Neutral Citation Number: 2015 EWHC 140 (Comm) 2014 Folio 1136

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 30/01/2015

Before :

THE HON. MR JUSTICE POPPLEWELL

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Between :

(1) SIERRA FISHING COMPANY	**Claimants**
(2) SAID JAMIL SAID MOHAMED	
(3) THE ESTATE OF JAMIL SAID MOHAMED	
- and -	
(1) HASAN SAID FARRAN	**Defendants**
(2) AHMAD MEHDI ASSAD	
(3) ALI ZBEEB	

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Luke Pearce (instructed by **Holman Fenwick Willan LLP**) for the **Claimants**
James Barratt (instructed by **Squire Patton Boggs (UK) LLP**) for the **1st & 2nd Defendants**
The 3rd Defendant did not attend and was not represented but made written representations

Hearing dates: 31 October 2014, 13 January 2015, with further written submissions on 14 & 16 January 2015

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE POPPLEWELL

The Hon. Mr Justice Popplewell :

Introduction

1. This is an application by the Claimants for the removal of the Third Defendant ("Mr Ali Zbeeb") as an arbitrator pursuant to s.24(1)(a) of the Arbitration Act 1996, on the grounds that circumstances exist that give rise to justifiable doubts as to his impartiality. The Defendants dispute the existence of such circumstances, and contend in the alternative that the Claimants have lost the right to raise this objection under s.73 of the Act by taking part in the arbitration.

The Parties

2. The First Claimant ("SFC") is a company incorporated in Sierra Leone involved in the supply of seafood. Its managing director is Mr Bassem Jamil Said Mohamed ("Mr Bassem Mohamed"), the brother of the Second Claimant ("Mr Said Mohamed"). The Third Claimant is the estate of their late father, who owned a 64% shareholding in SFC ("the Estate").

3. Mr Ali Zbeeb is a Lebanese lawyer and one of three founding partners in the law firm Zbeeb Law & Associates, together with his father, Mr Hussein Zbeeb, and Mr Hadi Zbeeb. Mr Ali Zbeeb is the managing partner of the firm.

4. The First Defendant ("Dr Farran") has at all material times been chairman of Finance Bank SAL ("Finance Bank"), a Lebanese bank based in Beirut. The Second Defendant ("Mr Assad") is an individual of Iraqi nationality.

The Arbitration Proceedings

5. In early 2011 Mr Said Mohamed entered into a finance arrangement with Dr Farran and Mr Assad who advanced a deposit of US$ 3.8 million for the purchase of two fishing vessels to be operated by SFC.

6. On 4 May 2012 Dr Farran and Mr Assad entered into a written agreement with SFC and Mr Said Mohamed (on his own behalf and on behalf of the Estate) providing for the terms by which the deposit would be repaid ("the Loan Agreement"). The Loan Agreement provided that SFC was to repay US$2.05 million (the agreement states US$ 2.5 million but it is common ground that this is an error) in monthly instalments, and the balance of US$ 1.75 million in accordance with a schedule which was to be agreed. Mr Said Mohamed guaranteed these obligations on his own behalf and on behalf of the Estate. The sixth point of the Loan Agreement contained an arbitration clause in the following terms:

> "The three parties agreed that in case any dispute arises in the execution of this agreement they will refer to arbitration in SIERRA LEON (sic) or LONDON (UK) as decided by [Dr Farran and Mr Assad]"

7. No repayments were made under the Loan Agreement. On 9 August 2012 Dr Farran and Mr Assad served a request for arbitration on the Claimants, notifying of an intention to commence arbitration in London and of the appointment of Mr Ali Zbeeb as their arbitrator. The request was addressed to SFC and Mr Said Mohamed, and related to the failure to fulfil the Loan Agreement. The request called upon the Claimants to appoint their own arbitrator, although it is the Claimants' case that it was erroneous in this respect because under s. 15(3) of the Arbitration Act 1996 the effect of the arbitration clause was that there should be a sole arbitrator.

8. On 22 August 2012 Dr Farran and Mr Assad entered into a further written agreement providing for the conversion of the loan into equity in SFC ("the Execution Agreement"). The Execution Agreement was signed by Mr Bassem Mohamed on behalf of SFC and purportedly on behalf of the Estate; the Claimants dispute Mr Bassem Mohammed's authority to act on behalf of the Estate. The number of shares to be acquired was to be determined based on a valuation being conducted by Ernst & Young. Clause 10 contained a London arbitration clause and provided that the agreement would be null and void if not executed (i.e. fulfilled) by 1 October 2012. The Execution Agreement was amended on 27 August 2012 by an Amendment Agreement to increase the amount to be converted to equity to US$4,480,000, and to provide for Mr Said Mohamed to sign the Execution Agreement.

9. In the light of this agreement, on 24 August 2012, Mr Bassem Mohamed emailed Daou & Daou Law Study ("Daou"), the lawyers acting for Dr Farran and Mr Assad, responding to the notice to appoint an arbitrator by saying that it was unnecessary to start arbitration proceedings in London because an amicable solution had been found. Daou replied by email on 29 August 2012 agreeing to "freeze the arbitration procedures" conditional upon fulfilment of the recently signed agreements. Mr Said Mohamed was copied into Mr Bassem Mohamed's email to Daou, and I infer that the agreement to freeze the arbitration was made with his knowledge and agreement, on his own behalf and on behalf of the Estate.

10. The Execution Agreement was not performed by 1 October 2012. On that day Daou sent a letter to Mr Bassem Mohamed as representing SFC and the Estate, stating that the arbitration procedure was revived. A similar letter was sent on 1 November 2012, this time addressed additionally to Mr Said Mohamed.

11. On 3 November 2012 Mr Bassem Mohamed emailed Daou in the following terms: "Please can you specify the time and exact location of the arbitration and I will forward to you our candidate for arbitration". The email was copied to Mr Said Mohamed, and I infer was sent with his knowledge and agreement, on his own behalf and on behalf of the Estate.

12. On 28 November 2012 Daou wrote to Mr Bassem Mohamed explaining that if the Claimants failed to appoint an arbitrator, Mr Ali Zbeeb would become sole arbitrator by default. That letter was countersigned by Mr Bassem Mohamed agreeing "to send the name and numbers of our arbitrator with (sic) the three days deadline". Daou emailed Mr Bassem Mohammed the following day, copied to Mr Said Mohamed, saying that they were awaiting the name and numbers of such arbitrator within three days. Again I infer that the countersignature was made with

the knowledge and agreement of Mr Said Mohamed, on his own behalf and on behalf of the Estate.

13. A new agreement was signed on 5 February 2013 between Dr Farran and Mr Assad and Messrs Bassem and Said Mohamed in their capacity as heirs to the Estate ("the Conversion Agreement"). Under the Conversion Agreement, which referred to the outstanding amount as US$ 4.7 million, 25% of the shares in SFC were to be transferred immediately to Dr Farran and Mr Assad, together with the right to manage the company, with a further 7% being transferred at a second stage. The Claimants undertook to repay the debt and a further US$250,000 in default of performance. The Conversion Agreement contained no arbitration clause, but provided:

> "In case [the Claimants] didn't execute all his engagements below mentioned during a month of the date whereof, this agreement is considered annulled and the two parties returned to the step reached by the arbitration in London upon the previous agreement concluded between the two parties."

14. The Conversion Agreement was not performed.

15. On 10 April 2013 Daou emailed Mr Said Mohamed in his personal capacity and as representative of the Estate, giving formal notice of the recommencement of the arbitration procedure and stating that Mr Ali Zbeeb was now sole arbitrator following the failure of Mr Said Mohamed to appoint an arbitrator. A further notice to the same effect was contained in a letter dated 15 April 2013 from Daou to all three Claimants.

16. On 2 May 2013 Mr Ali Zbeeb wrote to all the parties "in my capacity as the selected arbitrator relating to the dispute between [the parties] and whom have entered an agreement on the 4th Day of May 2012, which was followed by various related amendments and attempts of amicable settlements, all of which were unsuccessful". He advised the parties that he had commenced the arbitration procedures in accordance with the Arbitration Act 1996 and that he would shortly be submitting invoices for past expenses and anticipated expenses and fees. It is the Claimants' case that Mr Ali Zbeeb had not become sole arbitrator and that he and Daou were mistaken in relying on sections 16 and 17 of the Arbitration Act 1996, which only apply where there is an agreement for each party to appoint its own arbitrator and not, as here, where the agreement is for a sole arbitrator. It is also the Claimants' contention that Mr Ali Zbeeb's appointment was and remained solely in relation to disputes arising under the Loan Agreement, namely a claim for repayment of the loan, and not in relation to any claim for conversion of the loan to equity in SFC under the Execution Agreement or Conversion Agreement.

17. On 15 July 2013 Mr Ali Zbeeb sent the parties a communication of arbitration procedures, a copy of which was not in evidence. In response, on 16 July 2013 Mr El-Sayed, a Lebanese lawyer acting on behalf of the Claimants, emailed Mr Ali Zbeeb stating that because the latter had been appointed as arbitrator by Dr Farran, it "reverse[d] the basic principle of impartiality of any arbitration" for him to be appointed as sole arbitrator. Mr El-Sayed asked for details of the basis on which the process had started in order to enable him to determine how to respond

to the arbitrator's requests. Although this letter queried Mr Ali Zbeeb's impartiality, it was not based on any other grounds than that he had been the other party's appointee; it did not raise any of the circumstances now relied on to justify doubts about his impartiality.

18. Negotiations between the parties continued. On 23 July 2013 Mr El-Sayed emailed Mr Ali Zbeeb asking for the arbitration to be frozen for two weeks whilst the parties worked on a settlement. Mr Ali Zbeeb responded the following day indicating that he would hold the session in London, for which arrangements had been made, unless notified by both parties that they wished to put the procedures on hold.

19. On 25 July 2013 a further settlement was reached, in the form of two letters of undertaking addressed to Dr Farran and Mr Assad signed by Mr Said Mohamed, countersigned by Mr Bassem Mohamed on behalf of SFC ("the July 2013 Agreements"). These agreements provided for the repayment of the debt by assignment to Dr Farran and Mr Assad of a debt of $2.7 million due from SFC to Mr Said Mohamed, and by the payment to them of the balance of $2 million by TCQ Power Ltd, a BVI company, as part of the anticipated proceeds of a joint venture investment by TCQ and Messrs Bassem and Said Mohamed in relation to an electricity project. A recital in one of the July Agreements provided:

> "Whereas Dr Hassan Farran and Mr Ahmad Asad have lend me and my brother Bassem Mohamed personally the amount of 4,700,000 USD which is subject to arbitration procedure, and in order to freeze this arbitration procedure temporarily and solve this matter in an amicable way…"

The Agreement went on to provide:

> "… in case of default of such transfer and waiver of this amount as a loan…, we unconditionally accept that the arbitration procedure will continue from the point we reached at the present date as per the correspondences between parties."

20. It appears that over the weekend before the planned arbitration session on 29 July 2013, the Claimants asked for it to be postponed because Mr El-Sayed would be unable to attend for medical reasons. Daou agreed to such postponement, but Mr Ali Zbeeb, who was already in London and had made arrangements, determined to conduct the hearing in the absence of the parties. On 31 July 2013 he sent the parties a document recording certain procedural decisions made at such session. These included that an arbitration agreement would be drafted by him and forwarded to the parties prior to a further hearing in London on 12 August 2013 at which the attendance of the parties was required and at which it would be signed. The document sent by Mr Ali Zbeeb recorded a decision that in the absence of any documents having been submitted on behalf of the Claimants, the documents submitted by Dr Farran and Mr Assad would be the only documents assessed and studied during the arbitration procedures and would for those purposes be communicated to the Claimants.

21. No hearing took place on 12 August 2013 because on 7 August 2013 the parties agreed once more to freeze the arbitral process to allow time for performance under the July 2013 Agreements. The agreement is recorded in an undated letter from Mr Ali Zbeeb which is endorsed in manuscript by Daou and by Mr El-Sayed. The terms of the agreement were that the arbitration process should be put on hold for three weeks to allow compliance with the July Agreements. Mr El-Sayed's endorsement on behalf of the Claimants provided that if and when the arbitration procedure restarted, they would then provide their comments on the arbitration procedure and agreement, reserving their rights in the meantime.

22. On 4 September 2013 there was an agreement to extend the freezing period of the arbitration process for a further 30 days, the Claimants' agreement being confirmed in an email from Mr El-Sayed to Mr Ali Zbeeb on 7 September 2013.

23. On 9 October 2013 Daou wrote to the Claimants alleging default on their part, and giving notice of the revival of the arbitration proceedings.

24. On 14 October 2013 Mr Ali Zbeeb wrote to the parties indicating there would be a procedural session in London on 22 October 2013 to deal with procedural directions and to exchange documents between the parties. Mr El-Sayed sent an email on 21 October 2013, the day before the hearing, saying that he would be unable to attend because it took more than one day to procure a visa and seeking an adjournment of the hearing. This was agreed to by Mr Ali Zbeeb who stated that the hearing would take place in November.

25. On or about 11 November 2011, the parties agreed to postpone the planned November hearing for three weeks, an agreement recorded in an email from Daou to Mr Ali Zbeeb and the Claimants of that date.

26. The hearing was rescheduled for 23 December 2013, and was conducted by Mr Ali Zbeeb in the absence of the parties. No substantive directions were made and Mr Ali Zbeeb notified the parties shortly thereafter that a further session would be scheduled in order for the parties to sign a formal arbitration agreement, which Mr Ali Zbeeb would draft and circulate in advance, and for the exchange of documents. He made further requests for his fees to be paid.

27. On 27 December 2013 Daou responded to Mr Ali Zbeeb giving notice that Dr Farran and Mr Assad had decided to continue with the arbitration proceedings from the point where they had stopped and were waiting for Mr Ali Zbeeb to notify the next session's date.

28. On 17 May 2014 Daou wrote again to Mr Ali Zbeeb alleging that the Claimants had failed to fulfil their obligations and that therefore Dr Farran and Mr Assad had decided to continue the arbitration proceedings from the point they had reached. Mr Ali Zbeeb was requested to set a new date for the next arbitration session.

29. The session was held in London on 26 June 2014. The Claimants were represented by Mr Englefield of Grace Associates. The notes of the meeting record that Mr Ali Zbeeb opened the session by explaining the background and that it had resulted in his appointment as sole arbitrator. He stated that he had previously conducted two sessions, the first in July 2013 where all parties were

absent with excuse, and the second in December 2013 where all parties were absent without excuse. At the meeting Mr Englefield registered an objection to Mr Ali Zbeeb acting as arbitrator on the grounds of his lack of independence. The minutes record the objection in these terms:

> "[The Claimants] advanced an argument alleging the existence of social and commercial relationships between the Sole Arbitrator and [Dr Farran and Mr Assad]. Namely, the representative of [the Claimants] stated that the arbitrator is a relative of [Dr Farran's] attorney/legal consultant. In response to the above, [Dr Farran] categorically any existence of any commercial relations with the Sole Arbitrator (sic). However, he confirmed that the Arbitrator has been a relative of one of his retained legal counsels for a very long time, a matter which [the Claimants] were always well aware of even before the existence of any commercial relationship between the Parties and prior to extending the loan. He also emphasised that his previous acquaintance with the Arbitrator is solely based on the latter's excellent reputation in legal practice in Lebanon and worldwide, which was the reason that caused [Dr Farran] to request the Arbitrator to accept his nomination to take part of the Arbitration Procedures as an Arbitrator named by [Dr Farran]. In addition [Dr Farran] stated that throughout the commencement of the Arbitration procedures, [the Claimants] refrained from nominating an Arbitrator to join [Dr Farran's] nominated Arbitrator (now the Sole Arbitrator) to choose together a Chairman and form an arbitral tribunal, in spite of many promises by [the Claimants] to do so.
>
> …the Arbitrator confirmed the above statement by [Dr Farran] as he denied any commercial relationship with [Dr Farran]."

30. At the hearing, and in the alternative to the objection to Mr Zbeeb acting as arbitrator, Mr Englefield asked Mr Ali Zbeeb to allow the Claimants to appoint their own arbitrator to sit alongside Mr Ali Zbeeb together with a chairman. Mr Ali Zbeeb indicated he would respond to that request in a subsequent ruling. He did so by letter dated 6 July 2014 in which he rejected the request and stated his view that he had been validly appointed as sole arbitrator in connection with the dispute.

31. By an e-mail dated 9 July 2014 sent by Mr Englefield to Mr Ali Zbeeb, the Claimants reiterated their objection to Mr Ali Zbeeb acting as arbitrator as a result of the Claimants' doubts as to his impartiality owing to his "close connection" with Dr Farran, and urged him to reconsider his position. The e-mail threatened an application to court to set aside the appointment of Mr Ali Zbeeb if he did not voluntarily step down. The email went on to request Mr Ali Zbeeb to agree that a joint arbitrator be appointed (by which was meant a co-arbitrator) because of the alleged close connection with Dr Farran.

32. Mr Ali Zbeeb responded to that e-mail on 21 July 2014 reiterating that he considered he had been validly appointed as sole arbitrator pursuant to s.17 of the

Arbitration Act 1996 and stating that the Claimants had lost any right to object to his appointment as a result of s.73.

33. Following appointment of new solicitors for the Claimants, on 24 July 2014 Holman Fenwick Willan LLP ("HFW") wrote on their behalf stating that from an initial view of the file it appeared that there were justifiable doubts as to Mr Ali Zbeeb's independence and impartiality for the purposes of an application to court under s.24. Amongst other points, HFW stated that it had been incumbent on Mr Zbeeb before accepting appointment on behalf of Dr Farran and Dr Assad, let alone becoming sole arbitrator, to notify the Claimants of his "close connection" to his appointees.

34. At this stage a further meeting with the parties was scheduled for 28 July 2014 to address the merits of the claim. HFW requested that it be adjourned. Mr Ali Zbeeb declined to adjourn the hearing.

35. Mr Mathew of HFW attended the meeting on 28 July 2014, at which he made it clear that the Claimants generally reserved their position in relation to the validity of Mr Ali Zbeeb's appointment and jurisdiction, as well as in relation to their concerns over his independence and impartiality. At the meeting, Mr Ali Zbeeb circulated a written response to HFW's letter of 24 July, in which Mr Ali Zbeeb said that the issue as to his impartiality had been adequately addressed in his previous communications. The response included the words: "I do not see why it is incumbent on me to perform the due diligence homework of [the Claimants]". He alleged that the Claimants had lost any right to object by reason of section 73.

36. At the meeting on 28 July 2014 Dr Farran and Mr Assad submitted a statement of claims setting out the relief they sought in the arbitration and, in brief terms, the alleged grounds for that relief. The claim advanced was for repayment of the loan through the mechanism of the transfer of shares in SFC by enforcement of all the agreements attached to the statement of claims, which included the Loan Agreement, the Execution Agreement, the Conversion Agreement and the July 2013 Agreements. The claim was for the transfer of shares in SFC, not simply for payment of a money sum.

37. Various directions were made by Mr Ali Zbeeb at the meeting, which were recorded in a document circulated by Mr Ali Zbeeb on 4 August 2014. The Claimants were directed to serve a statement of defence by 15 August 2014 and a further session was scheduled for 29 August 2014.

38. The Claimants did not serve a defence in the arbitration. On 26 August 2014 HFW sent to Mr Ali Zbeeb a letter challenging his jurisdiction over the substantive dispute between the parties and reiterating the grounds for doubts about his impartiality. It requested that no further hearings take place until Mr Ali Zbeeb determined the challenge to his jurisdiction, and indicated that should he determine that he had jurisdiction, the Claimants would apply to Court for a determination that he had no jurisdiction and would apply in the alternative for his removal under section 24. The grounds of challenge were, in summary:

    (1) Mr Zbeeb had never properly been appointed as arbitrator, sole or otherwise, and so did not have jurisdiction to decide any dispute between the parties.

(2) In any event, Mr Ali Zbeeb could have no jurisdiction over the agreements which post dated his appointment, which now appeared to form the basis of the entire claim.

(3) The Claimants had justifiable doubts as to Mr Ali Zbeeb's impartiality such that in the absence of him voluntarily stepping down an application would be made under s. 24 of the Arbitration Act.

39. Mr Ali Zbeeb decided to proceed with the arbitral session scheduled for 29 August 2014. Again the Claimants attended, through HFW, in order to protect their position whilst reserving all rights and making it clear they did not accept Mr Ali Zbeeb's jurisdiction. At this session Mr Ali Zbeeb handed down a pre-prepared document in which he declared he would not be accepting any further submissions from the Claimants and would proceed directly to an award on the merits alongside an award on jurisdiction.

40. On 17 September 2014 Mr Ali Zbeeb e-mailed the parties indicating that an arbitral session was to be held on 8 October 2014, at which he would hand down a final award on the merits.

41. On 19 September 2014 the Claimants issued the present application to remove Mr Ali Zbeeb as an arbitrator under s.24(1)(a). A copy was sent to Mr Ali Zbeeb by email the same day and it was served on him on 29 September 2014.

42. The case was originally listed to be heard on an urgent basis on 2 October 2014 as a result of Mr Ali Zbeeb's threat to issue his award on 8 October 2014. On 30 September 2014 Mr Ali Zbeeb sent a letter to the court in his capacity as a respondent to the present application. He reiterated that he was the sole arbitrator. He expressed the opinion at the beginning of the document that he should not be part of the challenge and should leave it to the Claimants and Dr Farran and Mr Assad to contest the application, but that nevertheless he would take the opportunity to express his opinion on the challenge. There then followed lengthy argument, with citation of authority, arguing that by reason of s.73 any right to object had been lost. In relation to the grounds advanced in support of the application alleging there were circumstances giving rise to justifiable doubts as to his impartiality, he identified the two grounds as being (1) connection to Dr Farran and (2) involvement of the tribunal in preparing the Execution Agreement and the Amendment Agreement. As to the first, he did not take issue with the facts relied upon, but alleged that they did not give rise to a real possibility of bias. In relation to the latter, he asserted that he had been approached by both parties and had been conducting settlement negotiations with the full consent of the Claimants.

43. Following appointment of English solicitors on behalf of Dr Farran and Mr Assad, Mr Ali Zbeeb was requested by all parties to refrain from proceeding to issue an award until the resolution of the Claimants' application. He responded in a letter to the Court on 2 October 2014 that he was not prepared to do so. The letter commenced by asserting that Mr Bassem Mohammed should be added to the application in his personal capacity on the basis that he was a party to the dispute, although this had not been alleged by any of the parties. It went on to recognise that there was a difficult dividing line to be maintained between Mr Ali Zbeeb explaining his conduct and defending himself from allegations that it gave rise to

justifiable doubts about his impartiality, on the one hand, and being perceived to take sides in the case which would only create such doubts, on the other. He stated that he regarded the Claimants' application as an attempt to delay the rendering of a Final Award and that it was not being made out of genuine concerns about independence or impartiality. This was tantamount to an accusation that the application was not being made in good faith. He said that he was putting the final touches to his award and would publish it either by email or, if he chose, at a hearing in London on 8 October, provided his fees were paid.

44. Because it appeared from this response that he would only issue his award if his fees were paid, on 2 October 2014, I acceded to an application on behalf of Dr Farran and Mr Assad to adjourn the hearing of the s. 24 application so as to enable them to file evidence in opposition, upon their undertaking not to pay for or take up the award prior to determination of the application. Such evidence was filed and the application came back before me on 31 October 2014.

45. In the meantime Mr Ali Zbeeb sent two further communications to the Court. On 23 October 2014 he sent an email which reiterated the grounds previously put forward for any right to remove him having been lost under s. 73. It also addressed the allegations that he personally had undertaken work for Finance Bank and the question of the knowledge of Messrs Said and Bassem Mohamed of his relationship with Mr Hussein Zbeeb. In response to a without prejudice communication which I have not seen, Mr Ali Zbeeb sent a further e-mail to the Court on the morning of 31 October 2014 referring to the Claimants' accusations of bias as being "odd and absurd accusations and analysis". He confirmed that he would proceed to issue his award, which had been completed, if and when his fees were paid.

46. The hearing was not concluded before me in the half day estimated. It came back on 13 January 2015, when I heard a further day's argument and reserved judgment. On 14 January 2015 Mr Ali Zbeeb sent a further email to the Court referring to "crucial evidence recently discovered" providing "solid proof" that the parties had agreed that he be involved in drafting the Execution Agreement. He accused the Claimants' solicitor of "distortion of facts and misrepresentation of events". He made detailed submissions, supported by authority, on what amounted to "taking part" for the purposes of s. 73 in support of an argument that the Claimants had lost the right to object under section 24. The document made it clear that his decision on jurisdiction in the Final Award would be in favour of Dr Farran and Mr Assad, and that he regarded himself as having jurisdiction over the disputes in part because of the terms of the Execution Agreement. It had a section which addressed issues raised at the hearing on 31 October 2014, advancing arguments, for example, that no distinction should be drawn between Mr Bassem Mohamed and Mr Said Mohamed. He attached 2 emails and two texts in support of an argument that Mr Bassem Mohammed was aware of his role in drafting the Execution Agreement and the Amendment Agreement, and referred also to a telephone conversation. The parties made further written submissions in the light of this email and its attachments.

The Issues

47. Section 24(1)(a) of the Act provides as follows:

> "(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..."

48. Section 73 of the Act provides as follows:

> "(1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection:
>
> (a) that the tribunal lacks substantive jurisdiction;
>
> (b) that the proceedings have been improperly conducted;
>
> (c) that there has been a failure to comply with the arbitration agreement or with any provision of this Part; or
>
> (d) that there has been any other irregularity affecting the tribunal or the proceedings,
>
> he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection."

49. It is common ground that circumstances which engage section 24(1)(a) are an irregularity affecting the tribunal or the proceedings within the meaning of section 73(1)(d), such that the right to object may be lost if the conditions in that section are fulfilled.

50. Accordingly two issues arise:

    (1) Are there circumstances which give rise to justifiable doubts as to Mr Ali Zbeeb's impartiality?

    (2) If so, did the Claimants take part or continue to take part in the arbitration proceedings, without raising the objection forthwith, at a time when they knew or could with reasonable diligence have discovered the existence of such circumstances.

The First Issue: section 24

51. In ***Locobail (UK) Ltd v Bayfield Properties Ltd*** [2000] QB 451, the Court of Appeal held that the common law test for apparent bias is reflected in section 24 of the Arbitration Act (see paragraph [17]). The common law test is that articulated by Lord Hope of Craighead in ***Porter v Magill*** [2002] AC 357 at paragraph [103], namely whether "the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased." Lord Hope gave a further explanation of what was meant by "fair-minded" and "informed" in ***Helow v Secretary of State for the Home Department*** [2008] 1 WLR 2416 at paragraphs [1]-[3]. See also ***Laker Airways Inc v FLS Aerospace Ltd*** [1999] 2 Lloyd's Rep 45 per Rix J at pp. 48-49 and ***A v B*** [2011] 2 Lloyd's Rep 591 per Flaux J at paragraphs [21] to [29].

52. The Claimants rely on four aspects of the evidence as giving rise to such apparent bias.

(1) Legal and business connection between Dr Farran and Mr Ali Zbeeb

53. The first is the legal and business connection between Dr Farran and Mr Ali Zbeeb. The connection alleged is that (1) Mr Ali Zbeeb was engaged by Finance Bank as legal counsel in 2005/2006 at a time when Dr Farran was, as now, chairman of the bank; and (2) Mr Ali Zbeeb's father and co partner in Zbeeb Law & Associates, Mr Hussein Zbeeb, has acted and continues to act as retained legal counsel to both Dr Farran and to Finance Bank, and retains a close internal role at the bank, where he is a member of the top executive management.

54. As to (1), this is apparent from Mr Ali Zbeeb's CV, which records his role as legal counsel for the bank for a year and a month between January 2005 and January 2006, during which his CV describes him as the Legal Counsel for International Affairs at the bank to conduct missions to West African countries for contract negotiations and advice on corporate related issues. Ms Welu, the solicitor for Dr Farran and Mr Assad, describes this in her witness statement as a period when Mr Ali Zbeeb was working "at the bank". In his communications to the Court of 23 October 2014 and 14 January 2015, Mr Ali Zbeeb states that at this time he was a trainee lawyer at his father's firm, when his father was acting as in house counsel for the bank, and that he had no independent contract with the bank or any direct payment from the bank; that he was shadowing his father in the latter's legal work for the bank, with his father acting in a personal capacity, and that this was all that was intended to be reflected on his CV describing himself as being legal counsel to the bank. This does not sit wholly easily with the CV's assertion of his role as legal counsel in contract negotiation and advice in missions to West African countries. There is no evidence from Dr Farran explaining the relationship which Mr Ali Zbeeb had with Dr Farran or the bank in this period. The existence of such relationship was not volunteered either by Dr Farran or Mr Ali Zbeeb at the meeting on 26 June 2014. Given this state of the evidence, a fair minded observer would conclude that there was a real possibility that Mr Ali Zbeeb's role as legal adviser to the bank in 2005/6 was a substantial one in which he was personally providing advice to the bank and representing it in its commercial dealings.

55. As to (2), Mr Hussein Zbeeb is listed on the website of Finance Bank amongst those described as "Members of Top Executive Management". There are documents evidencing Mr Hussein Zbeeb acting both for Dr Farran personally,

and for the bank, in a number of cases in Beirut between 2012 and 2014 in what appears to be substantial litigation. Mr Ali Zbeeb has suggested in his emails of 23 October 2014 and 14 January 2015 that Mr Hussein Zbeeb is instructed by Dr Farran as an in house counsel in the former's personal capacity, not on behalf of Zbeeb Law & Associates, which has no financial relationship with Finance Bank or Dr Farran. This latter assertion is at odds with Ms Welu's witness statement which states that her understanding, apparently derived from instructions from Dr Farran, is that Zbeeb Law & Associates is one of several law firms used by Dr Farran and the bank. The point is made to support a further statement apparently on Dr Farran's instructions, that neither Mr Ali Zbeeb nor his firm would derive significant income from the relationship. This denial is pregnant with an admission that Mr Ali Zbeeb and his firm derive some financial income from Dr Farran instructing the firm. Ms Welu does not explain the work on which Zbeeb Law & Associates has been instructed, nor the amount of the income. Mr Matthew responded in a witness statement on behalf of the Claimants that the Beirut court documents suggested a significant income, and that the Claimants' researches suggest that Zbeeb Law & Associates is the main firm used by Dr Farran and the bank. There was no response from Ms Welu challenging this evidence.

56. On the state of the evidence a fair minded observer would conclude that there was at least a real possibility that Zbeeb Law & Associates, in which Mr Ali Zbeeb has a financial interest, has through his father been instructed to act for Dr Farran personally, and for the bank of which Dr Farran is chairman, in relation to substantial commercial matters from which the firm derives a significant financial income; and that such activity has occurred since 2012 and could be expected by Mr Ali Zbeeb to continue.

57. I have little hesitation in concluding that these connections would give rise to justifiable doubts as to Mr Ali Zbeeb's ability to act impartially in a dispute to which Dr Farran was a party. The fair minded observer would take the view that this gave rise to a real possibility that Mr Ali Zbeeb would be predisposed to favour Dr Farran in the dispute in order to foster and maintain the business relationship with himself, his firm and his father, to the financial benefit of all three. Such possibility is not significantly diminished if, as Mr Ali Zbeeb's evidence suggests, the financial benefit would accrue to his father rather than to the firm.

58. In this respect assistance is derived from the International Bar Association Guidelines on Conflicts of Interest in International Arbitration ("the IBA Guidelines"), which provide illustrations of what the international arbitral community considers to be cases of conflicts of interest or apparent bias. Part I of the Guidelines contains General Standards with explanatory notes. General Standard 6 recognises that the fact that the arbitrator's law firm may have dealings with one of the parties does not automatically give rise to a conflict of interest requiring disclosure and that all depends on the circumstances of each individual case. Part II of the Guidelines gives practical guidance on the application of the General Standards in particular circumstances by listing situations under three lists in decreasing order of seriousness, being a Red List, an Orange List and a Green List. The Red List contains those circumstances regarded as giving rise to

justifiable doubts about the arbitrator's impartiality or independence and is divided into a Non-Waivable Red List and a Waivable Red List, whose titles are self explanatory. The Orange List contains situations where, depending on the facts of a given case, there may be justifiable doubts as to the arbitrator's impartiality or independence such that the arbitrator has a duty to disclose them to the parties under General Standard 3(a). Waiver of a Waivable Red List conflict of interest requires express acceptance of the arbitrator acting by a party who has actual knowledge of the situation. Constructive knowledge is insufficient. An Orange List conflict of interest can be waived by inactivity following disclosure by the arbitrator.

59. One of only four situations identified in the Non-Waivable Red List is where "*the arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom*" (paragraph 1.4). The Waivable Red list includes the situation where "*the arbitrator currently represents or advises one of the parties or an affiliate of one of the parties*." (paragraph 2.3.1) and where "*the arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties.*" (paragraph 2.3.6). Mr Barratt argued that paragraph 1.4 of the Waivable Red List was confined to cases engaging the principle reflected in English law in ***Dimes v The proprietors of the Grand Junction Canal*** (1853) 3 HL Cas 759 that a judge or arbitrator must not preside over a matter in which he has a financial interest. In my view this reflects the wider category of circumstances recognised in ***Locobail v Bayfield*** and section 24 of the Act as giving rise to a justifiable doubt as to impartiality. The state of the evidence in this case would leave the fair-minded observer concluding that there was a real possibility that the relationship between Mr Ali Zbeeb and Dr Farran fell within these criteria, as well as the situation described in the Orange List where "*the arbitrator's law firm has within the past three years acted for one of the parties or an affiliate of one of the parties in an unrelated matter without the involvement of the arbitrator.*" (paragraph 3.1.4).

60. The doubts are reinforced by Mr Ali Zbeeb's statement at the hearing on 26 June 2014 that it was not for him to do due diligence on behalf of the Claimants in relation to any connections he had with Dr Farran. On the contrary, it was his duty to make voluntary disclosure to the parties of connections which were known to him which might justify doubts as to his impartiality, a duty recognised in General Principle 3 of the IBA Guidelines. Such disclosure is required of an arbitrator whatever "due diligence homework" steps may be available to the parties to discover their existence for themselves. Mr Barratt correctly submitted that if circumstances are not such as to engage s. 24, a failure by the arbitrator to disclose them cannot itself fulfil the section, although where there is any room for doubt an arbitrator would be well advised to make disclosure. But Mr Ali Zbeeb's assertion that it was for the Claimants to find out whether such circumstances existed, not for him to volunteer them if they did exist, amounted to an erroneous denial of his duty of disclosure to the Claimants, which reveals an attitude which would reinforce a fair minded observer's doubts as to his impartiality.

(2) Mr Ali Zbeeb's involvement in the negotiation and drafting of the Execution Agreement and Amendment Agreement

61. The second aspect relied on by the Claimants is the involvement of Mr Ali Zbeeb in advising and assisting Dr Farran and Mr Assad in the settlement negotiations which gave rise to the Execution Agreement and the Amendment Agreement, and his drafting of those agreements. There is no doubt that Mr Said Mohamed was aware of Mr Ali Zbeeb's involvement in the drafting shortly after the Amendment Agreement was executed, at the latest, and there is some documentary support for the evidence of the Defendants, including that of Mr Ali Zbeeb, that Messrs Said and Bassem Mohamed jointly instructed Mr Ali Zbeeb together with Dr Farran and Dr Assad to take on that role. I will assume for the purposes of the present application that that is so. It would not give rise to any apparent bias if the dispute were confined, as it appeared to be at the time, to the rights and obligations of the parties under earlier agreements. However the situation changed significantly when the statement of claims was presented at the meeting on 28 July 2014. That was the first occasion on which it was apparent that Dr Farran and Mr Assad were relying on the Execution Agreement as one of the agreements to support a claim for transfer of the shares in SFC rather than a money award. Equally importantly, the arbitration clause in the Execution Agreement is part of what is relied upon by them and Mr Ali Zbeeb as conferring jurisdiction upon him in relation to such a claim, rather than the jurisdiction being confined to a money claim under the Loan Agreement which was what was encompassed in his original appointment. It is to be inferred that Mr Ali Zbeeb and/or his father, who was copied in on the 28 August email, was giving advice to Dr Farran and Mr Assad. Such advice potentially included advice as to the terms and effect of the clause in a respect which would include the jurisdictional issue upon which Mr Ali Zbeeb is now called to adjudicate as arbitrator. He was responsible for the drafting of the clause. There would be a real possibility, in the mind of a fair minded observer, that he would wish to decide the jurisdiction issue in favour of Dr Farran and Mr Assad whom he and/or his father was advising at the time. The situation potentially falls within paragraphs 2.1.1 and/or 2.1.2 of the Waivable Red List of the IBA Guidelines where *"the arbitrator has given legal advice ... on the dispute to a party or an affiliate of one of the parties"* and/or *"the arbitrator has previous involvement in the case."*

(3) Connection between Mr Ali Zbeeb and Daou

62. The third aspect of the Claimants' complaint is that there is said to be a close connection between Mr Zbeeb, or Mr Zbeeb's law firm, and Mr Daou, counsel for Dr Farran and Mr Assad in the arbitration. On analysis this turns out to be based on nothing more than the fact that on the bank's website both Zbeeb Law & Associates and Daou are identified as advisers to the bank. This says little if anything about a connection between the two firms and affords no grounds for supposing that Mr Ali Zbeeb might be predisposed to favour Dr Farran by reason of any relationship with Mr Daou or his firm.

(4) Mr Ali Zbeeb's conduct of the reference

63. Fourthly, the Claimants rely on Mr Ali Zbeeb's conduct of the reference as giving rise to justifiable doubts about his impartiality. Many aspects of his conduct were attacked. Most do not afford grounds for doubting his impartiality. I am, however, persuaded that two aspects of his conduct do justify such doubts.

64. The first is his refusal to postpone the publishing of his award pending the outcome of this application when asked to do so by both sides on or shortly before 2 October 2014. The justification put forward was Mr Ali Zbeeb's view that the application is unfounded. However this affords no reason for failing to give effect to the expressed desire of both parties that the question should be resolved by the Court, which is the proper forum for its determination. Save in exceptional circumstances an arbitrator in the consensual arbitral process should give effect to the parties' desire that the tribunal should postpone its award until after determination of a court challenge which is capable of affecting the jurisdiction to make such an award, with the obvious advantages in cost and convenience which that entails.

65. Secondly the content and tone of the tribunal's communications with the parties, once the dispute as to impartiality and jurisdiction had arisen in the summer of 2014, and of the five communications with the Court thereafter, justify doubts as to his impartiality. The correspondence from Mr Ali Zbeeb of 6 July, 21 July, 28 July and 29 August 2014 is argumentative in style and advances points against the Claimants which had not been put forward by Dr Farran or Mr Assad, and to which the Claimants had not been given an opportunity to respond. In his correspondence addressed to the Court, Mr Ali Zbeeb recognised there is a line to be drawn where an arbitrator is the subject of an application that he be removed for apparent bias. He is a respondent to such an application, with a potential independent interest in its outcome in relation to his incurred and future fees. There is nothing wrong with him putting before the Court his evidence on the course of the proceedings, and his evidence in relation to that which is said to raise justifiable doubts about his impartiality; and he is entitled to put before the Court his view as to why he should not be removed. Should he wish to do so, the proper course is to acknowledge service of the arbitration claim form, rather than send correspondence to the Court. But in doing so, he must be careful not to appear to take sides, so as to be unable subsequently to judge impartially the rival arguments in the case. The content and tone of Mr Ali Zbeeb's communications is in my view clearly on the wrong side of this line. They involve detailed and vehement argument, not merely as to whether there are grounds for apparent bias, but also, and indeed predominantly, why the Claimants have lost the right to object. They advance arguments on behalf of Dr Farran and Mr Assad which the latter had not advanced for themselves, supported by detailed exposition and citation of authority. They also advance the case of Dr Farran and Mr Assad as to the tribunal's jurisdiction over a claim for transfer of the shares in SFC in terms which have not been articulated or advanced by Dr Farran and Mr Assad themselves. Mr Ali Zbeeb disparages the Claimants' s.24 application in intemperate language. He questions the good faith of the Claimants in advancing it. He gives the appearance of having descended into the arena and taken up the battle on behalf of Dr Farran and Mr Assad. He has become too personally involved in the issue of impartiality, and the issue of his jurisdiction, to guarantee the necessary objectivity which is required to determine the merits of the dispute (cf ***Howell v Millais*** [2007] EWCA Civ 720 at paragraph [33]).

Second Issue: Loss of right to object under s. 73

66. In determining whether the Claimants took part or continued to take part in the arbitration proceedings, without raising the objection forthwith, at a time when they knew or could with reasonable diligence have discovered the existence of such circumstances, it is necessary to address separately the three sets of circumstances which I have held give rise to justifiable doubts about Mr Ali Zbeeb's impartiality. Where there are different circumstances which engage s. 24(1)(a), they may be sufficient to do so individually, or they may only do so cumulatively. In the former case, the right to object is not lost unless section 73 is fulfilled in relation to each set of circumstances which is individually sufficient to engage s. 24(1)(a). In the latter case, the right to object cannot be lost unless section 73 applies to sufficient of the circumstances that what is left is cumulatively insufficient to engage section 24(1)(a).

67. In this case each of three sets of circumstances is sufficient on its own to give rise to justifiable doubts about Mr Ali Zbeeb's impartiality. It is therefore necessary to consider separately whether the Claimants have lost the right to rely on each such set of circumstances.

68. So far as concerns the conduct of Mr Ali Zbeeb in his communications with the Claimants since July 2014, and in his five communications to the Court culminating in his email of 14 January 2015, there can be no question of the Claimants having lost the right to object. These are continuing circumstances giving rise to justifiable doubts as to his impartiality which occurred after the challenge to his impartiality had been made on 26 June 2014, and in large part after the Claimants had advanced and maintained their request that he stand down, followed by the application for his removal. It is not suggested on behalf of Dr Farran and Mr Assad that any steps were taken by the Claimants in the arbitration proceedings without voicing relevant objections after 26 June 2014, save for the Claimants' request on 9 July 2014 that Mr Ali Zbeeb agree to the appointment of a co arbitrator (paragraph 31 above), which was accompanied by the raising of the objection and in any event preceded all bar one of the communications justifying doubts as to Mr Ali Zbeeb's impartiality.

69. Similarly, objection was taken to the role of Mr Ali Zbeeb in advising Dr Farran and/or Dr Assad on the Execution Agreement as soon as such conduct was capable of justifying doubts about his impartiality, which did not occur until, at the earliest, the statement of claims were filed by Dr Farran and Dr Assad on 28 July 2014 advancing a case relying on the Execution Agreement for the substantive relief claimed, and (at least so far as Mr Ali Zbeeb has interpreted it) for the jurisdiction of the tribunal to grant such relief. There can be no question of any step having been taken without objection thereafter and none is suggested by Mr Barratt; HFW had already sought Mr Ali Zbeeb's resignation, and maintained the objection throughout the period up to the issue of the present removal application on 19 September 2014.

70. So far as concerns the connections between Mr Ali Zbeeb and Dr Farran, three questions arise. When did the Claimants raise the objection? Did the Claimants take part in the proceedings without raising the objection forthwith? If so, did the

Claimants at that time know of the circumstances, or could they with reasonable diligence have discovered them?

71. The first time that any relevant objection was raised as to Mr Ali Zbeeb's impartiality on these grounds was at the hearing on 26 June 2014. The accusation of impartiality made in the letter from Mr El-Sayed of 16 July 2013 is not here relevant, because it was based solely on the fact that Mr Ali Zbeeb had purportedly become the sole arbitrator following appointment by the other party, which is not one of the grounds now being advanced under section 24. The current objection was consistently maintained after it had first been raised on 26 June 2014.

72. The next question is therefore whether the Claimants took part in the proceedings prior to 26 June 2014, and if so when.

73. A party does not take part in an arbitration for the purposes of section 73 unless and until he invokes the jurisdiction of the tribunal in respect of the merits of the dispute or invokes the jurisdiction of the tribunal to determine its own jurisdiction over the merits of the dispute: ***Broda Agro Trading v Toepfer*** [2011] 1 Lloyds Rep 243, ***Sovarex v Romero Alvarez*** [2011] 2 Lloyd's Rep 320 at paragraphs [12]-[25]. However once a party has taken part in proceedings, he may "continue to take part" by silence or inactivity in the face of a right to object which subsequently becomes available to him: ***Rusal v Gill & Duffus*** [2000] 1 Lloyd's Rep 14 at pp. 20-21. If the status quo is that a party has already taken part, and is therefore participating in an arbitration in which he has invoked the exercise of the tribunal's jurisdiction, he may have to do something positive to change the status quo if he is properly to be regarded as not having continued to take part in the reference. But in the absence of a prior taking part, mere silence and inactivity will not be sufficient; nor will any activity which is neutral or equivocal as to whether the party invokes or accepts the exercise by the tribunal of jurisdiction over him. In this respect there is no relevant distinction to be drawn between section 72, which preserves the right to challenge the jurisdiction of the tribunal for a person who has not taken part in the proceedings, and section 73 which is concerned with the loss of the right to object more generally.

74. Mr Barratt submits that the Claimants took part in the reference by the following activity:

(1) the Claimants' agreement to freeze the arbitration procedures in August 2012 (paragraph 9 above);

(2) Mr Bassem Mohammed's email of 3 November 2012 to Daou requesting the time and exact location of the arbitration and promising to forward the Claimants' "candidate for arbitration" (paragraph 11 above);

(3) the countersignature by Mr Bassem Mohamed of Daou's letter of 28 November 2012 agreeing to send the name and numbers of the Claimants' arbitrator within a three day deadline (paragraph 12 above);

(4) the Claimants' agreement recorded in the Conversion Agreement of 5 February to return to the stage reached in the arbitration if the Conversion Agreement were not performed (paragraph 13 above);

(5) failure by the Claimants to take objection following recommencement of the arbitration by notices of 10 and 15 April 2013 (paragraphs 15 to 17 above);

(6) Mr El-Sayed's email of 23 July 2013 requesting that the arbitration be frozen for two weeks whilst the parties worked on a settlement (paragraph 18 above);

(7) the Claimants' agreement recorded in the July 2013 Agreement to return to the stage reached in the arbitration if it were not performed (paragraph 19 above);

(8) the Claimants' request to postpone the hearing scheduled for 29 July 2013 (paragraph 20 above);

(9) the Claimants' agreement on 7 August 2013 once more to freeze the arbitration process to allow time for performance under the July Agreements (paragraph 21 above); and to extend the freezing period on 7 September 2013 (paragraph 22 above);

(10) failure by the Claimants to take objection following recommencement of the arbitration by notice of 9 October 2013 (paragraph 23 above);

(11) the Claimants' requests to postpone the hearing scheduled for 10 October 2013 and rescheduled for November 2013 (paragraphs 24 & 25 above);

(12) failure by the Claimants to take objection following recommencement of the arbitration by notice of 27 December 2013 and 17 May 2014 (paragraphs 27 & 28 above).

75. None of this activity or inactivity amounted to taking part in the proceedings within the meaning of section 73. A request or agreement to put the arbitral process on hold does not of itself seek to invoke the tribunal's jurisdiction; it is entirely neutral in that respect. The suspension merely seeks to preserve the status quo and envisages that if and when the process is revived the parties will be in the same position procedurally as they were when it was suspended. If at the moment of suspension a party has not lost the right to object because he has not yet taken part, a request for a suspension of the process preserves such right together with all other procedural rights. An obligation to raise the objection at that stage would serve no purpose because it would not fall to be addressed unless and until the process were revived, and any consideration of it before that time would be inconsistent with the parties' agreement to suspend the process. For similar reasons an agreement to revive the process from where it left off in the event of certain future contingencies cannot amount to taking part.

76. Mere silence and inactivity in the face of revival of the process by the other party is equally incapable of amounting to a first taking part. It does not of itself invoke the tribunal's jurisdiction. If the right to object remains at the moment of suspension, the objection remains open to the party upon the other party's revival

of the process unless and until the objecting party does something which is unequivocally an invocation of the tribunal's jurisdiction. Were it otherwise a party who wished to decline to take part in an arbitration would lose the right to do so by a suspension of the process, putting him in a worse position by virtue of an agreement whose purpose was merely to preserve the status quo.

77. For similar reasons, requests or agreements to adjourn a procedural hearing cannot of themselves amount to a first taking part (although they might amount to continuing to take part where the party has already taken part by invoking the tribunal's jurisdiction). They do not, of themselves, seek to invoke the tribunal's jurisdiction; they merely seek to preserve the opportunity to participate or object at the hearing whose postponement is sought or agreed.

78. Nor can the Claimants' indication that it would be appointing its own arbitrator amount to taking part, because it does not recognise the tribunal as yet being properly constituted and therefore cannot amount to invoking the jurisdiction of a tribunal in its improperly or imperfectly constituted form.

79. Mr Barratt also relied on the Claimants' requests on 26 June 2014 and 9 July 2014 that Mr Ali Zbeeb agree to the appointment of a co arbitrator (paragraphs 30 & 31 above). It is not necessary to decide whether such a request amounts to taking part in the proceedings in the context of an objection to Mr Ali Zbeeb participating as an arbitrator on grounds of lack of impartiality. They cannot assist the Defendants because on each occasion they were put forward as an alternative whilst maintaining the primary position that objection was taken on grounds of lack of impartiality. The relevant objection was raised "forthwith", even if the requests amounted to taking part.

80. In the light of my conclusion that the Claimants have not taken part in the proceedings at any relevant time without raising the objection, it is not necessary or appropriate to undertake an analysis of the state of their actual or constructive knowledge of the connections between Mr Ali Zbeeb and Dr Farran which afford the grounds for his removal. This might have proved a difficult analysis at any particular point of time because the connections constitute continuing circumstances occurring over the course of the relevant period.

Conclusion

81. The application for the removal of Mr Ali Zbeeb succeeds.