BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. 844 of 2008

IN THE MATTER OF The Arbitration Act Cap. 110

AND IN THE MATTER OF the Arbitration between Fiton Technologies Corp. and the Government of Barbados

AND IN THE MATTER OF the removal of Mr. V.V. Veeder as Arbitrator

BETWEEN:

FITON TECHNOLOGIES CORP. **PLAINTIFF**

AND

THE ATTORNEY GENERAL **DEFENDANT**

Before the Honourable Mr. Justice Olson DeC. Alleyne, Judge of the High Court

Appearances:

Mr. Barry Gale Q.C. with Mr. Ralph Thorne Q.C. and Ms. Mechelle Forde for the Plaintiff

Sir Maurice King Q.C. with Mr. Barry Carrington and Mr. Adrian King for the Defendant

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2012: October 04, 17

2013: June 17

DECISION

Introduction

[1] The application before the Court is one by which the Defendant challenges the authority of Mr. V. V. Veeder ("Mr. Veeder") to continue serving as sole arbitrator in arbitral proceedings between the parties. It raises two broad issues. These are (1) whether the Court should set aside a consent order relating to the arbitrator's appointment; and (2) whether the arbitrator should be removed by reason of impartiality. Before particularising the application, I will provide some introductory details and outline the statutory provisions of relevance.

[2] The Plaintiff, Fiton Technologies Corp., ("Fiton") is an external company registered in Barbados under the provisions of the ***Companies Act Cap. 308***.

[3] The Defendant, the Attorney-General of Barbados, represents the Government of Barbados ("the Government") in these proceedings.

[4] On 23 April 2004, the parties entered into a written agreement ("the agreement") for the remediation by the Plaintiff, of an area of Government land that formerly housed the operations of an oil refinery.

[5] Clause 13.1 of the agreement provides that the governing law shall be the laws of Barbados. Clause 13.2 is an arbitration provision. It mandates the referral to arbitration of all unsettled disputes, differences or questions between the parties arising out of the agreement, any such referral to be in accordance with the provisions of the ***Arbitration Act, Cap. 110 ("the Act")***.

The Arbitration Act, Cap. 110

[6] The Act came into force on 15 August 1958. ***Section 39(1)*** provides that it applies to arbitrations commenced after that date. Its objective as expressed in the long title is "*to make provision for Arbitrations*".

[7] ***Section 2*** of ***the Act*** provides, *inter alia*, that the term "arbitration agreement" means "a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not". It also provides that, for the purposes of the Act, "Court" means the High Court or a Judge.

[8] Part II of the Act is headed *"Effect of Arbitration Agreements"* and comprises sections 3 to 7. ***Section 3*** relates to the tenure of arbitrators. It reads:

> The authority of an arbitrator or umpire appointed by or by virtue of an arbitration agreement shall, unless a contrary intention is expressed in the agreement, be irrevocable except by leave of the court.

[9] Part III comprises sections 8 to 13. Those provisions relate to arbitrators and umpires. Of them, sections 8 and 12 are relevant. ***Section 8*** reads:

> Unless a contrary intention is expressed therein, every arbitration agreement shall, where no other mode of reference is provided, be deemed to include a provision that the reference shall be to a single arbitrator.

[10] ***Section 12*** empowers the court to appoint an arbitrator or umpire, under an arbitration agreement, in certain circumstances. The relevant portion of that provision reads:

> In any of the following cases -
>
> (a) where an arbitration agreement provides that reference shall be to a single arbitrator, and all the parties do not after differences have arisen, concur in the appointment of an arbitrator;
>
> (b) …
>
> (c) …
>
> (d) … ,
>
> any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint, or as the case may be, concur in appointing, an arbitrator… and if the appointment is not

> made within seven clear days after the service of the notice, the Court may on application by the party who gave the notice, appoint an arbitrator…who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties.

[11] ***Section 27*** is contained in Part VI. Though having no direct relevance, it is of some interest. Sub-paragraph (1) of that provision acknowledges the power of the court to grant leave to revoke the authority of an arbitrator who is not, or may not, be impartial.

[12] Part VII is headed "*References under Order of Court*". It comprises sections 30 to 34 and regulates court ordered references. These are distinct from references made under arbitration agreements. I will reproduce the following portions of these provisions by way of illustration:

> ***Section 30(1)***: Subject to rules of court and to any right to have particular cases tried with a jury, the Court may refer to an official or special referee for enquiry or report any question arising in any cause or matter, other than a criminal proceeding by the Crown.
>
> ***(2)***: The report of an official or special referee may be adopted wholly or partially by the Court, and if so adopted may be enforced as a judgment or order to the same effect.
>
> ***Section 31***: In any cause or matter (other than a criminal proceeding by the crown)-
>
> (a) If all the parties interested who are not under disability consent; or
>
> (b) if the cause or matter requires any prolonged examination of documents or any scientific or local investigation which cannot in the opinion of the Court conveniently be made

before a jury or conducted by the Court through its other ordinary officers; or

(c) if the question in dispute consists wholly or in part of matters of account,

the Court may at any time order the whole cause or matter, or any question or issue of fact arising therein, to be tried before a special referee or arbitrator agreed on by the parties, or in default of agreement, before an official referee or officer of the Court.

Section 32(1): In all cases of reference to an official or special referee or arbitrator, the official or special referee or arbitrator shall be deemed to be an officer of the Court and, subject to rules of court shall have such authority and conduct the reference in such manner as the Court may direct.

(2): The report or award of any official or special referee or arbitrator, or any such reference shall, unless set aside by the Court, be equivalent to the verdict of a jury.

(3): The remuneration to be paid to an official or a special referee or arbitrator to whom any matter is referred under an order of the Court shall be determined by the Court.

***Section 34*:** The Court of Appeal shall, on an appeal, have all such powers as are conferred by the provisions of this Act on the Court in relation to references.

[13] The other relevant provision is ***Section 37***. It reads:

> This Act shall, except as herein expressly mentioned, apply to any arbitration to which the Crown, or any public officer in respect of any act or omission by him or by his department is a party, but nothing in this Act shall empower the Court to order any proceedings to which the Crown is a party or any question or issue in any such proceedings, to be tried before any referee, arbitrator, or officer without the consent in writing of the Governor-General. (my emphasis)

[14] In some degree, the success of a facet of the Government's application hinges on the interpretation of this provision. For convenience, I shall refer to the part of the provision beginning with the words "but nothing in this Act" as "the second part of section 37" and the words preceding that phrase as "the first part of section 37".

Background to the Application

[15] The background to the application is best understood in the context of some of the statutory provisions identified above.

[16] The agreement does not stipulate a mode of reference. Hence, ***section 8*** of ***the Act*** operates to import a provision that the reference shall be to a single arbitrator.

[17] As events unfolded, disputes arose under the agreement which the parties were unable to resolve. Fiton gave notice of their intention to go to arbitration and called on the Government to concur in the appointment of an arbitrator.

[18] The parties did not reach any agreement in this regard and on 21 May 2008, Fiton filed an Originating Summons ("the Originating Summons"), in which it sought, *inter alia*, an order "pursuant to ***Section 12*** *of* ***the Act*** that some fit and proper person be appointed to act as arbitrator" under the agreement.

[19] However, before the Originating Summons was heard, the Government agreed to the appointment of Mr. Veeder as arbitrator. He was one of Fiton's nominees. The parties agreed that the court proceedings be adjourned *sine die* and that Mr. Veeder be informed of his appointment.

[20] Fiton's Counsel, Mr. Barry Gale, Q.C. and Mr. Martin Valasek, notified Mr. Veeder of his appointment and he, Mr. Veeder, communicated his acceptance to the parties by email on 26 November 2008.

[21] Nonetheless, on 27 November 2008 when the Originating Summons came before Goodridge J., the parties consented to an order ("the Consent Order") that Mr. Veeder be appointed to act as arbitrator. That order has not been drawn up and perfected.

[22] After accepting the appointment, Mr. Veeder sought to get the arbitration proceedings underway. However, for reasons which I reveal shortly, the Government developed doubts about his independence and impartiality. This led to the filing, by the Government, of a summons on 26 February 2009 ("the Original Summons").

[23] By the Original Summons, the Government sought orders for Mr. Veeder's removal; the appointment of a new arbitrator by the court, failing agreement by the parties on an appointment within twenty one days; and a stay of the arbitral proceedings. The ground of the application, as detailed on its face, was as follows:

> Mr. Veeder's participation in pending arbitration proceedings with Mr. Yves Fortier Q.C. as one of the Applicant's counsel gives rise to serious issues of Mr. Veeder's independence and/or impartiality.

[24] Later examination of relevant correspondence shows that, early in the arbitral proceedings, Mr. Veeder, on being informed by Fiton that Mr. Yves Fortier had joined its legal team, sent an email to the parties notifying them that he was sitting with Mr. Fortier as a co-arbitrator in pending arbitration proceedings.

[25] The Original Summons was not heard as the parties suspended the arbitration and attempted to negotiate a new contract. That attempt failed and on 23 February 2012, Fiton filed a Notice of Intention to proceed with the Original Summons.

[26] Meanwhile, though, Mr. Fortier ceased to be a member of Fiton's legal team, having retired from practice. The Government abandoned its original ground of complaint, but maintained its unease as to Mr. Veeder's partiality for two other reasons. I shall come to these later. Additionally, the Government thought it fit to challenge the validity of the Consent Order.

[27] Accordingly, the Government filed an Amended Summons on 31 May 2012 ("the Amended Summons"). It differs from the Original Summons in many respects. Gone are the requests for a stay of the arbitral proceedings and the order for the appointment of a new arbitrator. The ground referring to the Veeder-Fortier association has also been removed. Added, is the request for an order setting aside the Consent Order. The Amended Summons is in these terms:

> 1. That the Consent Order entered by Madam Justice Kaye Goodridge on the 7th day of November, 2008 in terms of the Originating Summons filed in High Court Suit No. 844 of 2008 Fiton Technologies Corp. v. The Attorney General by the Plaintiff on May 21, 2008, be set aside on the grounds that the Court has no jurisdiction to make such Order;
>
> 2. An Order that Mr. V.V. Veeder the arbitrator appointed in the reference between Fiton Technologies Corp. and the Government of Barbados under the arbitration agreement dated the 23rd day of April 2004 be removed on the grounds that the Defendant has serious reservations about the independence and impartiality of Mr. V.V. Veeder as arbitrator in these proceedings.

Application to Set Aside the Consent Order

[28] I turn to paragraph 1 of the Amended Summons. To provide some background to the Consent Order, I will particularise the correspondence exchanged by the parties with respect to Mr. Veeder's appointment and the hearing of the Originating Summons.

[29] The Originating Summons came before Chandler J. on 17 June 2008. He had before him a supporting affidavit that had been sworn by Fiton's Chief Executive Officer and filed on 21 May 2008. Chandler J. ordered the Government to file and serve an affidavit in response by 15 August 2008 and he set a further date for Fiton to file a reply.

[30] The Government did not comply with that Order. On 15 August 2008, Counsel for the Government, Mr. Barry Carrington wrote to one of Fiton's Counsel, Mr. Ralph Thorne Q.C., in these terms:

> "As you are aware, at the hearing of the captioned matter in the No. 6 Supreme Court on June 17, 2008, it was ordered, inter alia, that the Defendant do file affidavits by August 15, 2008.
>
> Please be advised that on reviewing FITON's application to the court, the government of Barbados has agreed to the appointment pursuant to clause 13(2) of the Agreement between the Government of Barbados … and FITON … dated April 23, 2004.
>
> In those circumstances, the necessity of filing affidavits is obviated, and, more importantly, the issue to be determined by the court has become moot.
>
> ….
>
> Kindly make the necessary arrangements to have this matter drawn to the court's attention and disposed of as deemed fit in the circumstances.
>
> Sincere apologies for the late notification as I was awaiting final instructions in this matter." (my emphasis)

[31] In October 2008, the parties exchanged correspondence on the choice of arbitrator but failed to reach agreement in this regard by 28 October 2008. The Originating Summons came before Goodridge J. on that date. She ordered the parties to file their affidavits by 7 November 2008.

[32] On 31 October 2008, Fiton filed a further affidavit in which its Chief Executive Officer deposed to the exchanges between the parties with respect to the choice of arbitrator. The Government filed no affidavit but on 7 November 2008, Mr. Carrington wrote to Fiton's Counsel, Mr. Barry Gale Q. C., in these terms:

> "... As you are aware, the Order of Madam Justice Goodridge mandated the filing of affidavits by November 7, 2008 if the parties are unable to agree on the choice of arbitrator. Due consideration was given to the choice of one of the three (3) nominees proposed by you. I am instructed

> to inform you that government has agreed to the appointment of Mr. V.V. Veeder, Q.C. as the sole arbitrator in this matter.
>
> Kindly notify us of the arrangements to convene a meeting with Mr. Veeder to discuss the procedure to be used, timelines and any issues ancillary to the early disposition of this matter.
>
> I am also taking the liberty of copying this correspondence to the Registrar of the Supreme Court for inclusion on the court file to reflect compliance with the Court's Order."

[33] The parties exchanged two letters in November 2008. These resulted in the agreement between the parties as to the course to be taken in respect of the arbitral and judicial proceedings. First, there was a letter dated 11 November 2008 from Mr. Gale Q.C. to Mr. Carrington. It was in these terms:

> "I acknowledge receipt of your letter dated November 7th 2008 and I am pleased to see that the parties have now agreed to that appointment (sic) of Mr. V.V. Veeder, Q.C. as the sole Arbitrator in this matter.
>
> In relation to paragraph 3 of your letter, I am arranging for Co-Counsel in Canada to make contact with Mr. V.V. Veeder to notify him of his appointment and thereafter to schedule a teleconference between himself, yourselves, Mr. Ralph Thorne Q.C. and myself to discuss procedure, timelines, etc.
>
> I propose that when the matter comes before the High Court again on November 27th 2008 that the matter be adjourned sine die but with liberty to either party to apply.
>
> I look forward to hearing from you in this regard."

[34] Mr. Carrington's letter in response is dated 18 November 2008. By its terms, he indicated that there was no objection to Mr. Veeder being notified of his appointment or the

scheduling, by the latter, of a teleconference. He also assented to the proposal contained in the penultimate paragraph of Mr. Gale's letter.

[35] Nonetheless, on 27 November 2008, the matter was not adjourned *sine die* but, rather, the parties sought and obtained the Consent Order.

The Procedural Issues

[36] Two procedural issues arose with respect to this aspect of the Amended Summons. Both were raised by Mr. Gale Q.C. who appeared for Fiton with Mr. Thorne Q.C. and Ms. Mechelle Forde. They are:

1. whether the application to set aside should have been brought by way of a fresh action; and
2. whether this court has jurisdiction to set aside the order of Goodridge J., assuming that she lacked jurisdiction to make it.

Submissions and Discussion

[37] With respect to the first question, Mr. Gale Q.C. submitted that a consent order cannot be set aside except in a fresh action brought for that purpose. He referred me to a passage found in **Volume 3(1)** ***Halsbury's Laws of England*** **4th ed.** at paragraph **521** in support of this submission. It reads:

> Once an order or judgment obtained by the consent of counsel has been drawn up and passed, it cannot form the subject of an appeal and cannot be set aside except in a fresh action brought for that purpose. In such an action the compromise may be set aside on a ground which would invalidate any other agreement between the parties, including mistake, illegality or duress, but not otherwise.

[38] Sir Maurice King Q.C., who appeared for the Government in association with Mr. Carrington and Mr. Adrian King, submitted that a consent order may be set aside on an application to the court that made the order, once the order has not been drawn up and sealed. He referred me to the passages found at ***Notes 30.7*** and ***30.8*** of ***The Caribbean Court Practice 2011 2nd Ed.*** by David di Mambro.

[39] The passage contained in ***Note 30.7*** states that:

> [i]t is possible, on an application made prior to, or contemporaneously with, the drawing up or sealing of the order, to set aside a consent order.

[40] Since the Consent Order was not drawn up, it is open to the Government to seek an order in this Court to set it aside. Mr. Gale Q.C. did not pursue this point further, having acknowledged that the Consent Order had not been drawn up and perfected. However, he went on to submit that a court will only set aside a consent order in exceptional circumstances. He contended that such an order places on the record of the court, the agreement of the parties in relation to issues arising for determination. He urged that a court treats such an order as if it were a contract between the parties and will only set it aside on the grounds on which it would set aside a contract or agreement.

[41] Sir Maurice did not contradict this submission. He referred me to the following passage found at **paragraph 1143** ***Halsbury's Laws of England*****, 5th ed., Vol. 12** as highlighting some of the bases on which a consent order may validly be set aside:

> A judgment given or an order made by consent may be set aside on any ground which would invalidate a compromise not contained in a judgment or order. Compromises have been set aside on the ground that the agreement was illegal as against public policy, or was obtained by fraud or misrepresentation, or non-disclosure of a material fact which there was an obligation to disclose, or by duress, or was concluded under a mutual mistake of fact, ignorance of a material fact, or without authority.

[42] In ***Siebe Gorman Ltd. v Pneupac Ltd.*** **[1982] 1 W.L.R. 185,** at **page 189, paragraphs E** to **G**, Lord Denning set out two distinct meanings to be given to the words 'by consent' and the implications of those meanings. He said:

> It should be clearly understood by the profession that, when an order is expressed to be made "by consent," it is ambiguous. There are two meanings to the words "by consent." That was observed by Lord Greene M.R. in Chandless-Chandless v. Nicholson [1942] 2 K.B. 321, 324. One meaning is this: the words "by consent" may evidence a real contract

> between the parties. In such a case the court will only interfere with such an order on the same grounds as it would with any other contract. The other meaning is this: the words "by consent" may mean "the parties hereto not objecting." In such a case there is no real contract between the parties. The order can be altered or varied by the court in the same circumstances as any other order that is made by the court without the consent of the parties. In every case it is necessary to discover which meaning is used. Does the order evidence a real contract between the parties? Or does it only evidence an order made without objection?

[43] It is not in issue that the Consent Order is of the first type mentioned by Lord Denning. Prior to agreeing its terms, the parties agreed upon Mr. Veeder's appointment and acted on that agreement. I should only vitiate the Consent Order if good grounds are established by the Government.

[44] In this respect, Sir Maurice referred me to ***Shepherd v Robinson*** **[1919] 1 K.B. 474** in support of the principle that a consent order made without authority may be set aside by the court. In that case, a consent order was set aside in circumstances where a party had given clear instructions that there should be no settlement without her consent. Counsel who consented to the compromise was unaware of those instructions.

[45] There is no suggestion in this case that the Consent Order was agreed without the authority of the Government. It is clear from Mr. Carrington's letter of 15 August 2008 that he was acting on his client's instructions. However, Sir Maurice contends that this is not enough. He urged that the effect of the second part of section 37 of the Act is such that the parties could not validly agree to the terms of the Consent Order without the written consent of the Governor-General.

[46] Counsel's argument in this respect is set out at paragraph 27 of the Government's written submissions. Quoting from that paragraph, he stated that "the Parties could not by their Counsel, compromise the matter in the face of the statutory requirement of section 37" of the Act. He submitted further that "the consent to the appointment of the arbitrator, in the absence of the written consent of the Governor General is unlawful…" If this submission is correct, it would constitute a basis on which the Consent Order could be set aside.

[47] Sir Maurice's more fundamental submission is that Goodridge J. lacked jurisdiction to make the Consent Order. That is the ground noted on the Amended Summons. He also bases that submission on what he asserts to be the meaning and effect of section 37.

[48] Counsel on both sides made submissions on the question as to whether I have power to consider the application to set aside the Consent Order on the ground of lack of jurisdiction. I do not find it necessary to consider these submissions. They do not seem to be relevant since the order has not been drawn up and perfected, but I do so out of deference to Counsel. Mr. Gale Q.C. submitted that I have no power to set aside the Consent Order in such circumstances. Sir Maurice disagreed.

[49] It is a fair summary of Sir Maurice's submission to say that he urged that (a) the Consent Order was a nullity; (b) no order is required to set aside a nullity and, hence, this Court must have jurisdiction to set aside the Consent Order; and (c) by purportedly consenting to Mr. Veeder's appointment, the parties could not confer jurisdiction on the Court to make the order.

[50] In support of his submission that I must have jurisdiction to set aside the Consent Order, Counsel referred me to the cases of ***Macfoy v United Africa Co. Ltd.*** **[1961] 3 All E.R. 1169**, ***Re Pritchard, Deceased*** **[1963] Ch. 502** and **S*trachan v The Gleaner Company Limited et al* [2005] 1 W.L.R 3204**. He underscored the following extract from the judgment of Lord Denning found at **pages 1172-1173** of ***Macfoy*** and endorsed by Upjohn L.J. in ***Re Pritchard*** at **page 520:**

> The defendant here sought to say, therefore, that the delivery of the statement of claim in the long vacation was a nullity and not a mere irregularity. This is the same as saying that it was *void* and not merely *voidable*. The distinction between the two has been repeatedly drawn. If an act is *void*, then it is in law a *nullity*. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.

[51] ***Macfoy*** and ***Re Pritchard*** were concerned with the validity of orders made where there were defects in the proceedings and whether the defects were curable or so fundamental as to nullify the proceedings. The issue in this case is somewhat different. The validity of the proceedings is not in dispute. The question is whether I can set aside the Consent Order, if it was made without jurisdiction. For this reason, I do not find those cases to be useful.

[52] I consider the **S*trachan*** case to be of greater relevance. Sir Maurice referred me to **paragraphs 27** and **28** of that decision, where Lord Millet stated:

> 27. In the present case the validity of the proceedings themselves is beyond challenge. The only question is whether an order of a judge of the Supreme Court made without jurisdiction is a nullity, not in the sense that the party affected by it is entitled to have it set aside as a matter of right and not of discretion (of course he is) nor in the sense that the excess of jurisdiction can be waived (of course it cannot) but in the sense that it is has no more effect than if it had been made by a traffic warden and can be set aside by a judge of co-ordinate jurisdiction.
>
> 28. An order made by a judge without jurisdiction is obviously vulnerable, but it is not wholly without effect; it must be obeyed unless and until it is set aside and (as will appear) it provides a sufficient basis for the Court of Appeal to set it aside. On the other hand, since the defect goes to jurisdiction, it cannot be waived; the parties cannot by consent confer a jurisdiction on the court which it does not possess.

[53] Mr. Gale Q.C., however, submitted that this case serves as an authority for the proposition that a court has no power to set aside an order of a court of co-ordinate jurisdiction, where that order has been made without jurisdiction. He submitted further, that any application to set aside such an order can only properly be brought before an appellate court.

[54] I agree with Mr. Gale's analysis. At paragraph 27, Lord Millet is merely posing a question as to the effect of an order made without jurisdiction. He answers that question, in part, at paragraph 28 where he alludes to the Court of Appeal being the appropriate forum for an order made by a judge without jurisdiction to be set aside. He discusses the issue at greater length in the ensuing paragraphs and states at **paragraphs 32** and **33**:

> 32. The Supreme Court of Jamaica, like the High Court in England, is a superior court or court of unlimited jurisdiction, that is to say, it has jurisdiction to determine the limits of its own jurisdiction. From time to time a judge of the Supreme Court will make an error as to his own jurisdiction. Occasionally (as in the present case), his jurisdiction will have been challenged and he will have to decide, after argument that he has jurisdiction; more often … he will have exceeded his jurisdiction inadvertently, its absence having passed unnoticed. But whenever a judge makes an order he must be taken implicitly to have decided that he has jurisdiction to make it. If he is wrong, he makes an error whether of law or fact which can be corrected by the Court of Appeal. But he does not exceed his jurisdiction by making the error; nor does a judge of co-ordinate jurisdiction have power to correct it.
>
> 33. In the present case Walker J held that he had jurisdiction to make the order he did. If wrong, his decision could be reversed by the Court of Appeal which would be bound without going into the merits to set aside his substantive order as a nullity. As between the parties, however, and unless and until reversed by the Court of Appeal, his decision (both as to jurisdiction and on the merits) was res judicata. As a judge of co-ordinate jurisdiction Smith J had no power to set it aside.

[55] The principle and reasoning contained in that passage seem to apply equally in this jurisdiction. However, in arguing this point, Counsel overlooked the fact that the

Consent Order has not been drawn up and perfected. If a court observes that it has made a fundamental error in rendering a decision, it may correct that error if the order has not yet been drawn up or perfected. It may do so on its own motion or on the application of a party. I derive support for this view from the case of ***In Re Harrison's Share*** **[1955] Ch. 260**. At **page 276**, Jenkins L.J. expressed the general principle that:

> … an order pronounced by the judge can always be withdrawn, or altered, or modified by him until it is drawn up, passed and entered.

He continued at **pages 283-284**:

> When a judge has pronounced judgment he retains control over the case until the order giving effect to his judgment is formally completed. This control must be used in accordance with his discretion exercised judicially and not capriciously.

[56] Since the Consent Order has not been drawn up and perfected, this Court has power to set it aside if it was made without jurisdiction. Hence, it is open to me to consider paragraph 1 of the Amended Summons and I so hold.

The Interpretation of Section 37

[57] That brings me to the interpretation of ***section 37*** of ***the Act***. Two questions arise from Sir Maurice's submissions. Both relate to the circumstance where the Crown is a party to the related arbitration agreement. The first is whether section 37 precludes a court from making an order appointing an arbitrator under section 12, unless the Governor-General's written consent is first obtained. The second is whether in the absence of such consent, ***section 37*** of ***the Act*** invalidates an agreement leading to a consent order for a section 12 appointment.

[58] At paragraph [10], I reproduced and explained ***section 12*** of ***the Act***. That provision empowers the court to appoint an arbitrator or umpire under an arbitration agreement, in specified circumstances. Sir Maurice submitted that the provision must be read in conjunction with, or subject to, section 37.

[59] Counsel submitted further that the words of section 37 must be given their plain, ordinary, literal and grammatical meaning. In this respect, he referred to an oft cited passage from the ***Sussex Peerage Case*** **[1843 – 60] All E.R. 55, 63** which reads as follows:

> …the only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense.

[60] Quoting from paragraph 15 of the Government's written submissions, Sir Maurice urged that the second part of section 37 "expressly prohibits a Court from ordering proceedings in an arbitration involving the Crown without the written consent of the Governor General." The paragraph continues as follows:

> The Governor General's consent is a condition precedent to the vesting of jurisdiction in the Court to make an order for the appointment of an arbitrator, whether by consent or not. The requirement for the Governor General's consent has the limiting effect on a Court to order proceedings relating to questions or issues in arbitrations involving the Crown in what would otherwise be a general provision that would empower a Court to make such an order on the application by or against anyone else.

I understood the general thrust of this submission to be, that the effect of section 37 is such that there can be no order under section 12 where the arbitration involves the Crown, without the written consent of the Governor General.

[61] Counsel referred me to ***Reid v Attorney General et al*** **(1981) 16 Barb L.R. 133** in support of his submission. In that case, a dispute had arisen under a commercial agreement that existed between the plaintiff, Lisle Reid, and the Government. The agreement contained an arbitration clause. Despite some initial agreement on the choice of arbitrator, the Government failed to set the arbitration process in motion. The plaintiff took out an Originating Summons seeking an appointment order under section 12 of the

Act. Williams J., as he then was, upheld the defendant's submission that the court had no power to appoint an arbitrator without the written consent of the Governor General. The learned judge stated at **page 136**:

> These proceedings are clearly proceedings to which the Crown is a party and in fact this is admitted by the plaintiff in the body of his summons. It seems to me that to order the appointment of an arbitrator is in effect to order proceedings to be tried before an arbitrator and consequently it is my view that I would be precluded by section 37 of Cap. 110 from making the order sought unless the written consent of the Governor General is duly exhibited.

[62] Sir Maurice also cited the case of ***Sir Robert McAlpine & Sons Ltd. v the Attorney General of Barbados*** **(1982) 17 Barb. L.R. 221**.

[63] That case involved a contract between the Government and a construction company for the construction of a government complex. The agreement contained an arbitration clause. The plaintiff commenced an action claiming, *inter alia*, a declaration and the payment of money it claimed to be due under an interim certificate. The Attorney-General took out a summons to stay the action. The summons succeeded. The court held that the issues raised between the parties were within the ambit of the arbitration clause and that the Contractor had not shown that the Government was not at all times ready and willing to submit all matters to arbitration. In reviewing the evidence with respect to this latter finding, Williams J, (as he then was), noted that the Government "ha[d] obtained the consent of the Governor-General to the making of an order referring the matter to arbitration."

[64] I derived no assistance from this case. I accept Mr. Gale's submission that it is not an authority for the proposition advanced by Sir Maurice. It may well be that the statement cited suggests that the court considered the obtaining of the Governor-General's written consent to be of significance. If it is so, this is hardly surprising given the court's earlier decision in ***Reid***. Nonetheless, the issue as to what section 37 requires was not raised or considered in this case. Hence, it is of no precedential value on the point.

[65] Mr. Gale Q.C. submitted that section 37 does not state that a court cannot make an order in arbitration proceedings involving the Crown without the consent of the Governor General. He urged that the true meaning of the second part of section 37 is that a court has no power to refer legal proceedings to which the Crown is a party to arbitration, a referee or other officer, without the written consent of the Crown.

[66] Counsel submitted further, that section 37 provides that the Crown is bound by the Act except as expressly so mentioned. He urged that there are no expressed exceptions and that, consequently, the Crown is bound by the entire Act. He contended that section 12 should be given its ordinary and natural meaning and that there is nothing in that section which excludes the Crown from the scope of its application.

[67] Mr. Gale Q.C. maintained that the second part of section 37 is not applicable to the facts of this case. This is so, he urged, since the Consent Order did not require the Crown to go to arbitration in proceedings pending before the Court but merely recorded the parties' agreement to Mr. Veeder's appointment. He submitted that the provision does not contemplate a situation where the parties have agreed on arbitration as well as on who the arbitrator should be.

[68] Counsel further submitted that if Sir Maurice is correct as to the meaning of the second part of section 37, the Crown would be able to frustrate the dispute settlement process to which it had agreed, thus making a mockery of arbitration agreements to which it is a party.

[69] Mr. Gale Q.C. submitted that ***Reid*** may be distinguished from the instant case. He urged that in the case before me, unlike in ***Reid***, the parties had agreed on the arbitrator's appointment and the arbitration process had been set in motion before the Consent Order was made. He submitted further that if ***Reid*** is to be taken as establishing any rule that the written consent of the Governor General is required (a) before the Crown can be compelled to comply with the terms of an arbitration agreement to which it is a party; or (b) as a prerequisite to the granting of an appointment order under section 12, then the case is wrongly decided.

[70] These submissions require me to determine the meaning and effect of section 37 and, in doing so, to review the decision in ***Reid***. As a precursor to this exercise, I have

considered the origins and development of this provision in the United Kingdom from whence it was derived.

[71] Legislative accommodation of arbitration processes in the UK can be traced back to 1689. However, the first comprehensive statute was the ***Arbitration Act 1889 ("the 1889 Act")***. That Act was divided into three parts. Part 1 dealt with references by consent out of court; Part 2, with references under orders of the court and Part 3 with references under Acts of parliament.

[72] The intent that the ***1889 Act*** should bind the Crown was expressed in Section 23. Seemingly, this was the model on which ***Section 37*** of ***the Act*** is based. The two provisions are structured identically and the difference in content is reflective of jurisdictional relevance. ***Section 23*** of the ***1889 Act*** reads:

> This Act shall, except as in this Act expressly mentioned, apply to any arbitration to which her Majesty the Queen either in right of the Crown, or of the Duchy of Lancaster or otherwise, or the Duke of Cornwall, is a party, but nothing in this Act shall empower the Court or a Judge to order any proceedings to which her Majesty or the Duke of Cornwall is a party, or any question or issue in any such proceedings, to be tried before any referee, arbitrator, or official without the consent of her Majesty or the Duke of Cornwall, as the case may be, or shall effect the law as to costs payable by the Crown.

[73] Part 2 of the ***1889 Act*** which dealt with court ordered references, was repealed by ***section 226*** of the ***Supreme Court of Judicature (Consolidation) Act 1925 ("the 1925 Act")*** and replaced by sections 88 to 92 of the ***1925 Act***. Simultaneously, ***Section 23*** of the ***1889 Act***, "so far as it relate[d] to a reference under an order of the High Court", was repealed by ***section 226*** of ***the 1925 Act*** and replaced with slight modifications by section 96 of ***the 1925 Act***. The latter provision is roughly equivalent to the second part of Section 37. It read:

> Nothing in the provision of this part of this Act relating to inquiries and trials by referees shall empower the Court or a judge to order any proceedings to which His Majesty or the Duke of Cornwall is a party, or

> any question or issue in any such proceedings, to be tried before any referee, arbitrator or officer without the consent of His Majesty or the Duke of Cornwall, as the case may be, or shall affect the law as to costs payable by the Crown.

[74] The next major UK statute was the ***Arbitration Act 1950 ("the 1950 Act")***. This Act was limited to references under agreements. It contained no provisions relating to court ordered references and section 30 which rendered the statute applicable to the Crown, contained no provision similar to the second part of ***section 37 of the Act***.

[75] That review demonstrates a legislative intent in the UK to link the statutory requirement for official consent expressed in ***section 23 of the 1889 Act*** to court ordered references in legal proceedings only. The distinction between these types of references and those made under arbitration agreements was stated with clarity by Russell and Hudson in their text ***Russell on the Power and Duty of An Arbitrator and the Law of Submissions and Awards* 10th ed. 1919**. Referring to court order references, they noted as follows:

> The references dealt with in the Arbitration Act under this heading are not references to arbitration in the ordinary sense of the term, and their inclusion in an Arbitration Act, or in a book on Arbitration, causes confusion. These references are nothing more than a delegation by the Court to an officer of the Court of the trial of the whole or any part of an action, or an enquiry by an officer of the Court as to any question in an action upon which the Court requires assistance.

[76] Though enacted after 1950, ***the Act*** bears some similarity to the ***1889 Act*** in that it contains provisions regulating court ordered references and section 37 which renders the act applicable to the Crown is akin to section 23 of the ***1889 Act.*** I must examine ***section 37***, and ***the Act*** as a whole, to discern the meaning of this provision and the scope of its application.

[77] ***Section 37*** of ***the Act*** serves two purposes. The first part renders the Act applicable to arbitrations to which the Crown is a party. This is subject to any express exceptions

contained in the Act. I accept Mr. Gale's submission that there is nothing in section 12, or elsewhere in the Act, that limits its application to the Crown.

[78] The second part of ***section 37*** imposes a restriction on the power of the court. In the circumstances specified in the provisions, it requires the written consent of the Governor-General as a prerequisite to the making of an order of the type prescribed. It bears repeating for ease of analysis. It reads:

> …but nothing in this Act shall empower the Court to order any proceedings to which the Crown is a party or any question or issue in any such proceedings, to be tried before any referee, arbitrator, or officer without the consent in writing of the Governor General.

[79] At first blush, the words "any proceedings to which the Crown is a party" may be taken to include arbitral proceedings involving the Crown. However, this phrase does not stand alone. I must construe it in light of the words that surround it. In this regard, the light shed by the words that follow it shows that it must be given a more limited interpretation.

[80] The ensuing words extend the restriction on the court's power to orders relating to "any question or issue **in any such proceedings**" (emphasis mine). Section 12 allows for the appointment of an arbitrator under an arbitration agreement by court order. However, nothing in the Act provides for the ordering by a court, that any question or issue in arbitral proceedings be tried before a referee, arbitrator or officer. Hence, it seems to me that the words "any such proceedings" and by extension, the words "any proceedings" cannot be taken to refer to arbitration proceedings.

[81] On the other hand, there is some synergy between the provisions of ***Part VII of the Act*** and the second part of ***section 37***. I make particular reference to ***section 31.*** This provision authorises the Court, in the prescribed circumstances, to order a cause or matter, other than a criminal proceeding by the Crown, or any question or issue of fact arising in a cause or matter, to be tried before a special referee or arbitrator agreed on by the parties, or failing agreement, before an official referee or officer of the Court. It appears that the real purpose of the second part of section 37 is to give the Crown special protection from litigation other than before the High Court or the Court of Appeal.

[82] I disagree with the opinion expressed in ***Reid*** that, to appoint an arbitrator pursuant to ***section 12 of the Act*** is, in effect, to order that proceedings be tried before an arbitrator in the sense contemplated by section 37. Section 12 appointments are made pursuant to an arbitration agreement. When the court makes a section 12 appointment, it is not referring proceedings or any question or issue arising in proceedings to be tried by arbitration. The parties themselves have, by agreement, provided for the reference. Section 12 merely provides a mechanism for the appointment of members of the arbitral panel, should the circumstances set out in that provision arise.

[83] I am fortified in this position when I consider the deficiencies intended to be remedied by the Act. Voluntary arbitrations lacked potency at common law. The following extract from **page 4** of ***Mustill and Boyd, Commercial Arbitration, 2001 2nd Ed.***, is instructive:

> Originally, arbitration in its commonly accepted sense suffered from defects which continued to plague some foreign systems until the twentieth century: for the success of voluntary arbitration depended then, and to a great extent still depends, on the willingness of the parties to abide by the spirit of the arbitration decision which they had made. An agreement to submit future disputes to arbitration is not, as a matter of contract law, capable of being directly enforced by the courts; nor can a judge force a party to comply with its implied undertaking to co-operate in the effective conduct of the reference. The arbitrator has no coercive powers with which to ensure that his procedural rulings are obeyed. Neither again is the implied obligation to act in accordance with the award enforceable at common law, except by a fresh action founded on the original agreement to arbitrate. In England, as in any other jurisdiction, a system of voluntary arbitration is by its nature vulnerable to the obstruction of an unscrupulous party.

[84] The first limb of ***section 37*** makes the accommodative statutory framework applicable to agreements to which the Crown is a party. I agree with Mr. Gale Q.C. that to construe section 37 in the manner pressed for by Sir Maurice would give rise to an anomaly. On the one hand, the Crown could agree on an arbitrator without reference to the court.

However, where the parties fail to agree on an arbitrator, the Crown could elect to disregard the appointment mechanism provided by the Act, thereby derailing the arbitration process. Thus, the Crown would be free to determine whether or not it would abide by its contractual obligations and the provisions of the Act which binds it. This is an inherently contradictory position and I must presume that Parliament intended no such absurdity.

[85] I am not persuaded that ***section 37*** of ***the Act*** has the meaning and effect urged by Counsel for the Government. I accept Mr. Gale's submission that the second part of that provision does not apply to references arising under arbitration agreements. I am persuaded that the condition it imposes is intended to apply to court ordered references regulated by ***Part VII of the Act*** only. These references relate to legal proceedings. To hold otherwise, is to disregard the language of section 37 and bring about an anomalous result.

[86] I am mindful that the decision I have reached on this point differs from that in ***Reid***. With the greatest respect, I consider that decision to be wrong and I will not follow it. The issue was only briefly discussed in that case and it does not appear from the report that the court had the benefit of extensive submissions from Counsel, as I have had in this case. I elect to depart from that decision in the interest of justice.

[87] I hold that the written consent of the Governor-General is not a prerequisite to the court making an order appointing an arbitrator under ***section 12*** of ***the Act***. Nothing in section 37 precludes the making of such an order in cases where the Crown is a party to the related arbitration agreement. I hold further that the absence of such consent is not a bar to the valid establishment by the parties of an arrangement which leads to a consent order with respect to an appointment.

[88] Consequently, the Consent Order cannot be impugned, nor the agreement underlying it vitiated, on the basis of anything contained in ***section 37*** of ***the Act***. Hence, paragraph 1 of the Amended Summons fails.

Application to Remove Arbitrator on Grounds of Bias

[89] This brings me to paragraph 2 of the Amended Summons, by which the Government seeks to have Mr. Veeder removed from office. As mentioned, the ground of objection

stated on the Amended Summons is that the Government has serious reservations about his independence and impartiality.

Background to the Allegations

[90] It is necessary to contextualise the factors on which the Government relies by reference to the correspondence and events that followed Mr. Veeder's acceptance email of 26 November 2008. The first email was one which Mr. Veeder sent to the parties on 1 December 2008 proposing an administrative meeting for 11 December 2008. The material portions of that email read:

> I acknowledge safe receipt of the several responses to my email message of 26 November 2008 to the Parties…
>
> I note the Respondent's request that the proposed first procedural meeting be put off until the Respondent has instructed Senior Counsel. Nonetheless, even if Senior Counsel were not yet instructed, I suggest that it would be helpful to hold an administrative meeting … to address at least the more mundane and immediate tasks arising at the outset of these proceedings, including the date, time, form and agenda of a more substantive procedural meeting.
>
> Accordingly, I request that an administrative meeting be held by telephone conference-call on Thursday, 11 December 2008, beginning at 1000 hours (Barbados time). It should not last more than 15-30 minutes; and it will not require the participation of Senior Counsel for either Party. In these circumstances, I expect that both sides will take part, and I request the names and telephone numbers of the Parties' intended participants to be provided to me as soon as possible.

[91] Mr. Valasek confirmed Fiton's participation in the proposed meeting by an email sent on 6 December 2008. In that email, he also gave notice that Fiton was adding Mr. Fortier to its legal team as Senior Counsel.

[92] On 7 December 2008, Mr. Veeder circulated an email which read in part:

> … I understand that the Respondent may not yet have appointed its legal representative and therefore that it cannot yet confirm its participation in next Thursday's administrative meeting…I hope this can be clarified early next week by the Respondent one way or the other.
>
> …as regards the Claimant's additional legal representative, I should disclose that I am sitting with Mr. Fortier as a co-arbitrator in pending ICSID proceedings. I do not myself regard this factor as impugning my independence or impartiality in these proceedings.

[93] This disclosure engendered doubt in Mr. Carrington as to Mr. Veeder's independence and impartiality. On 10 December 2008, he circulated an email in which he indicated that the Government was reserving its rights in the matter. Then, by email disseminated on 16 January 2009, he registered the Government's formal objection to Mr. Veeder continuing as arbitrator. That email read, in part:

> We respectfully disagree with Mr. Veeder on the issue of his independence or impartiality in this matter while Mr. Fortier is one of Fiton's Counsel. The Respondent has no say or control over who Fiton choses as its legal representatives, but our research revals (sic) that issues of independence and/or impartiality may arise, post appointment of an arbitrator, in instances such as this one.
>
> In the circumstances, it is the Respondent's desire that another arbitrator should be chosen to deal with this matter. We are prepared to recommend an individual for your consideration as arbitrator.
>
> It should be noted that in the event that Fiton opposes our objection to the replacement of Mr. Veeder, it is our intention, pursuant to the [Consent Order] to refer this matter to the High Court for determination.

[94] Fiton opposed the objection. On 22 January 2009, Mr. Gale Q.C. gave notice of his client's intention to apply for an order dismissing the objection and confirming Mr. Veeder's appointment, unless the Government withdrew the objection by 30 January 2009.

[95] On 22 January 2009, Mr. Valasek also circulated an email addressed to Mr. Veeder. I will reproduce it substantially, since it is central to the Government's argument. It reads:

> Dear Mr. Veeder
>
> I refer to Mr. Carrington's email of 16 January, in which Respondent has formally objected to your continuing as arbitrator in this matter, and to your email of 17 January responding to same and inviting Claimant's response.
>
> As you have seen by copy of the letter from Mr. Gale to Mr. Carrington of even date, Claimant opposes Respondent's objection to you continuing as arbitrator merely because you and Mr. Fortier are sitting as co-arbitrators in a pending ICSID case. Indeed, it is Claimant's position that an arbitrator's professional links with a party's counsel is not a serious basis for removing an arbitrator (*see, e.g.*, E. Gaillard & J. Savage, eds., *Fouchard, Gaillard Goldman on International Commercial Arbitration* (The Hague: Kluwer, 1999) at para. 1031; *see also IBA Guidelines on Conflicts of Interest in International Arbitration* (2004) at section 4.4).
>
> Unless Respondent reconsiders its objection, we will seek an order from the High Court dismissing Respondent's objection and confirming you as arbitrator in this matter.
>
> In the meantime, it is Claimant's respectful submission that you remain seized of the matter and, until and unless the High Court sustains Respondent's objection, have full authority to continue to oversee and direct the fair, orderly and expeditious conduct of these proceedings (see Barbados Arbitration Act, Cap. 110, section 3; *see also* UNCITRAL

Model Law on International Commercial Arbitration, Article 13(3) *in fine*). Accordingly, Claimant requests that the Tribunal turn its attention to the organization of the preliminary procedural meeting in this arbitration while the parties resolve the challenge, if necessary, in the High Court.

This brings us to the issue of Respondent's legal representation. By email communication to the parties dated 5 January 2009, the Tribunal asked Respondent to name its legal representative or explain why more time was needed before a representative was named. We find ourselves no further ahead on this issue over two weeks later, having received no clarification from Respondent.

Frankly, it was clear from Mr. Carrington's email of 3 December 2008 to the Tribunal that Respondent had already appointed its "Senior Counsel." Mr. Carrington explained the situation as follows (my emphasis):

> *I applaud your effort to have the arbitration done as speedily as possible by scheduling an administrative meeting via teleconferencing to deal with some administrative matters. Even though you indicated that the teleconference of December 11, 2008 at 10.00 a.m. can be done without Senior Counsel, I would rather defer to Senior Counsel re. the scheduling issues as I cannot commit to any timetable/timeframes since I do not know his schedule. Consequently, I will not be participating in the teleconference of December 11, 2008.*
>
> *I will be providing a brief to Senior Counsel on the arbitration, together with your contact information, issues for discussion/decision, including the Draft Terms of appointment and secretarial fees, etc.*

> *I am confident that our Senior Counsel will contact you regarding procedural matters in due course.*

It is clear from the content of Mr. Carrington's email, over six weeks ago now, that Senior Counsel had already been appointed. Indeed, it was not a question of waiting for the appointment of Counsel, but simply of having that individual get up to speed before communicating with the Tribunal about the preliminary meeting. Even considering the intervening holiday period, and the slower pace of dealings within government generally, it is now past the reasonable time for the Respondent's senior counsel to have identified himself to the Tribunal and to Claimant's legal team.

Claimant therefore respectfully submits that the Tribunal can reasonably conclude that the Respondent has indeed named its Senior Counsel, but has not yet identified him to the Tribunal, causing delay in these important proceedings, notwithstanding the Tribunal's repeated requests to Respondent to name its Senior Counsel (I refer to the Tribunal's emails dated 7, 11, and 22 December 2008, and 5 January 2009). In any event, it is clear that, quite apart from its Senior Counsel, Respondent's legal team includes Mr. Carrington (Chief legal Officer, and a lawyer who, quite apart from Senior Counsel, would be eminently qualified to represent respondent in a preliminary meeting for the purpose of organizing the further steps in this arbitration).

In the circumstances, Claimant therefore requests that the Tribunal give Respondent a final chance to identify its Senior Counsel or any additional member(s) of its legal team. Specifically, Claimant requests the Tribunal to invite Respondent to identify its Senior Counsel (etc.) by the end of next week (30 January 2009), and to provide his availability for a preliminary meeting in the following two weeks (weeks of 2 and 9 February 2009). Furthermore, Claimant requests that the Tribunal direct

> that, failing any response from Respondent, a preliminary meeting will be peremptorily fixed on or about 2 February 2009 for a date that is convenient to the Tribunal sometime in the following two weeks (i.e., to be held no later than 13 February 2009).
>
> …..
>
> Sincerely,
>
> Martin J. Valasek

[96] Mr. Veeder's response followed on 23 January 2009. He wrote:

> Dear Colleagues,
>
> I acknowledge safe receipt of the letters from Mr Gale QC and Mr Valasek both dated 22 January 2009 on behalf of the Claimant, in response to my message of 17 January 2009 to the Parties. I have not received any response from the Respondent.
>
> I request the Respondent to show cause in writing, as soon as practicable but not later than 30 January 2009, why I should not make the several procedural orders requested in the penultimate paragraph of Mr Valasek's letter of 22 January 2009.
>
> Yours sincerely
>
> V.V. Veeder

[97] The Government did not respond to this email. On 26 February 2009, it filed the Original Summons, Mr. Carrington's supporting affidavit and a Certificate of Urgency. On 5 March 2009, Mr. Gale Q.C. forwarded copies of these documents to Mr. Veeder. In the accompanying email, he notified Mr. Veeder of the service of the proceedings and the nature of the Orders sought by the Government; informed him of the scheduled date of hearing and of Fiton's intention to resist the application; and indicated that he would advise him of the outcome, in due course.

Submissions and Discussion

[98] The Government alleges apparent bias. They identify two factors as the basis of their objection. The first relates to Mr. Veeder's response to Mr. Valasek's email of 22 January 2009. They claim that Mr. Veeder acted on advice and recommendations contained in Mr. Valasek's email. Additionally, they complain that the response was sent before 30 January 2009, the date Mr. Gale Q.C. had given in his email of 22 January 2009 for Fiton to withdraw its objection. The second factor on which the Government relies, is the fact that Mr. Veeder was made aware of the content of the court documents relating to the initial request for his removal.

[99] Paragraphs 33 to 36 of the Government's written submissions and the evidence contained at paragraphs 5 and 6 of an affidavit filed by Mr. Carrington on 2 May 2002, confirm that the Government had ceased to rely on the fact of the professional relationship between Mr. Veeder and Mr. Fortier as a basis for objection.

The Test for Apparent Bias

[100] Sir Maurice referred to the following passage from the judgment of Lord Brown-Wilkinson in ***R v Bow Street Metropolitan Stipendiary Magistrates Ex parte Pinochet Ugarte*** **(No. 2) [2000] 1 A.C. 119**, **132 to 133**, for an exposition of the concept of apparent bias:

> The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be judge in his own cause, since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial.

[101] Counsel cited the case of ***Meerabux v The Attorney General of Belize*** **[2005] 2 A.C. 513** for an explanation of the applicable test in determining whether this form of bias has been

established. In this respect, Mr. Gale Q.C. referred me to the cases of ***Re Medicaments and Related Classes of Goods*** **[2001] 1 W.L.R.**, ***Porter v Magill*** **[2002] A.C. 357** and ***National Assembly for Wales v Condron*** **[2006] EWCA Civ. 1573; [2007] 2 P&C.R.4**.

[102] The test enunciated in those cases and that which is applicable in this jurisdiction was stated by the Caribbean Court of Justice in ***Barbados Turf Club v Melnyk*** **[2011] CCJ 14 (AJ); [2011] 79 WIR 153** at **paragraph 10**, as follows:

> Where, as in this case, the Respondent contends that the decision of the tribunal was tainted by apparent bias, the appropriate test 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': In re Medicaments and Related Classes of Goods (No. 2) [2001] 1 WLR 700 at pp. 726-727.

[103] In ***Barbados Turf Club,*** the test was applied in assessing the conduct of a disciplinary tribunal. In ***R v Gough*** **[1993] A.C. 646,** Lord Goff opined that the same test should apply in all cases of apparent bias. He stated at **page 670, paragraph C:**

> I think it possible, and desirable, that the same test should be applicable in all cases of apparent bias, whether concerned with justices or members of other inferior tribunals, or with jurors, or with arbitrators.

[104] That passage was cited with approval by the Court of Appeal of England and Wales in ***Locobail (UK) Limited v. Bayfield Properties Ltd. et al.*** **[2000] QB 451, 476** at **paragraph 16**. In ***AT & T Corp & Anor v Saudi Cable Co***. [**2000] 2 Lloyd's Rep 127**, the Court of Appeal of England and Wales applied the dictum of Lord Goff in holding that the test for apparent bias is the same in arbitration as in judicial proceedings.

[105] In this respect, Mr. Gale Q.C. submitted that the ground stated in the Amended Summons is, in itself, insufficient to establish a case of apparent bias. He maintained that the fact that a claimant is fearful is not decisive. He cited ***National Assembly for Wales (supra)*** in support of the principle that the relevant test requires the Court to carefully analyse the facts as they appear from the material before it. In that case, Richards L.J. stated at paragraph 50, that:

> The court must look at all the circumstances as they appear from the material before it, not just at the facts known to the objectors or available to the hypothetical observer at the time of the decision.

[106] This statement underscores the fact that the test is an objective one to be applied to the facts as elicited before the court. Reservations on the part of a complainant, however serious, about the independence or impartiality of the decision maker, are not, in themselves, enough. The applicable test is an objective one with the matter being assessed through the eyes of the informed and fair-minded observer. His approach is not to be confused with the Government's. He remains detached, agreeing with the Government only if he finds the complaints justified after an informed and fair-minded assessment.

[107] As Lord Hope commented in ***Helow v Secretary of State of the Home Department*** **[2008] 1 W.L.R 2416**, at paragraph 2, the approach of the fair-minded and informed observer is not to be confused with that of the complainant. He stated:

> The "real possibility" test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively.

[108] But, who is the fair-minded and informed observer? He is a fictional character employed to represent the standard to be applied. The epithets that describe him broadly capture the characteristics he must possess. Courts in other jurisdictions have detailed some of these characteristics. In ***Helow***, Lord Hope described him this way at **paragraphs 2** and **3**:

> 2. The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in *Johnson v. Johnson* (2000) 201 CLR 488, 509, para 53…But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can

> be justified objectively, that things they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.
>
> 3. 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 geographical 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.

[109] In ***Saxmere Company Limited et al v Wool Board Disestablishment Company Limited*** **[2010] 1 NZLR 35**, Blanchard J. said this at **paragraph 5**:

> The fair-minded lay observer is presumed to be intelligent and to view matters objectively. He or she is neither unduly sensitive or suspicious nor complacent about what may influence the judge's decision. He or she must be taken to be a non-lawyer but reasonably informed about the workings of our judicial system, as well as about the nature of the issues in the case and about the facts pertaining to the situation which is said to give rise to an appearance of bias.

[110] In ***Prince Jefri Bolkiah v State of Brunei Darussalam*** **[2007] UKPC 62; [2008] 2 LRC 196,** Lord Bingham described the concept, in this way, at **paragraph 16**:

> The concept of the fair-minded and informed observer has been discussed in cases such as *Johnson v Johnson* [2000] 5 LRC 223 at [53] and *Lawal v Northern Spirit Ltd* [2003] UKHL 35, [2004] 1 All ER 187 at [14] It is not in any way obscure. The requirement of fair-mindedness means that the observer must be taken to have a balanced approach, neither naive or

> complacent nor unduly suspicious or cynical. The requirement that the observer be informed means that he does not come to the matter as a stranger or complete outsider; he must be taken to have a reasonable working grasp of how things are usually done.

[111] These sentiments were echoed by Lord Kerr at paragraph 36 in ***Belize Bank Ltd v Attorney General of Belize et al*** **[2011] UKPC 36; (2011) 80 WIR 97.**

[112] The features identified in the cited cases are merely examples of the type of qualities to be expected of an observer who is fair-minded and informed. His dominant characteristics are fair-mindedness and being fully informed on matters relevant to the issue under consideration. Lord Kerr summarised this and his required role in ***Lesage v The Mauritius Commercial Bank Limited*** **[2012] UKPC 41;** [2013] All ER (D) 23, at **paragraph 47,** in this way:

> The notional observer must be presumed to have two characteristics: full knowledge of the material facts and fair-mindedness. Applying these qualities to his consideration of the issue, he must ask himself whether there was a real possibility that the decision-maker would be biased.

As Kirby J. commented, at **paragraph 96,** in ***Smits v Roach*** **(2006) 228 ALR 262**, '[t]he fictitious postulate has been stretched virtually to snapping point'. However, as he explained, there is a purpose to be served by the exercise. He stated at **paragraph 97**:

> Of course, the elaboration of such features is provided by judges to remind themselves, the parties and the community reading their reasons that the standard that is applied is not simply the reaction of the judges…to a particular complaint. It is, as far as can be, an objective standard: one aimed at emphasising the undesirability of idiosyncratic and personal assessments of such matters.

Application of the Test

[113] In ***Doyle v R* Crim. App No. 22 of 2008 (date of decision 14 December 2012)**, at paragraph 43, Peter Williams J.A. explained the approach to be taken by the court in applying the test for apparent bias. He stated:

> The judge properly applied the test for apparent bias as set out in *In re Medicaments*…and approved in *Porter v. Margill*… The position is that "the court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased.

[114] Hence, having ascertained the circumstances which have a bearing on the allegation of bias, I have to determine whether the fair-minded and informed observer, considering those circumstances, would conclude that there is a real possibility of bias.

[115] Turning to the factual basis of the objection, I disregard the fact of the association between Mr. Veeder and Mr. Fortier, as a circumstance which has a bearing on the allegation of bias. The Government has abandoned this initial ground of challenge, seemingly satisfied that it is no longer material. It is open to a party to waive a possible ground of objection: ***Locabail (UK) Ltd v Bayfield Properties Ltd et al [2000] Q.B. 451, paragraph 15***.

[116] Not surprisingly, the written submissions of the parties did not address this issue and Sir Maurice made no submissions with respect to it. During the course of his submissions, Mr. Gale Q.C. referred me to ***paragraph 1031*** of ***Fouchard, Gaillard, Goldman on International Commercial Arbitration*, (The Hague: Kluwer, 1999)** and ***section 4.4*** of the ***IBA Guidelines on Conflicts of Interest in International Arbitration (2004)***. These sources were referred to in Mr. Gale's letter to Mr. Carrington of 22 January 2009 and Mr. Veeder's email of even date, in which they advanced the proposition that "an arbitrator's professional links with a party's counsel is not a serious basis for removing an arbitrator". It appeared to me that Mr. Gale's primary purpose in producing these extracts was to demonstrate that they supported the proposition expressed by him and Mr.

Valasek. However, he alluded that, if the Veeder-Fortier association was a ground of complaint, it was bound to fail.

[117] It is not necessary for me to consider this point but out of deference to Mr. Gale Q.C., I will comment on it briefly. The issue is whether an arbitrator's association, as co-arbitrator in pending proceedings, with counsel for one of the parties is enough, without more, to lead to a finding of apparent bias.

[118] Mr. Veeder's curriculum vitae is in evidence. He is a highly qualified and experienced arbitrator and like Mr. Fortier, is one of her Majesty's Counsel. He has acted in judicial capacities in England and is widely published. Mr. Gale's evidence is that he is regarded as a leading expert on arbitration. I deduce from their professional rank, that Mr. Veeder and Mr. Fortier are persons of experience and distinction.

[119] In ***Taylor v Lawrence*** **[2002] EWCA Civ. 90** at **paragraphs 61** to **64**, Lord Woolf stated that the fair-minded and informed observer must be taken to be aware of the culture and traditions prevailing in the legal profession. Similarly, he must be aware of those that exist in the arbitration community. However, I have no evidence before me as to the practice in the arbitration community.

[120] In any event, as Lord Steyn noted in ***Lawal v Northern Spirit Limited*** **[2003] UKHL 35; [2005] 1 WLR 3019,** while the observer may have such awareness, he may not be wholly uncritical of that culture. Adopting the words of Kirby J. in ***Johnson v Johnson*** **(2000) 201 CLR 488 page 509, paragraph 53**, he noted that the observer would be "neither complacent nor unduly sensitive or suspicious."

[121] The fair-minded and informed observer would recognise that Mr. Veeder and Mr. Fortier are but men subject to human failings. However, any suspicion would be outweighed in his mind by the fact that the individuals involved are experienced lawyers of the highest calibre and that Mr. Veeder is an experienced arbitrator with some judicial experience. He would consider that given his professional standing and experience, it would not be expected that Mr. Fortier would seek to influence Mr. Veeder in the conduct of the arbitration. He would also consider that Mr. Veeder would be accustomed and expected to adjudicate in arbitral proceedings uninfluenced by his professional links. Further, he would note that Mr. Veeder acted properly by disclosing their association, immediately on becoming aware that Mr. Fortier had joined Fiton's legal team.

[122] However, the fact of this disclosure is not decisive. In ***Helow***, Lord Mance stated at **paragraph 58**:

> The other consideration is that Lady Cosgrove did not volunteer a reference to her membership of the Association. Had she disclosed this, the very fact of disclosure could have been seen by a fair-minded observer as a "badge of impartiality", a showing that "she [had] nothing to hide and [was] fully conscious of the factors which might be apprehended to influence … her judgment": *Davidson v Scottish Ministers (No 2) 2005 1 SC (HL) 7*, paras 19 and 54, per Lord Bingham of Cornhill and Lord Hope of Craigwell. Again, however, this can only be one factor, and a marginal one at best. Thus, to take two opposite extremes, disclosure could not avoid an objection to a judge who in the light of the matter disclosed clearly ought not to hear the case; and non-disclosure could not be relevant, if a fair-minded and informed observer would not have thought that there was anything even to consider disclosing.

[123] Furthermore, the fact that Mr. Veeder stated that his impartiality was unaffected by his professional association with Mr. Fortier is immaterial. The standard remains an objective one, the yardstick being that of the fair-minded and informed observer.

[124] All factors considered, while it might trouble the mind of the unduly suspicious, I do not think that such an observer would find that there was a real possibility of bias on Mr. Veeder's part by reason only of his professional association with Mr. Fortier.

[125] I turn to Mr. Veeder's conduct in responding to Mr. Valasek's email of 22 January 2009. Given the Government's allegations, fair-mindedness necessitates that the observer make a careful analysis of that email and Mr. Veeder's response. The first notable feature of the email, is that it was addressed to Mr. Veeder and copied to Counsel for the Government, in keeping with a directive that Mr. Veeder had given to the parties.

[126] Turning to the body of the letter, in the first three paragraphs, Mr. Valasek rehashed the history of the proceedings. In paragraph 4, he stated that Mr. Veeder should remain seized of the proceedings and that his authority to act continued, until and unless the High Court sustained the Government's objection. He cited legal authorities in support of that

proposition. The paragraph went on to request that Mr. Veeder turn his attention to the organisation of the first procedural meeting, leaving the parties to resolve the Government's challenge in the High Court, if necessary. At paragraphs 5 to 8, Mr. Valasek addressed the Government's failure to identify its Senior Counsel and stated that this resulted in a delay in the proceedings. In the penultimate paragraph, Mr. Valasek requested Mr. Veeder to take certain specific steps to facilitate the holding of the preliminary meeting.

[127] This examination shows that the email comprised submissions by Mr. Valasek to Mr. Veeder, on behalf of Fiton. Mr. Veeder responded to those submissions by calling on the Government to show cause in writing, not later than 30 January 2009, why he should not make the procedural orders requested.

[128] The Government's contention is not borne out by this analysis. I accept Mr. Gale's submission that Mr. Veeder acted properly in providing the Government with the opportunity to respond to Mr. Valasek's submissions. It is true that Mr. Veeder did not await the outcome of the dialogue between Mr. Gale Q.C. and Mr. Carrington. However, I do not see how that can lead to a finding of apparent bias.

[129] ***Section 3 of the Act*** provides that the authority of an arbitrator appointed pursuant to an agreement is irrevocable except with the leave of the court, unless a contrary intention appears in the arbitration agreement. Mr. Veeder was not obligated to delay the proceedings. These are all matters of which the informed and fair-minded observer must be taken to be aware, although he is not a lawyer. He would be aware that Mr. Veeder invited the Government's response to Fiton's submissions. He would also be aware that, had the Government opted to respond, it could have submitted that Mr. Veeder should postpone the proceedings.

[130] I see nothing in these circumstances that could lead the informed and fair-minded observer to conclude that there was a real possibility of bias.

[131] This leaves the issue of Mr. Veeder's awareness of the filing and content of the Original Summons and supporting affidavit. I note Mr. Gale's submission that Mr. Veeder knew about the Government's concern prior to the filing of the Original Summons. Mr. Carrington's emails of 10 December 2008 and 16 January 2009 conveyed this to him. Mr. Gale's letter of 22 January 2009 to Mr. Carrington was copied to Mr. Veeder. This letter,

like Mr. Valasek's email of 22 January 2009, referred to the Government's complaint. The only new information conveyed to Mr. Veeder by Mr. Gale's email of 5 March 2009, was that the Government had made the application to seek his removal.

[132] As Mr. Gale Q.C. submitted, Sir Maurice did not seek to demonstrate how the matters complained of could lead the fair-minded and informed observer to conclude that there was a real possibility of bias. Presumably, the Government's argument with respect to this factor must be that, having obtained knowledge of the fact and details of the application, there would be a real possibility that Mr. Veeder's mind might be prejudiced against it in the further hearing of the arbitration.

[133] Mr. Gale's evidence as contained at paragraph 8(c) of an affidavit filed on 25 May 2012, is that, as a general rule, an arbitrator is made aware of challenges made against him. He exhibited a copy of Article 14 of the International Chamber of Commerce Arbitration and ADR Rules which contains a requirement that an arbitrator be afforded an opportunity to comment in writing on any challenge made of him. This evidence is unchallenged and I accept it.

[134] The informed and fair-minded observer must be taken to be aware of this practice. He is aware of how things are done. He is also aware that despite the complaint, Mr. Veeder would be expected to proceed with the arbitration guided by professionalism and integrity and to disregard irrelevant considerations. He would anticipate that given his vast experience and level of qualification, Mr. Veeder would not depart from this expectation. Thus, without more, this ground cannot succeed.

[135] The fact that an adjudicator becomes aware of a complaint against him is not a basis for imputing apparent bias. If that were so, a court would be obligated to recuse itself even after hearing an unmeritorious application for recusal. The duty of judges to proceed with matters before them when faced with unfounded disqualification applications has been acknowledged in ***Locabail (supra)*** at paragraphs 22 to 25. In ***Hock Hua Bank (Sabah) Bhd v L. T. Yong*** [1995] 2 MLJ 213, the Court of Appeal of Malaysia directed a High Court judge who had wrongly recused himself after hearing an unmeritorious complaint, to hear the trial of the action. The same should apply to arbitrators.

[136] I accept Mr. Gale's submission that it is difficult to comprehend how the disclosure to Mr. Veeder could lead the fair-minded and informed observer to conclude that there was

likely to be a real possibility of bias on his part. Knowledge of the proceedings and the details of the complaint, without more, provides no satisfactory basis for his discharge.

[137] In the circumstances, when the matters of which the Government complains are considered separately and collectively, the informed and fair-minded observer would not conclude that there was or is a real possibility of bias on Mr. Veeder's part. Hence, I find no merit in paragraph 2 of the Amended Summons.

Disposal

[138] Consequently, the Amended Summons fails in its entirety and must be dismissed.

[139] I will hear the parties as to costs.

Olson DeC. Alleyne
Judge of the High Court