Cofely v Knowles – From Appointment to Disappointment

There have been two High Court cases within the last 15 months that lift the lid off what some perceive to be questionable practices (particularly in relation to the *Eurocom* case) that have developed over the last few years in the world of adjudication and arbitration in the UK. The first, in November 2014, was a decision of Ramsey J sitting in the Technology and Construction Court in *Eurocom v Siemens PLC*[1], and the second, which is the focus of this article, was a decision of Hamblen J, in the Commercial Court in *Cofely Limited v Anthony Bingham and Knowles Limited*[2].

Both cases illustrate the lengths to which some parties will go to steer the nomination process to secure the tribunal of their choice. Some view these practices as innocent forum shopping; others see them as tantamount to forum shoplifting. What is becoming increasingly clear is that these practices have become by no means exceptional or even unusual.

Hopefully, the outcome of these cases will act as a real deterrent to these practices in the future.

The *Eurocom* Decision

Eurocom made an application to the Court to enforce an adjudication decision of Mr Anthony Bingham against Siemens: the judge had to determine whether there were natural justice reasons why enforcement should not be granted.

What persuaded Ramsey J in the *Eurocom* case to refuse enforcement of Mr Bingham's adjudication decision was certain statements made by an employee of Knowles to the nominating body (the RICS) in that case during its application to the appointment of an adjudicator. Ramsey J found that this individual had deliberately or recklessly misrepresented the existing conflicts of interest relating to a number of those on the nominating body's panel of adjudicators. The purpose of making those representations was presumably to persuade the nominating body not to nominate those individuals, thereby increasing the prospects of appointment for other members of the panel, including Mr Bingham.

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The *Cofely* Case: The Background to The Section 24 Application

Cofely, in an arbitration that it had commenced against Knowles, applied to the court under Section 24(1)(a) of the Arbitration Act 1996 to have Mr Bingham removed as arbitrator, on the basis that circumstances existed which gave rise to justifiable doubts about Mr Bingham's impartiality.

Mr Bingham had been appointed as arbitrator by the Chartered Institute of Arbitrators ('CIArb') in response to an application made by Knowles. What lay at the heart of Cofely's concerns regarding Mr Bingham's impartiality was the nature of the professional relationship between Mr Bingham and Knowles. It was, Cofely contended, so close that it gave rise to an

[1] [2014] EWHC 3710 (TCC).

[2] [2016] EWHC 240 (Comm).

inference of apparent bias sufficient for the purposes of Cofely's application.

It appears from the judgment that it was the publication of the *Eurocom* decision that prompted Cofely's advisers to start raising several questions, firstly with Knowles and then with Mr Bingham, regarding the conduct of the arbitration proceedings at that time, and in particular the nature of the professional relationship between Knowles and Mr Bingham.

One important distinction between these two cases is that, whereas in the *Eurocom* case, Knowles was acting as a party representative, in the *Cofely* case, Knowles was a party to the proceedings. Those proceedings related to a dispute that had arisen under an agreement between Knowles and Cofely called "*the Success Fee Agreement*" ('the SFA') under which Knowles had been engaged to provide dispute resolution services in connection with disputes that had arisen under a major concession agreement to which Cofely was a party.

Having become dissatisfied with Knowles' performance, Cofely terminated the SFA. The ensuing dispute concerned Knowles' fee entitlement for services provided pre-termination. Knowles' fee claim fell into two parts, a defined element and an undefined element. The arbitration proceedings commenced in February 2013. Mr Bingham disposed of the defined element of the claim relatively quickly in a partial award in August 2013, awarding Knowles £1,000,000 plus interest.

Cofely then applied to Mr Bingham for a further partial award concerning the proper interpretation of the SFA apparently designed to reduce the scope of the factual enquiry that would be required in order to dispose of the claim for the undefined element of the fee. It was at that point that the controversial *Eurocom* decision became public.

The *Cofely* Case: Enquiries About the Professional Relationship

The enquiries that Cofely's advisers now raised firstly with Knowles and then with Mr Bingham amounted to an in-depth inquest into all aspects of their professional relationship. In particular, the initial list of questions sent to Mr Bingham covered the following grounds:

- on how many occasions over the last three years had Mr Bingham acted as adjudicator or arbitrator in disputes with which Knowles was involved either as party or as party representative?
- in how many of those cases had Mr Bingham made a decision favourable to Knowles or the party it was representing?
- what proportion of Mr Bingham's professional income over the last three years was accounted for by such cases? and
- what action, if any, did Mr Bingham take in this arbitration to satisfy himself that there was no information that he should disclose to Cofely that *"could reasonably be interpreted (on an objective basis) as undermining your apparent impartiality?"*.

Mr Bingham's response to continuing pressure from Cofely's advisers to provide this information was to call a meeting, ostensibly to explore whether the tribunal had been properly constituted. This meeting took place at Knowles' offices: on the night before, Knowles had served a skeleton argument and Mr Bingham informed the parties that he would be making a ruling on the issue in hand.

It is clear from the Judgment that the meeting was fractious and did little to advance matters in a positive direction. No less than 3.5 pages of Hamblen J's decision is a verbatim transcript of exchanges between Mr Bingham and Cofely's barrister in which Mr Bingham was attempting to persuade the latter to *"come clean"* about the actual purpose and significance of the information that Cofely was seeking. Cofely's barrister's position was that it was impossible to answer questions of that nature until the totality of the information had been made available. Matters became so heated that at one stage Knowles' barrister offered to act as mediator.

Broadly speaking, there were two issues that the court was called upon to consider in determining if Mr Bingham ought to be removed as arbitrator under Section 24 of the Arbitration Act 1996:

- the extent of the professional relationship between Mr Bingham and Knowles revealed by the information before the court regarding the number of cases in which Mr Bingham had acted as adjudicator or arbitrator in which Knowles had represented one of the parties, the number of cases

decided in favour of the party Knowles had represented, and the income derived by Mr Bingham from such cases and the *Eurocom* decision itself ("*the Relationship Issues*"); and

- Mr Bingham's conduct both during the arbitration proceedings, and in particular at the meeting, and thereafter in the context of the Court proceedings which, it was alleged, showed that he had sided with Knowles and was "*aggressive and unapologetic*" about his previous conduct ("*the Conduct Issues*").

The Judge's Decision: The Relationship Issues

The Judge considered that the key aspect of the evidence concerning the professional relationship between Mr Bingham and Knowles was that, over the last three years, 18% of his appointments and 25% of his income had been derived from cases involving Knowles. He dismissed as irrelevant Mr Bingham's point that all these appointments had been made by a nominating body rather than by Knowles directly.

On the nominating body side of the matter, the Judge mentioned Rule 3 of the CIArb *Code of Professional and Ethical Conduct for Members* (October 2000) which provides:

> "Both before and throughout the dispute resolution process, a member shall disclose all interests, relationships and matters likely to affect the member's independence or impartiality or which might reasonably be perceived as likely to do so."

The Judge felt that it was "*notable"* that, in the form he had completed for the CIArb prior to his appointment in this case, Mr Bingham had failed to respond to an item requiring the disclosure of *"any involvement, however remote"* with either party over the last five years.

The Judge also referred in this connection to General Standards 2 and 3 of the *IBA Guidelines on Conflicts of Interest in International Arbitration*, and in particular what is known as the '*Orange List'* of situations which might give rise to doubts about an arbitrator's impartiality or independence. He observed that this document represented "*accepted good arbitral practice generally".*

He then observed that, even though Knowles does not actually appoint adjudicators/arbitrators directly,

> "it is able to influence and does influence such appointments, both positively and negatively. It does so positively by putting forward the name of the chosen appointee either on his/her own or with others. It also does so more indirectly by identifying required characteristics that will only be shared by a small pool of people. It does so negatively by putting forward a list of those potential appointees that it does not wish to be appointed and who are said to be inappropriate. These practices would be apparent from the appointment forms which, as was common ground, would have been forwarded to Mr Bingham. Their significance is highlighted by the Eurocom case which provides a striking example of Knowles steering the appointment process towards its desired appointees and doing so as a matter of general practice."

Crucially, the Judge considered that Knowles' appointment "*blacklist"* was of itself "*a matter of significance"* because it meant that potential appointees would be aware that how they handled a particular reference might lead to them "*falling out of favour*" and being placed on the list. The Judge considered that this would be *"important for anyone whose appointments and income are dependent on Knowles related cases to a material extent, as is the case for Mr Bingham."*

The Judge considered that, in the light of the *Eurocom* decision, it was reasonable for Cofely to pursue enquiries into the nature of the relationship between Mr Bingham and Knowles. Whereas Cofely had pursued those enquiries *"in a courteous manner"*, he considered that Mr Bingham's *"essential response…. involved avoiding addressing the requests and instead giving the appearance of seeking to foreclose further inquiry by demonstrating their irrelevance and, moreover, doing so in an aggressive manner."*

The Judge's Decision: The Conduct Issues

It has already been noted that the Judgment contained no less than 3.5 pages of the transcript from the meeting that Mr Bingham convened in order to make a ruling on the validity of his appointment. The Judge considered that this extract – although reflecting only a part of the business conducted at the hearing and highly repetitive in content – *"reflected the tone of the hearing"* at which Mr Bingham had *"aggressively questioned"* Cofely's barrister concerning that party's question about the proportion of Mr Bingham's professional income that was attributable to cases involving Knowles.

The Judge's concerns about the hearing were twofold. Firstly, he considered that Mr Bingham was using the meeting as a means by which he could arrive at a *"ruling"* on apparent bias which, he observed, neither party had asked him to make, and which was, in his opinion, inappropriate. Second, *"the manner in which this was done"* – involving Mr Bingham effectively cross-examining Cofely's barrister in an aggressive and hostile way – had led to him *"descending into the arena in an inappropriate manner."*

The third feature of Mr Bingham's conduct that the Judge criticised related to the witness statement that he had prepared for Court proceedings. That statement, the Judge commented, demonstrated a continuing lack of awareness regarding the relevance of the relationship issue and the potential inappropriateness of his conduct at the hearing that *"demonstrates a lack of objectivity and an increased risk of unconscious bias"*.

Finally, the Judge noted that Mr Bingham considered that Cofely's requests for information amounted to *"aggressive, challenging, perhaps even bullying behaviour"* and an unwarranted attack on him and that this view was consistent with his own assertive conduct at the time. Nevertheless, the judge felt that Cofely's enquiries had been reasonably made and expressed: Mr Bingham's response – one of attack being the best from of defence – had inevitably led to him "*descending into the arena*" himself.

The Verdict

For Cofely to succeed in its application for a Section 24 Order removing Mr Bingham as arbitrator in this case, it had to persuade the Judge that *"the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased"*.

The Judge was careful to stress that there was no question of any actual bias having occurred in this case. However, he was satisfied that the evidence before him was sufficient to require Mr Bingham's removal. He directed that, if Mr Bingham did not resign, an order for his removal would be made.

The significance of these decisions for nomination practice

It is inevitable that, with a case such as this, involving a well-known figure in the sphere of construction dispute resolution and one of the best-known claims consultancy companies in the sector, much of the attention will focus upon the personalities.

That would be a mistake. The big issue that emerges from these two decisions, and with which nominating bodies are now going to have to wrestle, is where the boundary should lie between legitimate steering of the nomination process by applicants for nomination and unacceptable manipulation of the nomination process.

One imagines that few people would seek to defend practices such as deliberate or reckless misrepresentation of the position regarding the existence of conflicts of interest by an applicant for nomination.

On the other hand, some degree of steering is not only desirable but is encouraged by nominating bodies. As a general rule, nominating bodies do seek to accommodate reasonable requests from applicants. For instance, most will tend to nominate an individual who has dealt with previous disputes on the project in question – such an appointment generally makes good sense – and most will listen to the views of the applicant – if not actually invite them as, for instance, TeCSA does – on the need for individuals with particular qualifications and/or expertise. Issues concerning the existence of a genuine conflict of interest are obviously something that should be raised with the nominating body at the outset.

Where the boundary becomes blurred is in the context of practices designed to secure the nomination of a particular individual from the panel of the nominating body in question. The most obvious example of this

type of practice involves the use of blacklists, which in some extreme cases seek to cut down a panel list of hundreds of nominees to maybe four or five. This sort of blacklist may or may not give reasons why the remaining individuals have been excluded, but often lack of competence or personal issues are given as the reason.

What makes this type of practice unacceptable to this author is that it is designed to circumvent the standard nominating procedures of the nominating body which may operate on a cab-rank principle or some other similar process with a list of individuals all of whom will have satisfied the nominating body regarding their competence. What this can lead to in effect is the applicant, rather than the nominating body, deciding who should be appointed to manage the dispute.

It is probably fair to attribute these practices to the introduction of statutory adjudication. In the days pre-adjudication, arbitrators were appointed by agreement between the parties, failing which a presidential nomination would take place. The process was relatively straightforward and uncontroversial. It is the speed of the adjudication process, and the requirement to get an adjudicator on board in a matter of 2-3 days, that has left the nominating body with no alternative but to decide the identity of the adjudicator based on the information provided by the applicant.

What this case tells us is that those practices have now spread to the appointment of arbitrators. Perhaps this is not surprising given the fact that the parties will often be the same as will the dispute resolver and the nominating body whichever technique is involved.

The situation is complicated by the fact that nominating bodies have in the past often made a selling point of the fact that their policy is to make the applicant's preferences a priority in terms of appointing a tribunal. The fact is that cases like *Eurocom* and *Cofely* do no favours for the UK dispute resolution sector; it is to be hoped that the nominating bodies will respond to the challenge.

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