the time of the Directions hearing before the arbitrators held on 14th May 1996 Mr Harris did not know that he would be required to attend the hearing of the proceedings under the Race Relations Act to give evidence orally; Mr Harris was first so informed by letter from the defendants solicitors dated 28th May 1996. No objection was then, that is on 14th May, taken by Mr Zaiwalla to Mr Harris continuing, as arbitrator, with the directions hearing and the matter was not raised by Mr Harris. The Notice of Motion, which subsequently came before Morison J, was amended in consequence of the hearing before him on 24th July 1996 to allege that *"Mr Harris failed to disclose at the hearing for directions on 14th May 1996 that he was going to be a witness at the CRE hearing and give evidence against Mr Zaiwalla."*

46. This allegation is misconceived; Mr Harris knew no more than Mr Zaiwalla or his clients. For Mr Harris to have raised the subject of his witness statement at the hearing if Mr Zaiwalla did not would have been calculated to provoke further complaints as to his conduct rather than to defuse those already made.

47. In my view it is plain that even if Marflet had been entitled to object to Mr Harris continuing to sit as arbitrator because of the contents of his witness statement that right was waived when no objection was taken at the hearing on 14th May. But in any event if Marflet had objected, in the circumstances of this case, justice to all parties would have required that Marflet instruct solicitors other than Zaiwalla & Co rather than that the arbitration should recommence with a fresh arbitrator.

48. Whether or not the opinions expressed by Mr Harris in his witness statement are justified were not matters for the decision of Morison J or of this court. No doubt at the hearing of the proceedings under the Race Relations Act Mr Harris will be subjected to the most rigorous cross-examination on such part of his witness statement as is admissible. Yet at the conclusion of his judgment Morison J said *"I very much hope that the maritime arbitration community recognises the importance of welcoming into it those who, by racial origin, come from countries from which much of the legal commercial business originates; otherwise London will lose its position as the preferred choice for the resolution of international disputes such as the present one, which has no connection with this country other than the parties' wish to have their disputes resolved here."*

49. This passage clearly carries the innuendo that the maritime arbitration community does not share the judge's view. In my judgment there was no evidence to justify any such innuendo. Further, counsel for Marflet specifically disclaimed any suggestion that the critical views of Mr Harris had any racial basis.

50. The origin of this passage in the judgment would appear to be paragraph 4 of the affidavit of Mr Zaiwalla sworn on 12th August 1996 and submitted by him to the judge after the conclusion of the hearings. That paragraph reads *"Finally I would respectfully point out to the court that the City of London has built up its good name and reputation as the leading International centre for Commercial and Maritime Arbitrations because of the high standards which the English Courts have ensured are demanded from the arbitrators. That has been the historical approach which this court has adopted to make sure that not only justice is done but is seen to be done."*

51. In accordance with the normal practice a copy of the judgment Morison J intended to hand down on 3rd October was sent to Zaiwalla & Co. on 2nd October. On that day Mr Zaiwalla saw fit to issue a press statement indicating that Morison J would be delivering an important judgment the following day "*when it is anticipated that the judge will give a public warning to the City on the need of the London Arbitration Community recognising the importance of welcoming into it those who, by racial origin, come from countries from which much of the legal commercial business originates; otherwise London will lose its position as a preferred choice for the resolution of International disputes.*"

52. After the judgment was handed down on 3rd October Morison J, at the request of Mr Zaiwalla and in ignorance of the press release, inserted the word "maritime" in the passage in his judgment which I have quoted.

53. In my view the innuendo is as regrettable and unjustified as the conduct of Mr Zaiwalla in disregarding his obligation as the solicitor for Marflet to treat as confidential the advance copy of the judgment sent to him by the judge.

LORD JUSTICE SIMON BROWN:

54. I agree with my Lords that none of the proposed grounds of appeal advanced here are arguable. Although Mr Pickering QC has striven manfully to make bricks without straw, there is in truth no substance whatever in the applicants' complaints.

55. I agree with all that my Lords have said and add merely a paragraph or two of my own with regard to the appellants' central attack upon Mr Harris for having continued to act as an arbitrator, notably at the hearing on 14th May 1996, without first notifying his fellow arbitrator and the umpire of his views about Mr Zaiwalla. It is, to my mind, a wholly misconceived attack. In the first place, had Mr Harris, for example, copied to his colleagues the witness statement he had made in the Race Relations Act proceedings, that inevitably would have done more harm than good: far better to let them form their own views of Mr Zaiwalla's competence and reliability (if, indeed, they had not already done so). In the second place, if it really be suggested that his colleagues should have been made aware of

56. Mr Harris's detailed views about Mr Zaiwalla, nobody was better placed than Mr Zaiwalla himself to do so: so far from these views having been hidden from Mr Zaiwalla, his complaint rather is that Mr Harris had been forthright enough to express them in a full statement which he is prepared to support in evidence.

57. Third, and to my mind altogether more fundamentally, I reject utterly the applicants' basic contention that to have formed and expressed strongly adverse views about a lawyer's competence disqualifies a tribunal on grounds of

actual or imputed bias from adjudicating upon the client's cause. The plain fact of the matter is that courts inevitably form views, often extreme views, favourable or otherwise, about the quality of those appearing before them. Not infrequently they must be at pains to ensure that the true merits or demerits of the rival cases are recognised and given proper weight notwithstanding the respective advocates' skills or lack of them. All this surely is obvious. There is, of course, all the difference in the world between an advocate and his client; likewise between an advocate and a witness. Generally speaking, if a judge has already, for reasons unconnected with the proceedings before him, formed a strong view one way or the other, about a party or his witnesses, then he cannot bring an impartial mind to bear upon the case: he is in a real sense prejudiced and should not sit. Yet even that generality requires qualification: courts do not ordinarily recuse themselves from adjudicating more than once upon a given litigant, whatever views they may have formed about him in the course of earlier proceedings. But none of this applies - would that it did - when one is faced merely with incompetent or unreliable advocates.

58. In saying all this I am not, of course, to be taken as expressing any concluded views of my own with regard to Mr Zaiwalla's qualities as a solicitor and advocate, although I think it right to observe that the present proceedings have revealed what seems to me an alarming succession of serious misjudgments on his part. Prominent amongst these are his immoderate efforts to persuade Mr Harris, initially in March 1995 and then again in June and July 1996, not to give evidence (or at any rate to alter his evidence) in the Race Relations Act proceedings; his unauthorised disclosure of the Steele memorandum to Morison J, and, more troubling still, the use of that memorandum, both before and after that hearing, to threaten libel proceedings and such like; his action in issuing a press release based upon Morison J's draft judgment; and, I should add, his vigorous espousal of several hopeless arguments in the case, some of which only came to be discarded during the actual hearing before us.

59. That brings me to a final footnote which I wish to add to these proceedings. Mr Pickering in the course of his submissions sought to urge upon us the great importance to the international mercantile community who arbitrate in London of justice and fairness always being seen to be done under our processes. That, he says, is one of the main reasons why London commercial arbitrations are so popular and continue to attract the business community from around the world. I have not the least doubt that all of this is perfectly true. But it seems to me that this case requires the making of a very different point. The circumstances here demonstrate to my mind a far greater risk that the confidence of the international business community in our arbitral system will be lost by protracted, rancorous and expensive procedural wrangling than by any failure to maintain the high standards of fairness which, it goes without saying, will always remain an imperative requirement.

Application refused with wasted costs order

MR. M PICKERING QC & MISS C AMBROSE (Instructed by Messrs Zaiwalla & Co., London WC2A 1ZZ) appeared on behalf of the Appellant
MR. A SCHAFF (Instructed by Messrs. Stephenson Harwood, London EC4M) appeared on behalf of the Respondent