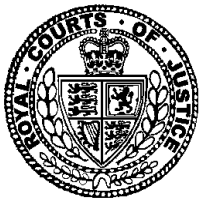

Neutral Citation Number: [2024] EWHC 382 (Comm)

Case No: CL-2023-000844

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

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

Date: 22/02/2024

Before :

MR JUSTICE CALVER

- -

Between :

(1)	**H1**	**Claimant/**
(2)	**H2**	**Applicants**
- and -		
(1)	**W**	**Defendants/**
(2)	**D**	**Respondents**
(3)	**F**	

- -
- -

Paul Stanley KC and James Purchas (instructed by **Browne Jacobson**) for the **Claimants**
David Lewis KC (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Second and Third Defendants**

Hearing dates: 08 February 2024

- -

Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on Thursday 22nd February 2024.

Mr Justice Calver :

1. The Claimants (referred to together as "**the insurer**") seek an order by their arbitration claim form dated 4 December 2023 under *section 24(1)(a)* of the Arbitration Act 1996 ("**the Act**"). The insurer seeks the removal of the sole arbitrator ("W") on the ground of apparent bias, in an arbitration between it and the second and third defendants, being a film company and a film production guarantor (referred to together as "**the insured**").

2. The underlying arbitration relates to a claim under a policy of film production insurance (the "**Policy**") issued by the insurer in connection with the filming of a television series.

3. The grounds of the claim as formulated in the application notice are that:

> "*a. W has made, on more than one occasion, remarks which objectively give the impression that he holds predetermined views as to the credibility of particular witnesses on issues central and/or important to the dispute;*
>
> *b. W has indicated that he is "good friends" with and knows some witnesses (or persons whose evidence is being relied on as hearsay) "extremely well" and that this will impact his assessment of the credibility of those witnesses and the weight to be placed on their evidence which relates to issues central and/or important to the dispute;*
>
> *c. W has subsequently, and at a time when he was aware that the Claimants were concerned about his impartiality, provided an account of his relationship with those persons which is not consistent with those statements;*
>
> *d. W made remarks indicating that he did not intend to listen with an open mind to any cross-examination of expert witnesses;*
>
> *e. W raised, without having any proper basis to do so and in a manner giving rise to the impression that he had formed a predetermined adverse view, questions about whether one of the Claimants' witnesses was being paid to give evidence, without raising any such question about the [Second and Third] Defendant's witnesses and where that witness's evidence addresses the [Second] Defendant's investigation into the incident and what he discovered in that investigation which is a central and/or important issue in the dispute;*
>
> *f. W indicated a predisposition not to take into account evidence given by that same witness to be called by the Claimants on the ground that he had "switched sides" and behaved*

unethically when that is contrary to the evidence contained in that witness's own witness statement;

g. W made a negative comment about the behaviour of the Claimants' other witness who is also a central and important witness to the knowledge of the [Second] Defendant's production crew which is an important issue in the dispute;

h. W identified to the Claimants certain witnesses that he considered would be helpful to their case if they attended the liability hearing;

i. W stated, without hearing his evidence, that the Claimants' underwriting witness was "not going to add anything" to the case when his expert evidence relates to central and/or important issues in the dispute;

j. Generally, in conducting the proceedings and in particular during a procedural hearing on 23 November 2023, W has given an impression of predisposition towards the [Second and Third] Defendants and a willingness to accommodate them without fairly taking account of the Claimants' position."

4. However, by the time of the hearing before me, the grounds had narrowed considerably and the more concise complaint focussed upon the observations made by W at the "**Second Procedural Hearing"** which the insurer submits gives rise to justifiable doubts about the arbitrator's ability to assess the witness evidence impartially. Specifically, the insurer complains that statements made by W, concerning his knowledge of the insured's factual and expert witnesses, give rise to an apprehension that he has pre-determined favourable views of those witnesses and pre-determined negative views of the insurer's witnesses. They also complain about the inconsistency of explanations given by W as to the nature and extent of his relationships with the insured witnesses.

5. The insurer makes clear that it does not contend that W is actually biased. Its case is put on an objective basis, namely that a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased (applying the test in *Halliburton Co v Chubb Bermuda Insurance Ltd* [2021] AC 1083 at 1111 per Lord Hodge).

6. The insurer seeks an order:
   (1) pursuant to *section 24(1)* of the Act, that W be removed as arbitrator;
   (2) pursuant to *section 24(4)* of the Act, that the Court should order that W be entitled to payment of his fees up until the conclusion of the Second Procedural Hearing on 23 November 2023, or alternatively make such order as it thinks fit with regard to his entitlement to fees and expenses or the repayment of any fees or expenses already paid;
   (3) that the second and third defendants pay its costs.

The Policy of Insurance

7. The Policy was issued by the insurer to the insured in January 2018. It is governed by English Law and provides for arbitration in London by a sole arbitrator who is to be "*an experienced practitioner in film or television programme production, as appropriate. If agreement cannot be reached on a suitable arbitrator, one will be chosen by the chairperson or president of the film or television production industry body as appropriate*".

8. The British Film Institute nominated W as the Arbitrator on 21 October 2022, after a dispute between the parties as to the appropriate arbitrator.

9. The relevant part of the Policy is Section A which covers expense incurred by a film production company or other named insured if a specified actor suffers injury which delays the film production.

10. Under the section headed "Cover" the Policy provides as follows:

> "*We will pay for the extra expenses which result solely and directly from the death or bodily injury occurring, or illness first becoming apparent:*
>
> > *i. of the named person during the currency of their contract with you in respect of the insured production or;*
> >
> > *ii. of any other person engaged by you to appear in or work on the insured production, during the currency of their contract with you, up to a limit of DKK: 100.000, after deduction of the excess*
>
> *Alternatively in the event that principal photography is reasonably and necessarily abandoned as a result of the death or bodily injury or illness of the named person we will reimburse you for the actual costs incurred (excluding insurance premiums) up to the date on which the decision is taken to abandon.*
>
> *Cover will be limited to extra expenses resulting from accidental death and accidental bodily injury only for each named person until we have approved their medical information. If we require a medical examination, it is to be completed no more than four weeks before the first camera day.*
>
> *The amount we will pay in settlement of a claim will never be more than the amount insured.*"

11. Under the "Exclusions" section of the Policy, it is provided that:

> "*We do not cover:*
>
> *…*

> *2. death, bodily injury or illness directly or indirectly caused by or resulting from:*
>
> *a. taking part in any hazardous activity…*"

12. Under the "Conditions" section of the Policy it is provided that:

> "*These conditions apply to all sections of this insurance. You must comply with all the requirements in the following conditions.*
>
> *1. You, your agents and your employees must:*
>
> *…*
>
> *b. exercise due diligence and take all reasonable steps and precautions to avoid or diminish and accident, injury, loss or damage, or any circumstance likely to give rise to a loss or claim, insured under this policy…*"

Background and Arbitration Proceedings

13. The background to this dispute is as follows.

14. On 19 May 2018, a stunt was being filmed which required the lead actor, JO, to throw a lit Molotov cocktail which was in a breakaway bottle containing flammable liquid. The scene involved a stunt actor lighting the Molotov cocktail, JO grabbing it from her, and then throwing it. In the second attempt to film the scene, the bottle broke in the lead actor's hand. His face and neck were badly burned, and the filming schedule was delayed as a result.

15. On the same day, the insured presented a claim to the insurer under Section A of the Policy for the anticipated extra expense arising from the delayed production, which I was told by Mr. Stanley KC, counsel for the insurer (together with James Purchas) amounts to a claim of around £3m.

16. On 27 June 2018, the insurer rejected the claim and declined to provide an indemnity. Two grounds were given for the rejection:

    (1) The insurer maintained that the claim fell into exclusion 2(a) of the Policy by reason of the fact that, it said, the lead actor's injury was the result of his participation in a "hazardous activity" ("**the exclusion issue**");
    (2) The insured had breached condition 1(b) of the Policy in that its agents and employees had failed to "*exercise due diligence and taken all reasonable steps and precautions to avoid or diminish an[y] … circumstance likely to give rise to a loss or claim under the Policy*" ("**the breach of condition issue**").

17. The insured challenged this denial of liability and eventually, on 30 August 2019 their solicitors, Quinn Emanuel ("**QE**") wrote to Browne Jacobson LLP ("**BJ**"), solicitors for the insurer, commencing this arbitration and nominating [CA] from the film production

industry as the sole arbitrator. BJ responded by letter dated 23 September 2019 and instead proposed (contrary to the terms of the arbitration clause) that the parties agree to appoint senior counsel with experience of acting as an arbitrator in media and film disputes, or alternatively a lawyer with media production experience.

18. The insured did not agree to this and the parties were unable to resolve their differences as to the appropriate arbitrator to appoint. Finally, by letter dated 22 April 2022, QE nominated 5 candidates to act as sole arbitrator, including W, whose expertise was described to be in film or television programme production, rather than in law. In a further letter, on 16 June 2022, it was stated "*W does not have experience in sitting as an arbitrator, but has been involved in three arbitration proceedings*" (presumably as a witness).

19. The parties were not able to reach an agreement. The question of the appointment of an arbitrator was referred to the British Film Institute. On 21 October 2022, the British Film Institute nominated W.

20. On 29 June 2023 the parties agreed W's Terms of Appointment. By the agreement the parties confirmed that they waived any objection to the appointment of the Arbitrator on the grounds of potential conflict of interest and/or lack of independence or impartiality in respect of any matters known to them at the date of the agreement.

21. On 7 July 2023, the insured served its Statement of Claim in the arbitration proceedings, maintaining that the harm suffered by JO and the resulting damage to the insured are within the scope of the cast insurance in section A of the Policy. In particular, the insured pleaded as follows:

    (1) Paragraph 25:

    > "*In Sweden, it is the established practice that the stunt coordinator is in charge of safety on the set. The insured retained as an independent contractor an experienced and well regarded stunt coordinator, [SS], to assume that responsibility. The stunt coordinator determined that shooting the scene was safe. In addition, The insured retained safety and security personnel who were present on set.*"

    (2) Paragraph 37:

    > "*As scripted and planned, the scene was not a "hazardous activity" under any interpretation of the term – [JO] was to bowl a bottle of water along the street. On the set the prop and the action were independently changed without the knowledge or authorisation of the insured or its producer. The unforeseen, unauthorised acts of third parties -including those that may cause injury to cast – are one of the chief risks against which production insurance is supposed to protect. If a third party's unforeseen and unauthorised acts cause injury during shooting of an otherwise safe scene, the scene does not become "hazardous" as a result so as to exclude coverage under a policy of production insurance. Furthermore, the stunt coordinator,*

> *who was responsible for safety on the set determined that the scene was safe, and the insured was entitled to rely on him (even if he was wrong). The exclusion on which the insurer relies to avoid payment does not apply.*"

(3) Paragraph 40:

> "*The insurer also denied the claim on the ground that the insured purportedly did not take reasonable precautions to avoid injury on the set. However the insured hired a well regarded, experienced stunt coordinator to ensure safety on the set. And, in this particular situation, the insured and the producer understood from the script and the production meeting that there was no hazard and the only issue for [JO] was a lit wick on a bottle of water which was addressed by the use of fire retardant clothing and having safety personnel on the set. The prop and the action got changed on the set, again without the knowledge or authorisation of the insured or the Producer. Therefore, the second purported ground for the insurer's refusal to pay on its policy does not apply either.*"

22. By its Defence served on 7 August 2023, the insurer pleaded at paragraph 35.1 that

> "*The established practice in Sweden, as elsewhere in the world, is that the producer is responsible for the overall safety of both cast and crew. In the context of stunts there should be a risk assessment completed for each piece of individual action, prepared by (or in conjunction with) the stunt coordinator which is then approved and signed off by the producer*".

23. In their Reply served on 25 September 2023, the insured pleaded in particular at paragraph 11.1.3 that:

> "*The activity here was not dangerous or hazardous as scripted. It was an accident. The accident resulted from the acts of third-party contractors of which the insured was not aware. The insured therefore was not aware of the danger even at the time of the accident itself and it certainly was not aware of it when the policy was taken out.*"

And at paragraph 19.2.4(c) and (f):

> "*The insured hired a reputable stunt coordinator, [SS], to oversee safety, and the stunt coordinator oversaw the shooting of the scene…*
>
> *The insured was not required to add to these precautions.*"

24. A four day liability hearing to determine the question of whether the insurer was liable to indemnify the insured under section A of the Policy was set to commence on 5 December 2023 ("**The Evidential Hearing**").

25. However, before that a procedural hearing ("**The First Procedural Hearing**") was held on 13 October 2023. W made various directions including that the parties were to exchange witness statements by 27 October 2023, and the date for exchange of expert reports was set for 10 November 2023.

26. At that hearing, the insured identified the expert evidence that it intended to adduce, which included: "*Market practice in Swedish film and television production in particular the practice in Sweden as to whether the stunt coordinator is responsible for safety on set*."

27. It follows that the issue of whether the stunt coordinator or the insured had ultimate responsibility for safety on set is a central issue in the arbitration, and it bears upon both pleaded defences, namely the exclusion issue and the breach of condition issue.

28. On 22 October 2023 W wrote to the parties identifying 12 individuals he wished to be available at the Evidential Hearing to answer questions.

29. On 27 October 2023, the parties exchanged witness statements. Of the 12 witnesses identified by W, witness statements were provided for two.

30. On 10 November 2023, expert reports were exchanged. The insured submitted three expert reports from PR, JJ and PS. JJ was put forward by them as an expert in Swedish practice on the allocation of responsibility for safety on set and the prevalence of risk assessments in the film industry in Sweden in 2018. He is a very experienced Norwegian film and television producer.

31. In his "witness statement" JJ stated in particular:

> "*7. When a film requires special effects which could involve a degree of risk the producer will hire a professional stunt coordinator with a proven track record to supervise the shooting of the scene and be responsible for the safety of the actors on the set. Even if producers have the final responsibility for the production it will be outside of their field of expertise to assess the degree of risk involved. They will depend on the specialist stunt coordinator to assess the risk and supervise the scene(s).*
>
> …
>
> *9. Just to have mentioned it on my latest film shooting in Latvia, the Latvian line producing company introduced a new form entitled risk assessment form and instruction which is to be signed by the line producer, production manager, risk assessor, and safety adviser. This is the first time such a document has been used on any film that I am aware of.*"

32. The insurer submitted two expert reports from JY and RA. RA is a stunt expert who has worked in the film industry as a stuntman and stunt coordinator for 30 years. The insurer also relies upon a witness statement of JH, who appends to his statement a report of the Swedish Work Environmental Authority ("**SWEA**"). JH had originally been tasked by *the insured* to investigate how the accident happened. Together, RA and JH give evidence that the ultimate responsibility for ensuring the safety of the crew and cast is that of the producer.

33. JH states in particular:

    (1) "*In relation to the safety of scenes where stunts are involved, there should be clear understanding regarding who was responsible for the different tasks. This comes from having clear structures and policies in place, for example in a Production Handbook. A Production Handbook would have a section on who is responsible for general risk assessments and special risk assessments. The CEO is responsible for safety of the production but this is normally delegated to the producer, who has day-to-day control over the production. The producer then sub-delegates things down to the production manager or line producer. There should have been a general risk assessment for that day of filming and a special risk assessment produced by the stunt coordinator for the scene, which should both be attached to the call sheet for the day so that everyone can see them*" (para 34)

    (2) "*… in Sweden it is normally the stunt coordinator who is the safety officer when they are on site and they are in charge of giving directions as to safety and the stunt coordinator can give directions to the SFX coordinator. In a properly managed production, it would be the Stunt Coordinator who would be tasked with producing or arranging for the production of specific risk assessments for all stunts, long in advance, for consideration by the production team, including the line producer and producer and to the extent insurance was to be sought for the filming of such stunts for consideration by insurers*." (para 38)

    (3) "*…what is clear is that there was no risk assessment of any sort produced before the filming nor does it appear that the line producer, production manager or location manager requested one at any point before filming. It was ZP's responsibility as the producer to see that all was done right. That is a central responsibility of the line producer, production manager / location manager who have a certain responsibility to ensure that a separate risk analysis is prepared, since they are the ones who submit the separate risk analysis to the insurance company. The Stunt Coordinator informed us that he did not know this was part of his responsibility*" (para 46)

34. RA states:

    (1) "*The ultimate responsibility for safety on set is always with the producer*" (para 6.1)

    (2) "*The Swedish Union for Performing Arts was quoted as saying "We believe that the ultimate responsibility always lies with the employer. Since the employer sometimes operates in another country, depending on the company's structure, the responsibility for the production in question is delegated to the highest*

producer because he or she controls the project and the company the finances of the project" (para 6.3)

(3) "*The Swedish Union for Performing Arts also states, "The producer is also the person who has to deal with work environment issues and problems that arise on the set. The practice is that the producer's word is law. When a stunt company is engaged in a project for a certain scenery, it is done because the specialist expertise is available at the stunt company. In this way, depending on the nature of the agreement between the different companies, the responsibility can be shared."* (para 6.4)

(4) "*It is wholly irresponsible of the producer to allow filming to commence without first checking whether a risk assessment had been undertaken by the stunt coordinator or SFX coordinator. I am shocked that a stunt as dangerous as this was even allowed to be shot without both risk assessments being prepared and signed off by producer ZP, emailed out to all heads of departments and a copy attached to the back of the days call sheet so everyone on set that day is aware of what is taking place*" (para 7.21)

(5) "*The Swedish Union for Performing Arts (in their comments to the Swedish Working Environment Authority), stated "On the question (to the Swedish Union for Performing Arts and Performing Arts) about who they had requested to see a risk assessment from at the stage shoot, the answer was:*
"It's always the production company that I, in my role as RSO, ask out risk assessments from. If the company were to say that they do not have documented risk assessments of a certain scenery or filming location, I would strongly question why they do not have it and point out that it is their duty to ensure that they are made and that they are available to their staff and safety representatives. How else can they ensure that their employees do not have accidents or an unhealthy working environment?" (para 7.22)

(6) "*It does not appear any clear contractual allocation of responsibility was made to [SE, stunt co-ordinator], about the safety on set, or that he was specifically requested to produce a risk assessment. Had he been asked to produce a risk assessment of what was proposed by the SFX department for this stunt, it would have revealed the obvious dangers of injury*" (para 8.10)

(7) "*From all of my experience gained working as a stuntman and stunt coordinator across the world, I believe that the standard set out in this report is world standard for stunt work*." (para 8.11)

35. JH also exhibited to his statement SWEA's Request for Additional Information of the insured on 20 August 2018 and this was accordingly also before the arbitrator at the Second Procedural Hearing referred to below:

(1) Under the heading 'Allocation of work environment tasks', SWEA noted inconsistencies in the insured's Production Manual concerning responsibility for safety on set:

> "*The production handbook states that the location manager is responsible for general safety on the set during the actual filming, which may seem to conflict with the fact that in the same handbook you also state that the stunt coordinator is the person responsible for safety during the filming…*
>
> *In your response to requirement point 4.1 it states that the production leader and site manager are required to prepare general risk analysis for each filming location, and communicate this through the daily document to the team called daily notification, although the role of site manager is not stated as a role in the existing production manual…*
>
> *Furthermore the production manual contains several other work environment tasks specified for different roles, which are not clear from your answer to requirement point 4.1, for example that "The production manager together with the site manager is responsible for discussing any risks that arise with the safety representative and communicating them to the producer.*"

(2) Under the heading of 'Information' the SWEA state their understanding of the role of producers and stunt coordinators in Sweden:

> "*You write in several places that it is the stunt coordinator who is the security manager when they are on site and that the stunt coordinator's words about the security at the filming site are undisputed. At the same time, it is important to point out that it is always the employer who is ultimately responsible for their employees. For example, although risk assessments and the development of measures are generally a task that the stunt coordinator has the skills to perform, it is up to you as an employer to ensure that this is done.*"

36. Thus, there was disagreement between the parties on several points. In his witness statement Mr. Newbold, the insurer's solicitor, accurately summarises the dispute between the parties in this regard as follows:

> "*26. In the underlying arbitration, [the insured's] position appears to be that in Sweden the responsibility for safety on the set rests exclusively with the stunt coordinator where one has been retained and relies on JJ's expert evidence in this regard.*
>
> *27. The [insurer] disputes this on various grounds:*
>
> *27.1 First as a general point in Sweden and elsewhere retaining a stunt coordinator does not relieve a film production company from the overall responsibility for safety on set. A film production company remains responsible for safety on set and is required to procure adequate risk assessments including from relevant specialists such as a stunt coordinator;*

> *27.2 Second if a production company is going to place any reliance on the third party such as a stunt coordinator to be involved in mitigating risks relating to safety on the set that needs to be set out in writing;*
>
> *27.3 Third on the particular facts of this case the insured did not address in writing with the stunt coordinator any responsibility for undertaking an assessment of the risks and there is a dispute on the facts.*
>
> *….*
>
> *28. While [the insured] refers to statements in JH's report and witness statement consistent with a general position about a stunt coordinator being responsible for safety on the set he does not mention the other aspects of JH evidence explaining the absolute responsibility for safety on the set of the producer, the need for a clear understanding of responsibility for different tasks where stunts are involved or the materials from the Swedish Work Environment Authority that reflect this, which JH sourced.*"

37. In the witness statements exchanged on 10 November 2023, the insured's experts disclosed the extent of their relationship with W as follows:

    (1) PR stated "*I have worked with many of the parties involved in this arbitration. We provided broker services on films managed or produced by W. The insurer is a large Lloyds syndicate and was a competitor but at times our clients would buy cover from Lloyds syndicates and undoubtedly The insurer would have been in the mix. We have provided insurance on numerous films on which F has provided completion guarantees and have dealt with their executives in London and Los Angeles. I have had no prior dealings with the insured".*

    (2) JJ stated "*One of my films was made for the Walt Disney Company. Coincidentally, W was an executive producer of that film. A further two were remade by Hollywood studios with me in a producing capacity. Most of my films were made in co-operation with Sweden's largest company [SF], acting as co-producer, investor and/or distributor. I myself held a key position at SF for eight years*".

    (3) PS stated "*I have worked with some of the parties involved in this arbitration. I previously consulted with F and they also guaranteed completion on some of the films I have produced. I have worked with W on the film … and we have tried to work on a couple of projects since but without conclusion. I have also worked with all three insurance broker that I have asked to advise on this arbitration. I have no prior dealings with The insured, or, to my knowledge with the insurer*".

38. The insurer did not at that stage request any further information of these relationships.

39. On 23 November 2023, the Second Procedural Hearing was held via MS Teams.

40. There is no approved transcript of the Second Procedural Hearing. The court has had the benefit of contemporaneous notes prepared by both QE and BJ. Whilst it is acknowledged that these notes are not as full and informative as a transcript would be, there was no dispute between the parties as to the accuracy of these notes.

41. The note prepared by QE was principally relied on by the parties in oral submissions. However, it was accepted by Mr. Lewis KC, counsel for the insured, that so far as the exchanges concerning JJ are concerned, BJ's note is fuller and accordingly more accurate.

Statements Made at the Second Procedural Hearing

42. According to the Quinn Emanuel note, in the discussion as to which witnesses W wanted to attend, the following exchange took place:

> "*W: Ok look I have 12 witnesses I would like to appear. For me, I don't need to hear any of the expert witnesses. I don't think they will add any value. I know what they are saying. They are exceptional people in their fields. They are the best, but I don't need them to say what is normal on a film. I know what is normal on film.*
>
> *JP (counsel for the insurer): Well there are a number of ways to go about this: we can cross examine; or we can make submissions. You can control what and how this proceeding works, but it is important that the parties aren't shut out from making submissions. You may not accept them but I need to be able to make them.*
>
> *W: Look, if you want to cross examine the expert witness that is fine by me. but I don't think we need to listen to them. I know them all personally extremely well on the insured side. I don't know your expert witnesses. You have an underwriter expert [JY]. But I don't think he adds much.*" (emphasis added)

43. It is clear that what W was saying was that he knew extremely well the three expert witnesses for the insured, that they were exceptional people in their fields and so it was not necessary to call them for cross examination because he would believe what they were saying.

44. Immediately after that exchange, the following exchange took place between the advocates and the arbitrator with regard to JJ (taken from the BJ note, which is agreed by the insured to be accurate other than the reference to "extremely good friends"):

> "*Arb – Three experts [for the insured], [PS] and PR, JJ, I know all three very well, I am extremely good friends with them and GE*[1]*."*

[1] One of the insured's factual witnesses

> *GG (counsel for the Insured) – For JJ, we have him because the insurer said they were going to contest the role of stunt coordinator as being in charge of safety on set – is this still being disputed?*
>
> *JP comments that this has been sprung on him and he needs to take instructions.*
>
> *Arb - JJ - in his report states that the role of the stunt coordinator as being in charge of safety on set - he doesn't need to appear. He is one of the top Norwegian producers and what he says is what I will believe but what he says is not how it operates in the rest of the world. He says stunt coordinator is in charge of safety on set in Scandinavia I absolutely believe what he says. But it's not what happens elsewhere in the world. If that's what he said I would accept that.*
>
> *JP - With respect I hope that you will reserve your judgement until you have heard the evidence and submissions at the hearing.*
>
> *Arb - I will of course reserve my judgement but I have read the statements and I know the professionals. I can say now what I think.*
>
> *JP - Sir I have made the submission so I won't say anymore.*" [emphasis added]

45. The QE note is more terse but to similar effect:

> "*[JJ] – does not need to appear?*
>
> *JP: will take instructions and revert*
>
> *W: [JJ] is one of the top Norwegian producers. He would know.*
>
> *JP Reserve judgment until you have heard the [cross examination]*
>
> *W: Not pre-judging. Stunt coordinator is in charge of safety on set. I can't dispute that. Will believe what he says.*"

46. JH had originally been retained by the insured to investigate how the accident came about. At the insurer's request, he subsequently gave the insurer a witness statement setting out his investigatory findings. This resulted in the following exchange taking place at the Second Procedural hearing according to the QE note:

> "*GG: [JH] is the one who communicated with the SWEA on behalf of The insured before he switched sides… JH was the person who communicated with the SWEA."*

JP: Look, JH addresses this. He says that he got this document [from SWEA] two days before he provided his witness statement. I think what we will have to do is address these documents in our opening submissions.

W: Ok. So look, why is he working for the insurer?

JP: He is not working for the insurer; we think that he is, rather nobly, coming before you to tell you what his view is.

W: I think there is a conflict of interest there.

GG: Absolutely. He didn't nobly come forward. He has switched sides. As you will see when you read his statement, his statement is unreliable. But I think you hit the nail on the head. It is highly inappropriate - the entire thing. They knew this was an issue. Apparently they contacted him. I doubt he reached out to Browne Jacobson - they contacted him. And it is highly inappropriate. And there are other issues as to [JH].

W: Well look. From my point of view, I believe that his evidence to either party should be disallowed. I don't think that we should allow it. He cannot change sides half-way through. I think it is absolutely wrong.

JP: It is not privileged, sir. Secondly, he was brought in as an independent regulator. What he has produced was sent to the regulator. There is no conflict. He has material evidence as to what was said by people at the time. That is highly relevant.

W: Well, when I saw his report I thought it was highly relevant. But I had no idea he is now working for you.

JP: Well, that is unfair. And one has to ask why he is doing that.

W: With due respect he was not there. Why is he a witness?

JP: Well he is a witness as to what was said.

W: Look, what he said in his statement, his examination, and interviewing after the event is very relevant. But now he has switched sides. I find his action incredible.

JP: No doubt he will be cross examined. But might I suggest you give him at least a chance?

W: But Mr Purchas, you are a fair man, surely you can see that if someone has switched sides half-way through…

JP: I don't see it that way. He was an employee retained to conduct an investigation. The insurer have called him as a witness. Not because he is…

> *W: Well look he is a gun for hire, it seems to me. Has any payment been made to him?*
>
> *JP: Nothing conditional on his evidence.*
>
> *GG: You didn't answer the question that was asked. Nothing contingent on his testimony. But he is being paid.*
>
> *W: But look, what is not normal is for him to switch sides.*"

47. The BJ note is to similar effect:

> "*Arb – JH did a report on the accident on behalf of the insured and now he works for the insurer?*
>
> *JP – He has agreed to come to the tribunal to present his recollection of the investigation, so that the truth is put before you.*
>
> *Arb – I find that inappropriate. Is there not a conflict of interest? Wrong to allow JH's evidence at all because he is in conflict.*
>
> *GG - He has "switched sides". His statement is unreliable.*
>
> *Arb – from my point of view, his evidence should be disallowed. He has had privileged information from the insured.*
>
> *JP – He was brought in as an independent investigator and he has nobly offered to come forward to speak the truth. There is no property in a witness. He has material evidence as to what was said by people at the time.*
>
> *Arb – When I saw his report, I thought that it was "highly relevant". He is now "working" for the insurer, finds his situation incredible "James you are a reasonable man, surely you can see that this is inappropriate?"*
>
> *JP – I'm afraid I don't see that and this is not true. What he said in his examination of the event and interviewing. I ask you to give him a chance to explain and be cross examined.*"

48. This exchange shows the inexperience of the arbitrator. The fact that the insurer was calling this important witness was no basis upon which to "disallow" his highly relevant evidence. The arbitrator was rather unfortunately egged on by the insured's representative's suggestion that it was "highly inappropriate" for JH to be called by the insurer to give evidence. It plainly was not.

49. Next, on 24 November 2023, BJ wrote to W to request further information about his relationship with the insured's witnesses.

50. Disclosure was provided by W on 25 and 27 November 2023. He listed PR, PS, JJ and GE, all being witnesses for the insured, as witnesses known to him, as he had made clear at the Second Procedural hearing. He stated that he had worked with each on at least one film and had no shared financial interests with any of them. Reflecting on the industry he considered that he would be surprised if any experienced film producer had not either known and/or worked with some of the expert witnesses in the arbitration.

51. In W's email on 27 November 2023, he explained these relationships further.

52. As to GE, W stated "*When GE was a senior director of F I would have meetings with him regarding bonding pictures I was producing. I estimate that I have met him on about five occasions over 30 years. I have never met him socially*."

53. As to JJ, W stated "*I executive produced one film with him. It was a Disney production… The film was produced in 1990 and I have seen him socially twice since then*."

54. As to PR, W stated "[*PR*] *was the senior broker at several insurance companies that insured films. I would meet with him to arrange various insurance policies on films that I was producing. I have never met him socially*."

55. As to PS, W stated "*I was Production Manager and Assistant Director on one film with him. … The film was produced in 1977. [PS] has asked me several years ago to Executive Produce another film which never materialised. I have met PS socially on one or two occasions since 1977*."

56. On 29 November 2023, the insurer confirmed it would be issuing a section 24 application, which it did on 4 December 2023, and the parties agreed to vacate the Evidential Hearing.

57. In Response to the application, on 12 January 2024 each of GE, JJ, PR and PS gave witness statements in which they explained the nature of their dealings with W. In particular:

    (1) GE explained that his relationship with W was "*exactly what one would expect from two senior professionals working within a relatively tight-knit industry".* He confirmed that he has "*similar relationships with other senior producers of W's calibre."* He had professional interactions with W when W was producing two particular films in 1992 and in 2005 respectively. GE does not recollect any contact since he retired in 2008.

    (2) JJ stated that he and W worked together on a single film - 'Shipwrecked' in 1990 - and have met twice in the 34 years since then. JJ disclosed their work together in his original report.

    (3) PR confirmed that he was a film and TV insurance broker in the UK prior to his retirement in 2009. During the course of over 40 years, he came to know and do business with most producers in the UK and elsewhere. He and W would meet to arrange insurance for films the Arbitrator was producing, but he does not think this happened after 1996 – he describes their relationship as a "*professional business relationship"*. He disclosed having provided broker services on films managed or produced by W in his original report. PR recalls them attending a

luncheon 5 or 6 years ago. He has not provided any broking services for W since 1996. He would not say that they are friends.

(4) PS describes his relationship as "*typical of many of my relationships with other prominent movie and television producers (and there are numerous other producers with whom I would say I have much closer association)".* He and W worked together on a single film forty-seven years ago, in 1976/1977. PS disclosed this in his original report. He explored recruiting the Arbitrator for a film in 2016 but "*the pieces did not come together and the film was abandoned"*: They were not friends and had only met a couple of times socially in the course of his life. They last met in 2020.

Legal Principles

58. By section 1 of the Act:

> "*The provisions of this Part are founded on the following principles, and shall be construed accordingly—*
>
> > *(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense…*"

59. Section 24(1) of the Act:

> "*(1) 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;*"

60. The duty of impartiality is enshrined in s.33 of the Act:

> "*(1) The tribunal shall*
>
> > *(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and*
> >
> > *(b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.*
>
> *(2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it.*"

61. In cases (such as here) where there is an allegation not of actual bias but of apparent bias, the relevant legal test[2] is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased:

> "*"Fair minded" means that the observer does not reach a judgment on any point before acquiring a full understanding of both sides of the argument. The conclusions which the observer reaches must be justified objectively and the "real possibility" test ensures the exercise of a detached judgment… Then there is the attribute that the observer is informed. It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographic context. She is fair minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment.*"

An informed observer "*will adopt a balanced approach*" and "*is neither complacent nor unduly sensitive or suspicious.*"

62. Disqualification of an arbitrator for apparent bias is not a discretionary decision reached by weighing various relevant factors in the balance such as inconvenience, costs and delay. Either there is a real possibility of bias or there is not *(AWG Group Ltd v Morrison [*2006] EWCA Civ 6 at [6]). In the absence of an obvious answer, "*if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal*" (*Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 at [25]).

63. In applying the test for apparent bias, the Supreme Court in *Haliburton* explained that there are matters which must be specifically taken into account in the context of an arbitrator. So far as they are potentially relevant to the present application, they include:

    (1) Given the private and confidential nature of arbitration and limited discovery, there is a premium on frank disclosure (*Halliburton* at [56]).

    (2) An arbitrator is not subject to appeals on issues of fact and often not on issues of law (*Halliburton* at [58]).

    (3) There is a marked difference between a judge who is the holder of a public office, funded by general taxation and has a high degree of security of tenure of office and therefore of remuneration and an arbitrator who has a financial interest in obtaining further income from other arbitral appointments and so may have an interest in avoiding action which would alienate the parties to an arbitration (*Halliburton* at [59]).

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[2] *Halliburton* (supra) at [52]-[53], applying *Helow v Secretary of State for the Home Department* [2008] 1 WLR 2416 per Lord Hope at [1]-[3].

(4) Arbitrators may have very limited involvement in and experience of arbitration (*Halliburton* at [60]).

(5) The professional reputation and experience of an individual arbitrator is a relevant consideration for the objective observer when assessing whether there is apparent bias (*Halliburton* at [67]).

(6) The objective observer is alive to the possibility of opportunistic or tactical challenges (*Halliburton* at [67]).

64. The context of the industry in which the appointment takes place is also relevant to the application of the test:

(1) A fair minded and informed observer would understand that arbitrators in a relatively small industry[3] are likely to have formed acquaintanceship with others in that industry in the course of their work (*Africa Sourcing Cameroun Ltd v LMBS Societe Par Actions* [2023] EWHC 150 (Comm), [2023] 1 Lloyd's Rep 627 at [89] per Sir Ross Cranston).

(2) It can fairly be assumed that one of the reasons the parties have agreed a trade/industry arbitrator is for their direct knowledge of the trade/industry; there is every likelihood that at some time the arbitrator will have had commercial dealings with one or both parties to the dispute; that is something the parties must be taken to have had in mind; most parties would take a fairly robust view of such matters and not regard them as of any significance when considering an arbitrator's ability to act impartially: *Rustal v Gill & Duffus* [2000] 1 Lloyd's Rep. 14 at 18 rhc, per Moore-Bick J (as followed in *Argonaut Insurance Co & Ors v Republic Insurance Co*. [2003] EWHC 547 (Comm) per Steel J).

(3) Where the parties have agreed to the appointment of a sole arbitrator because of his technical skill and knowledge, procedural responses to a case involving relatively complicated evidence might not necessarily reflect the kind of management regime that would be imposed by a King's Counsel fulfilling that function: *Norbrook Laboratories Ltd v Tank* [2006] EWHC 1055 (Comm), [2006] 2 Lloyd's Rep. 485 at [153] per Colman J.

(4) However, there must be an objective assessment of the evidence presented. An arbitrator may use his personal knowledge (of the industry) to evaluate the evidence and submissions before him, but this cannot supplement or supplant evidence (*Fox v Wellfair Ltd.* [1981] Lloyd's Rep. 514, 522).

65. Mr. Lewis KC for the insured relies upon the fact there is no automatic appearance of bias when an arbitrator expresses a preliminary view. In *Bubbles & Wine Ltd v Lusha* [2018] EWCA Civ 468 at [34] Leggatt LJ stated:

> "*There is nothing wrong with a judge indicating provisional views, and advocates are generally grateful for such indications*

[3] As is the case here

> *as it gives them an opportunity to correct any misconception which the judge may have and to concentrate in their submissions on those points which appear to be influencing the judge's thinking. The expression of such views could only be thought to indicate bias if they are stated in terms which suggest that the judge has already reached a final decision before hearing all the evidence and argument*".

66. Moreover, he points out that an arbitrator may display conduct which is "palpably bad" without giving rise to an apprehension of bias. Behaviour may be 'inept' and shows lack of due forethought but not occasion a real possibility of apparent bias: *Bubbles & Wine Ltd*, [35] per Leggatt LJ.

67. Mr. Lewis KC argues that there is a crucial distinction between a *predisposition* towards a particular outcome and a *predetermination* of the outcome; the former is consistent with a preparedness to consider and weigh factors in reaching a final decision; the latter involves a mind that is closed to the consideration and weighing; *Jackson v Thompson Solicitors* [2015] EWHC 218 (QB) at [15] per Simon J. He contends that this distinction is material in the instant case.

68. Mr. Stanley KC, on the other hand, emphasised the fact that an arbitrator should not be influenced in expressing his views by extraneous matters, in particular by assessing witnesses' evidence and their credibility by reference to his previous knowledge of them. An arbitrator can express a view as long as they do not close their mind to the submissions and evidence before them:

> "*[J]ustice is portrayed as blind not because she ignores the facts and circumstances of individual cases but because she shuts her eyes to all considerations extraneous to the particular case*" (Locabail, at 471).

69. It follows that if there is a real possibility that extraneous factors have played a part in the arbitrator's decision, by the arbitrator taking into account something that should not legitimately be part of the decision making process at all, then the fair minded and informed observer would consider that there is a real possibility of bias.

Analysis

70. In light of the witnesses' evidence in response to this claim, there could not be any justifiable doubts about W's impartiality based purely upon the degree of professional acquaintance shown by the details of his past relationships with GE, JJ, PR and PS, as described above. Such commercial dealings are entirely to be expected of "*an experienced practitioner in …television programme production"* who has been in the market for some time and the parties must be taken to have had this in mind at the time of the arbitration agreement. The fair-minded and informed observer would understand this fact. Indeed, Mr. Stanley KC made clear that "*having seen the objective facts about W's relationship with the witnesses, we accept and agree that objectively speaking relationships of that sort would not be expected to be troublesome*."

71. Accordingly, despite the overly comprehensive nature of the grounds of challenge in the Arbitration Claim Form, Mr. Stanley KC sought, ultimately, to rely principally upon two aspects of the arbitrator's conduct in support of the application:

    (1) The first concerned the way in which he criticised JH for supposedly "switching sides".

    (2) The second concerned the remarks he made about how he would approach the evidence of the expert witnesses both generally, and in particular in the case of JJ.

JH

72. I do not consider that the remarks which W made about JH would lead a fair minded and informed observer, having considered the facts in the present case, to conclude that there was a real possibility that the arbitrator was biased. W's remarks are unfortunate and misguided but, as I have already stated, he was led down the path of wrongly criticising JH by the insured's lawyer. Whilst at one stage he says that JH's "highly relevant" evidence "should be disallowed", he does not in the end make any ruling/direction excluding JH's evidence by reason of his supposedly "switching sides". Whilst the arbitrator's approach to JH's evidence is undoubtedly concerning, on balance I do not consider that his remarks in this respect sufficiently demonstrate any animus against the insurer or a closed mind as opposed to a lack of experience on his part which, if necessary, could be corrected at the Evidential Hearing at which JH was to give his evidence.

The expert witnesses generally and JJ in particular

73. However, so far as the remarks which W made about the witnesses generally and in particular JJ, in my judgment a fair-minded and informed observer, having considered the facts in the present case, would conclude that there was a real possibility that W was biased. My reasons for so concluding follow.

74. Whilst ultimately agreeing that the parties could call their witnesses, including their expert witnesses and have them cross-examined, the arbitrator expressed a clear view that it was not necessary for them to be called ("*I don't think we need to listen to them*") because "*I know them all personally extremely well <u>on the [insured's] side</u>*". He coupled this remark with the observation that he didn't know the insurer's expert witnesses. Seen in context, the suggestion that it was unnecessary to call any expert witnesses was plainly not an expression of a balanced and impartial view, or merely a concern about the hearing over-running, or an attempt by the arbitrator to impose an orderly and economical procedure on the parties[4], as Mr. Lewis KC suggested. Rather, a fair minded and informed observer would consider that the arbitrator was saying that he would accept at face value the evidence of <u>the insured's</u> expert witnesses because he knew them to be "*exceptional people in their fields*". He was thereby pre-judging the merits of the dispute. The fair minded and informed observer would likely consider that his prejudice in favour of the insured's expert witnesses would prevent an impartial assessment of the evidence

[4] See Norbrook Laboratories v Tank [2006] 2 Lloyds Law Reports at [153]

of the insurer's witnesses[5]. The fact that the arbitrator reluctantly agreed that they could be cross-examined would not assuage the concern of the fair minded and informed observer that after cross examination he would still be materially influenced (in their favour) by this extraneous consideration.

75. This extraneous influence upon the exercise of W's judgment is best illustrated by the very concerning exchanges which took place concerning JJ. It is clearly essential that the arbitrator should keep an open mind as to whether or not the producer is ultimately responsible for safety on the set and whether the position in Sweden is different to the rest of the world in that respect. As I have already explained, that is an important issue in the arbitration. However, I consider that the exchanges with W concerning JJ (set out above) would suggest to a fair minded and informed observer that the arbitrator did not have an open mind on this topic by reason of his extraneous view of the reputation of JJ. He said "*what [JJ] says is what I will believe*" immediately after — and therefore because - "*he is one of the top Norwegian producers*". Because he is one of the top Norwegian producers - and despite the fact that the arbitrator's own understanding was that the stunt coordinator is not in charge of safety on set (but rather the producer is) – the arbitrator is making clear that he would believe what JJ says about the (different) position in Sweden, come what may.

76. The appearance of bias in the sense of appearing to pre-judge this issue by reference to JJ's status, was not cured by the arbitrator saying, in response to the protestation of junior counsel that he should first hear the evidence before making up his mind, "*I will of course reserve my judgement*", because he then immediately added: "*but I have read the statements and I know the professionals. I can say now what I think* ." A fair minded and informed observer would not be reassured by this further statement at all; rather it would reinforce in their mind that regardless of what might happen when the evidence is tested in cross-examination, the arbitrator would judge that evidence by reference to his personal knowledge of the status of JJ (and the other experts called by the insured). It is the very opposite of the arbitrator keeping an open mind. At the very least, there is "*real ground for doubting the ability of the arbitrator to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him*", per *Locabail* at [25]. In any event, as Colman J stated in *Norbrook* (supra) at [155], the arbitrator's "*stated determination to put matters "out of his mind" is … no answer. The essential attribute of objective impartiality is not to be achieved by subjective self-discipline.*"

77. Indeed, it was common ground before me that, consistently with what the arbitrator stated in this passage ("*I have read the statements"*), before the Second Procedural Hearing began the arbitrator had indeed read all of the witness statements and expert reports served by the parties. He would therefore have been aware of the fact that whether (i) the insured or (ii) the stunt co-ordinator was responsible on set for the safety of the cast and crew in the case of a stunt in Sweden, was a highly contentious issue between the witnesses[6] (and the parties[7]). This was certainly not a case, as submitted by Mr. Lewis KC, where *"[JJ's] evidence was not seriously contradicted at the time of the hearing.*" To state that he would believe the insured's expert because he knew him and because he is one of Norway's top producers before (i) that evidence had even been called and tested

[5] See *AMEC Capital Projects v Whitefriars City Estates* [2005] 1 All ER 723 at [17] per Dyson LJ.
[6] In particular RA and JH, who also exhibited SWEA's contrary view.
[7] On the face of the pleadings, as set out above.

in cross-examination and (ii) he had heard what the insurer's witnesses had to say on that topic, undoubtedly gives an appearance of bias.

78. Nor do I consider that the aforementioned concerns are obviated by the fact the insured's junior counsel said, in response to a question from the insured's lawyer, that he would need to take instructions on whether the issue as to who was responsible for safety on set was still being disputed, because it had been sprung upon him. By this exchange, it would have been made clear to W that there *was* indeed a live dispute as to this issue (with no indication that it had been abandoned), and yet W still went on to make the unfortunate remarks that he did to the effect that whatever JJ says he would believe.

79. This is not, as Mr. Lewis KC sought to argue, a case (like *Jackson v Thompson* [2015] EWHC 218) where an arbitrator is merely indicating a predisposition towards a particular outcome, giving the parties an opportunity to persuade him that his initial assessment of an issue may be wrong. Nor is it a case like *The Elissar* [1984] 1 Lloyd's Rep 206, where an arbitrator is expressing a provisional or tentative view on a point in issue upon which he has not heard full argument. Nor is this a case like *The Sur* [2019] 1 Lloyd's Law Reports 57 at [165], of the arbitrator simply making a passing comment in the cut and thrust of the arbitral process. It is a case where the arbitrator gives the firm impression of having already allowed extraneous, illegitimate factors to influence his assessment of evidence which he has not yet heard and, moreover, of not even realising that that is an unfair approach to adopt. W's remarks "*suggest a mind which is closed to the consideration and weighing of relevant factors*"[8]. That is particularly concerning in a case such as this, where the arbitrator is a sole inexperienced arbitrator (without the tempering influence of two other co-arbitrators), making findings of fact which are not susceptible to appeal (his decision would only be subject to a *section 68/69* challenge).

80. The serious problem which the arbitrator's statements at the Second Procedural hearing creates is that when he makes his findings on the merits after having heard the witness evidence, there will be no way of knowing for sure (unless he were expressly to repeat these statements) whether he allowed his professed admiration for, and personal knowledge of the reputation of the insured's expert witnesses to unfairly influence his findings on the merits generally (and his findings as to which of the witnesses' evidence he accepted). The strong suspicion will inevitably be that he did; and the fair minded and informed observer would accordingly conclude that there was at least a real possibility that the arbitrator was biased.

81. Of course, in a tight-knit industry, the parties may be taken to have expected that their chosen industry arbitrator might know of the reputations of certain of the factual or expert witnesses, and might have worked with them before. If W had said only that he knew JJ having once worked with him before, or that JJ had a high reputation in the industry, then there could be no complaint. However, the parties would certainly not expect their chosen industry arbitrator to state (particularly where one of them, the insurer, is not a member of that close-knit industry) that because he knew "the professionals" called by the insured, and in particular because he knew JJ and knew of his reputation, he would believe what he/they said before he had even heard him/them cross-examined and before he had heard the insurer's witnesses ("*I know all three [of the insured's experts] very well, … what JJ said is what I will believe.. I absolutely believe what he says.. if that's what he said I*

[8] *Jackson* at [15].

would accept that… I know the professionals. I can say now what I think "). That gives the appearance of bias.

82. It is one thing to express a preliminary view as to the merits of a dispute or the credibility of a witness after hearing the parties' evidence; it is another matter altogether to express such a view, preliminary or otherwise, before even hearing the witnesses, based upon the extraneous fact of purporting to know a witness by reputation or acquaintance.

83. Put another way, the parties might expect the arbitrator to use his special knowledge of the film industry to understand the evidence that is given at the arbitration and any usages of the trade. But they would not expect him to use his special knowledge to pre-determine that he would prefer the evidence of an industry insider whom he knew (both personally and by reputation) over one whom he did not know. Rather, they would expect him to undertake an objective assessment of the evidence after he had heard it and heard it tested in cross examination.

84. As I have explained, I do not consider that any of these conclusions are in any way affected by the various authorities relied upon by Mr. Lewis KC. The outcome of an allegation of apparent bias in a particular case very much depends upon the precise factual circumstances which obtain in that case.

85. In particular, I do not consider that it is an answer to the appearance of bias in this case that the arbitrator said other things which might be interpreted as his being non-partisan *overall* or as being unhelpful in a particular, and different, respect to the case advanced by the insured[9]. His saying that he wanted everyone to be heard in full, or that he was unhappy, for example, that one of the insured's factual witnesses (AB, the director) was not going to attend, would not reassure the fair minded and informed observer that he would not, nonetheless, be materially influenced in his assessment of the expert evidence by the extraneous consideration referred to above. The arbitrator's duty is to determine the dispute fairly and impartially, and his observations concerning the way he would assess the expert evidence fall well short of compliance with that duty.

Conclusion

86. In all the circumstances I consider that W should be removed as arbitrator pursuant to *section 24(1)* of the Act. Pursuant to *section 24(4)*, I consider that he should be paid his fees and expenses up until the conclusion of the Second Procedural hearing on 23 November 2023.

Anonymisation

87. Finally, I add that the Court has chosen to anonymise the identities of the parties, the witnesses and the arbitrator in this judgment.

88. The relevant legal principles in this respect were set out by Moulder J in *Radisson Hotels Aps Danmark v Hayat Otel* [2023] EWHC 1233 at [9] to [12]:

[9] Such as his saying that if WM did not attend to give evidence "*I will mark that up accordingly*"; or describing AB as "*flaky*".

(1) The principles as to anonymisation have been considered to be the same as those for publication (*Radisson* at [9]);

(2) When considering whether to publish a judgment in an arbitration claim, the court must weigh the factors militating in favour of publicity against the desirability of preserving the confidentiality of the original arbitration (*Radisson* at [10] citing *Manchester City Football Club Ltd v Football Association Premier League Ltd* [2021] EWCA Civ 1110 at [62]);

(3) In general the imperative of open justice, involving as it does the possibility of public scrutiny as a means by which confidence in the courts can be maintained and the administration of justice can be made transparent will require publication where this can be done without disclosing significant confidential information (*Radisson* at [10] citing *Manchester City* at [62]);

(4) In considering anonymisation, the court has to balance the parties' expectation of privacy in arbitral proceedings against the public interest in judgments. In that analysis factors to consider include (a) the extent to which details of the arbitration are disclosed in the judgment; (b) whether the fact of the arbitration has been made public by one of the parties seeking anonymity; and (c) whether the proposed anonymisation of the parties and the witnesses may make the judgment difficult for a reader to follow it (*Radisson* at [17]-[19] citing *Manchester City* at [55] on point (c)).

89. In the present case, applying that balance, I consider that the judgment should be published but the parties' and witnesses' names should be anonymised (there is a risk of revealing the nature of the parties by reference to some of the witnesses of fact linked to those parties). Both parties have urged this course upon the court. They accept that open justice mandates the publication of this judgment but the judgment should be anonymised to protect the parties' expectation of confidentiality in the arbitration process. I accept that that is the appropriate course.

90. In terms of whether to anonymise the identity of the arbitrator, the position is more finely balanced:

(1) In *Halliburton* Lord Hodge noted that while the obligations of confidentiality which are usually imposed in arbitration agreements are designed to protect the privacy of the parties to the arbitration and the evidence led in arbitral hearings, no party contended that there was any basis in the public interest for preserving the anonymity of the arbitrators themselves in a challenge where the allegation was one of apparent bias. He held that the principle of open justice, pointed towards disclosure of their identity (*Halliburton* at [6]);

(2) That the arbitrator had taken no part in the proceedings or had a long-established reputation for integrity and impartiality is *not* a sufficient ground for anonymising the identity of that arbitrator (*Halliburton* at [6]);

(3) Only exceptionally will it be appropriate to preserve the anonymity, such as where identifying the arbitrator would defeat the purpose of maintaining the confidentiality of an arbitration and the parties to it or for exceptional reasons

relating to the arbitrators' right to privacy or their safety (*Newcastle United (Privacy)* at [19]).

91. The position in *Halliburton* was different to the position here. In *Halliburton* the identity of the parties had already been revealed by the Court of Appeal in its judgment. There was then no justifiable ground for retaining the anonymity of the arbitrator alone. That is not the case here, where the parties and the witnesses are anonymised. I have evidence before me that this is a small, tightly knit industry and there is not understood to be any public statement about the arbitration. I consider that revealing the name of the arbitrator in this case would be likely to, or at least might, defeat the purpose of maintaining the confidentiality of the arbitration and the parties to it.

92. I was also told that this is only the first time that W has been appointed as an arbitrator and he is not someone who holds himself out as having a long-established reputation as an arbitrator, nor is he appointed to an arbitral body or panel. The arbitration is effectively a "one-off" and there is no public interest in revealing his identity. I add that neither of the parties wanted his identity to be revealed.

93. In all the circumstances, I consider that exceptionally the arbitrator's identity should not be revealed in this judgment and accordingly he has been anonymised as "W".