Neutral Citation Number: [2020] EWHC 1283 (Comm)

Case No: CL-2019-000441

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

**IN THE MATTER OF THE ARBITRATION ACT 1996**
**AND IN THE MATTER OF AN ARBITRATION CLAIM**

Rolls Building,
Fetter Lane,
London EC4A 1NL

Date: 21/05/2020

**Before** :

**THE HONOURABLE MR JUSTICE HENSHAW**

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**Between :**

| | |
|---|---|
| **C LIMITED** | **Claimant** |
| **- and –** | |
| **(1) D**<br>**(2) X** | **Defendants** |

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**Duncan Bagshaw** (instructed by **Howard Kennedy LLP**) for the **Claimant**
**James Freeman** (instructed by **Allen & Overy**) for the **First Defendant**
**Tom Sprange QC and Gayatri Sarathy** (instructed by **King & Spalding International LLP**) for the **Second Defendant**

Hearing date: 23 April 2020

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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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**Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 21 May 2020 at 10:30 am.**

**Mr Justice Henshaw:**



## (A) INTRODUCTION

1. This judgment follows an extended full day's hearing listed to resolve an application (the "***section 24 application***") by the Claimant ("***C***") for an order under section 24 of the Arbitration Act 1996 ("***the 1996 Act***") removing the Second Defendant ("**X**") as arbitrator in a London Court of International Arbitration ("***LCIA***") arbitration (the "***Arbitration***") between C and the First Defendant ("***D***").

2. The hearing took place in private pursuant to CPR 62.10(3)(b). All parties were content for the judgment to be public provided it was suitably anonymised.

3. The section 24 application was brought on the grounds that X had deliberately misrepresented their arbitration experience in their CV, on the basis of which X had been appointed by the LCIA; and that when C asked X about their arbitrator experience, X had responded defensively and referred C back to the allegedly false and misleading CV.

4. In the event X resigned during the course of the proceedings in the circumstances I describe below. There is therefore no need for any order under section 24. However, C has continued the proceedings in order to claim its costs, on the basis that D and X contested C's prior challenge before the LCIA Court and the section 24 application itself.

5. This has had the unfortunate result that by the time of the hearing before me the parties' costs schedules claimed in aggregate approximately £256,000 in respect of the section 24 application. That might be compared to the value of C's monetary claim against D in the underlying arbitration of approximately €166,000, albeit C makes certain non-monetary claims too.

6. C asks the court to order that D and X pay C's costs of and incidental to the section 24 application, including the proceedings before the LCIA Court. D and X resist any such order and contingently seek costs orders in their favour.

## (B) FACTS

7. C and D are both companies which carry on activities with philanthropic aims. C is a company which designs software, and which has created a mobile software application (or 'app') and database for use by refugees to help them to identify and locate support services. D is a non-profit federation based in another EU Member State which seeks to find and protect lost, abducted and displaced children.

8. On 29 August 2017 C and D entered into a licence agreement (the "***Agreement***") whereby C licensed a platform to D, for D to adjust the appearance (or 'skin') of the app so as to make it more user-friendly to children.

9. C says D secured, with C's assistance and introductions, a large grant (around €1.3million) to pursue the configuration and implementation of the modified app.

10. Having secured the grant, and shortly after the release of the modified app, on 13 July 2018 D sought to terminate the Agreement, for reasons which C maintains were unjustified. C sought to organise a mediation to resolve the dispute, but according to C, D declined to agree to mediate on the dates proposed by C.

11. C therefore commenced the Arbitration, in which it sought (i) the balance of the fee under the Agreement (€51,061.81), (ii) damages (limited in accordance with a contractual limitation clause to the total amount of the fees, namely around €115,000) and (iii) a declaration that the intellectual property in the modified app, and associated database, belonged to C.

12. C applied to the LCIA to appoint an arbitrator on an expedited basis, so that there could be an urgent hearing to resolve the question of the ownership of the intellectual property. The LCIA appointed X on an expedited basis on 29 November 2019. X's CV was provided to the parties with the Notice of Appointment.

13. X has 35 years of experience as counsel, solicitor and mediator in commercial disputes, including LCIA proceedings. X's evidence is that during discussions with the LCIA in March 2018, X made clear that they had not been previously appointed as an arbitrator. X was invited by the LCIA to submit a CV, given X's experience as a mediator and the recognition in the industry that there is no strict delineation between the disciplines. It is common ground that the LCIA was fully aware that X had not previously been appointed as arbitrator in an LCIA arbitration. X says they accepted the appointment in view of their considerable expertise as a mediator and familiarity with the specialist subject matter of the claim.

14. X's arbitration CV stated that:

> "X has been a counsel in a number of arbitrations over [their] 30 year career in the law and has been recommended in the directories. X has recently retired from fulltime private practice to concentrate on [their] Arbitration and Mediation career. X is familiar with all the major Arbitration institutional rules as well as the relevant legislation and Ad hoc arbitration practices. As an adjudicator and arbitrator [X] is confident to make pragmatic procedural and substantive decisions. [X] is used to conflicts

> where there are strong personalities within the parties' groups and where there may be some cynicism towards the potential for dispute resolution. [X] has an engaging style and is often praised for [their] proactive approach.
>
> Examples of cases X has been involved with either as counsel or Arbitrator include …
>
> *[followed by a list of cases]*"

15. Neither party to the Arbitration challenged X's appointment, nor was involved in X's selection or appointment.

16. According to C, X initially indicated that they would urgently resolve the ownership of the intellectual property in the modified app on a preliminary basis, but after receiving representations from D's solicitors Allen & Overy ("***A&O***") (but not, C says, from C), X decided instead to invite C to apply for interim measures.

17. On 21 December 2018, C submitted a request for interim measures under Article 25 of the LCIA Rules. A hearing took place on 8 March 2019, at which both parties made oral submissions. On 27 March 2019, X dismissed the request on the grounds that C had not established that the application was urgent or that substantial prejudice would be suffered if interim relief were not granted.

18. C believed that that decision failed to take proper account of its submissions, and also had concerns as to X's treatment of C's submissions. C concluded that X's decisions not to resolve the intellectual property ownership matter as a preliminary issue, and on the interim measures application, indicated an apparent bias against C and in favour of D and its lawyers.

19. C therefore in April 2019 filed a challenge ("***the First Challenge***") with the LCIA Court, complaining that X had failed to treat the parties fairly and impartially in the interim measures decision and the procedure leading up to it, adding that in part this might have arisen due to X's lack of experience as an arbitrator.

20. In response to the First Challenge, X on 19 April 2019 commented to the LCIA (not copied to the parties at the time) that "*I obviously refute any impartiality or bias allegation or indeed any allegations of incapacity/incompetence*". The LCIA wrote to the parties indicating that X had confirmed they did not intend to resign. C's solicitors asked to see X's correspondence indicating that. After a delay, C's solicitors made submissions as to why they should be entitled to see the arbitrator's comments, and on 2 May 2019 the LCIA provided a copy of X's email of 19 April.

21. In addition, on 1 May 2019 X wrote to the parties and provided them with a separate response to the challenge (forwarding a response X had sent to the LCIA on 29 April), stating:

> "I was not asked to respond by the Claimant to the Challenge to my position under Article 10.5. I was asked to and refuse to resign my position.

> However I do not wish my lack of response to be taken as any acceptance of the allegations against me in the Challenge under Article 10 of the LCIA rules. Accordingly, I make 2 short comments;
>
> 1. I refute any allegations of bias or impartiality . On the contrary, I have tried very hard to give the Claimant time to make all her arguments as fully as she wishes recognising her position as a litigant in person and I have listened and understood these arguments. I have acceded to requests for more time from the Claimant and postponed the first hearing at the Claimant's request despite the Respondent objecting due to a member of their team not being available. As part of the Interim measures decision I have not made any findings on the merits of the substantive case and indeed have accepted that there may be a prima facie case to answer on the claims. However I found that the grounds for interim measures had not been made out.
>
> 2. In so far as allegations against me regarding my competence, I simply point out that I have been a qualified lawyer for over 35 years; undertaken many LCIA arbitrations as counsel and have been familiar with their rules for many years now. Further, I was a Disputes partner in one of the foremost IP law firms in the country for over 10 years and understand well the IP issues in this matter. I object strongly therefore to any suggestions that I lack competence to hear the case . Finally, my resume was before the parties on my appointment last year and no objections were taken as to my competence at that stage.
>
> I have no more to say on the matter and am content to leave this to the determination of the LCIA Court."

22. C states that X did not in this message mention any experience as arbitrator other than by referring back to their CV. C's director states in her witness statement:

> "I was quite taken aback by that response. Firstly, I was struck by the fact that the Arbitrator had not said in the response that [they] had acted as arbitrator before, at all. Instead, [X] was now saying only that [they] had "undertaken many LCIA arbitrations as counsel". Secondly, I got the strong impression that the Arbitrator was behaving defensively, and that [they were] angered by the (perceived) suggestion that [they] lacked competence, describing that as an "allegation", when in fact no such allegation had been made. Describing it as an " allegation" was also a highly combative way of responding to complaints about [X's] handling of the arbitration. This further reinforced my view that [C] could not receive a fair hearing from this Arbitrator if [they] were not removed."

C's solicitors the same day (1 May) sent an email to X including the following request:

> "Further to our earlier emails today, we refer to point 2 of your (undated) email to the LCIA to which you refer below. We sincerely apologise if the fault is ours, however we find it difficult to understand from that email whether or not you had been appointed in any previous LCIA arbitrations, before this one, or indeed whether you had been appointed in any previous arbitrations before this one."

On 3 May 2019 C's solicitors wrote:

> "We understand that you had not been appointed, before this reference, as an arbitrator in an arbitration under the LCIA Rules. If there remains any doubt about that and you are not willing to confirm, then we will invite the LCIA Court to ask the LCIA Secretariat to confirm the matter from its records. However we do not consider that this should be necessary, since that matter has already been confirmed to our client by the LCIA Secretariat.
>
> We remain concerned that you have not clarified the question of your previous experience as arbitrator in arbitrations other than under the LCIA Rules, notwithstanding our direct request for you to do so.
>
> This issue was raised in the Challenge, and you responded in some detail in relation to the matter of your experience, but without stating that you had been appointed as an arbitrator before this reference. In those circumstances, it is our position that, in the absence of confirmation to the contrary, the LCIA Court can and should proceed on the basis that you had not been appointed as an arbitrator before this reference.
>
> We will make further submissions to the LCIA Court on that issue on Tuesday 7 May 2019, when we will ask for this inference to be drawn in the absence of contrary confirmation.
>
> We mean no disrespect by pursuing this inquiry but we consider we have an obligation to do so, in the interests of fairness and openness, and of proper resolution of the issues in the Challenge, and related matters. Given the ongoing Challenge, which we would expect to be resolved by the LCIA Court with its usual expedition, we consider it important that this issue is addressed promptly."

23. X did not respond to either of these communications, quite possibly because having (as the emails indicate) obtained the LCIA's specific permission to send the 1 May email, X did not consider it appropriate to request permission to continue the correspondence.

24. C's evidence is that it then discovered that X promoted themself online as a mediator (X's primary practice after retiring from law firm practice) using another CV which included a list of "*examples of cases mediated*" which was identical to the list of cases of X's experience as "*counsel or arbitrator*" in X's arbitration CV. C says it took this

as strong evidence that X did not have the experience as arbitrator (or, probably, as counsel in arbitration) claimed in the arbitration CV at all, and that the CV provided to the LCIA Court was deliberately misleading. C's evidence is that it appeared conclusively to C that X had created the arbitration CV by copying and pasting the list of cases in which X had acted as mediator.

25. C therefore filed a further challenge ("***the Second Challenge***") with the LCIA Court on 7 May 2019, alleging that X's response to the First Challenge gave rise to justifiable doubts as to their independence and impartiality and, further, that X had made an allegedly false or misleading statement regarding their experience on the CV.

26. On 27 June 2019, the former Vice-President of the LCIA Court, Professor John Uff QC, considered and rejected the First and Second Challenges ("***the LCIA Decision***").

27. In relation to the First Challenge, Professor Uff QC concluded that the allegations "*comprise[d] nothing more than a series of complaints that the arbitrator preferred the submissions and contentions of [D]*"; that X's decision "*was commendable in having dealt with technically difficult and procedurally complex issues succinctly and in a manner which did justice to the case of both parties*", and that "*no proper grounds [were] made out upon which the arbitrator's conduct can legitimately be challenged*".

28. On the Second Challenge, Professor Uff QC stated *inter alia*:

> "51. As regards the second ground of challenge, the submission notes at paragraph 10 that the Claimant had been informed orally by the LCIA Secretariat that this arbitration is the arbitrator's first appointment as arbitrator in an LCIA arbitration. The Claimant then seeks to develop a case that the failure to state that this was the first arbitration the arbitrator had ever undertaken (if that be the case) gives rise to justifiable doubts as to the arbitrator's impartiality, and constitutes a breach of the Arbitration Agreement and a material misrepresentation of the position regarding [X's] experience. The breach of the Arbitration Agreement arises from Article 14.5 of the LCIA Rules that requires all parties to act at all times in good faith."

29. Professor Uff then concluded, referring to previous statements on behalf of C in the First Challenge, that C was already on notice of X's lack of experience from the date of X's appointment or shortly thereafter, and the question of whether X had ever sat in a non-LCIA arbitration was one which occurred to or should have occurred to C. C in any event had the means of discovering such information. The challenge was therefore out of time under paragraph 10.3 of the LCIA Rules.

30. Professor Uff continued:

> "55. However, it would be wrong to dismiss the second challenge merely on a technicality. If the matters asserted are indeed of any relevance or importance to the Claimant, it is inexplicable why the matter was not pursued as soon as [X] was appointed. The implication of the second Challenge is that it is

> relevant to the arbitrator's conduct of the case that [they] had not or may not have been appointed as arbitrator in any other case.
>
> 56. In my view, such an assertion could not properly ground a challenge based on Article 10.2 of the LCIA Rules without evidence of a lack of fairness or impartiality or other questionable conduct to support the challenge. The appointment of arbitrators is a matter for the LCIA Court who can be expected to investigate the arbitrator's general experience and specific experience in arbitration matters. In the case of [X], as [X's] response states and as confirmed in [X's] CV, [they have] an impressive career involving wide experience in dispute resolution and experience specifically in arbitration matters as counsel and in other areas short of sitting as arbitrator. In addition, [X's] conduct of the present arbitration up to and including the application for interim relief was entirely consistent with the requirements of the LCIA Rules of efficiency, diligence and industry in disposing effectively of difficult and contentious issues in a cost effective manner."

31. Undeterred, C on 12 July 2019 issued a claim for an order under section 24 of the 1996 Act to remove X from the Arbitration proceedings and an order that X was not entitled to payment of their fees. C also sought an order against D for the costs of the application and of the Arbitration proceedings.

32. D filed an Acknowledgment of Service on 30 July 2019 indicating that it would contest the claim.

33. X did not provide comments on the section 24 application by letter (as CPR PD62 § 4.3 permits) but appointed solicitors and on 30 July 2019 filed an Acknowledgment of Service indicating an intention to contest the claim. Given the seriousness of the allegations against X, I do not find that at all surprising.

34. D filed evidence in response to the section 24 application on 20 August 2019, "*contesting the following applications by … C…*". C highlights the fact that the witness statement of Mr Mejia of A&O (acting for D on a *pro bono* basis in relation to the section 24 application) included the following passages:

    i) "*[D] also argued [in response to the Second Challenge] that the arbitrator was more than experienced enough to handle the arbitration (including because of [their] experience as partner in the dispute resolution group of three well known law firms) [SM2, at paras. 31-38] and that the alleged lack of previous appointments as arbitrator did not affect this conclusion."*

    ii) "*The Challenge Decision [of Prof. Uff] … properly addresses and resolves the parties' relevant submissions*."

    iii) *"I am not aware of any grounds to consider that the arbitrator lacks impartiality."*

35. C served reply evidence on 27 August 2019.

36. On 7 October 2019, X served a short witness statement, including the following passages:

> "2. I adopt a neutral approach in these proceedings. Should any submission be required as to matters of law or other representations on my behalf, they shall be made by counsel.
>
> 3. I have read the statements submitted by the balance of the parties. I wish to provide the Court with assistance on two factual issues that I do not believe have been directly addressed in evidence. I do so as I wish to ensure that the Court has evidence on all issues that may be relevant to its determination. I have deliberately not addressed contentious issues of fact, nor contentious regarding conclusions or inferences that the Court ought to reach on the basis that these points will be decided by the Court by reference to the available evidence and it would be inconsistent with my neutral position to engage in them. At the same time, I make no admissions.
>
> ….
>
> 5.1. My CV accurately records my experience and expertise as a commercial disputes lawyer over a 35 year career;
>
> 5.2. The vast majority of that experience is as Counsel and/or Solicitor of the record in the proceedings, or as mediator. I have previously been engaged as Mediator in an LCIA proceedings that did not proceed to Award. My Mediator CV was on the LCIA Mediator list following this matter;
>
> 5.3. In discussions in March 2018 with the LCIA with regards to me providing a CV for potential Arbitration appointments I was transparent about my arbitration experience. In particular, that since retiring from [] in 2017 I had a number of appointments as mediator, but not as arbitrator. My Arbitration CV was added to the LCIA database following these discussions;
>
> 5.4. Given my profile and experience the LCIA indicated that they would consider me in appropriate matters as arbitrator, including those that would benefit from my mediation skill set which lends itself to dealing with litigants in person, in disputes where a relationship might be resurrected or in disputes where mediation might be a useful complementary process to the actual arbitration;
>
> 5.5. Where I certainly appreciated the opportunity to sit as an arbitrator, I did not actively seek appointments, nor aim to present myself in a more favourable light to gain any appointments, including in this arbitration. Since retiring from [], I have been more than busy with mediation work and

> considered any arbitrator appointments as an adjunct to my mediator appointments;
>
> 5.6. My Arbitration CV was provided to the LCIA in this context and consistent with the approach adopted by a number of lawyers embarking on mediator and arbitrator focused careers, whereby broad experience and expertise is provided with no specific delineation between disciplines;
>
> 5.7. The LCIA approached me in November 2018 as they said that they had an urgent matter suitable for an arbitrator familiar with Mediation and the related expertise in dealing directly with litigants;
>
> 5.8. I have significant expertise and experience with regards to the subject matter and legal issues arising in these arbitration proceedings and therefore felt able to agree to this appointment by the LCIA. I would not have accepted the appointment unless I was entirely confident that I had the required experience and skill set. I did not amend or alter my CV for the purposes of this appointment; …"

37. On 14 October 2019 C again invited X to resign in light of this evidence, and the following day invited D to agree to the resignation.

38. On 29 October 2019 D rejected the notion that the section 24 application had merit, but offered to agree to X being removed on condition that no order be made as to costs, and that the resignation should not affect or provide a basis for challenging the decisions X had taken to date or procedural steps already performed.

39. On 5 November 2019 C's solicitors wrote to X's solicitors explaining that C had not previously reported X to the Solicitors Regulatory Authority ("***SRA***"), but felt that they might become obliged to do so by changes to the SRA Code of Conduct which were to come into force on 25 November 2019. C's solicitors wrote again on 21 November 2019 and 3 December 2019 urging X's solicitors to comment on this point. On 4 December 2019 X's solicitors replied, saying that they and X took the view that no reporting obligation arose.

40. On 20 November 2019 C declined to accept D's offer that there should be no order as to costs of the section 24 application, and made a counter-offer to settle the entire arbitration.

41. On 6 January 2020, C's solicitors made a report to the SRA in respect of the same matters arising in the section 24 application.

42. X's solicitors consulted a leading solicitor in SRA investigations and Solicitors Disciplinary Tribunal hearings. Ms Walker, a senior partner in the firm, states in her witness statement dated 17 April (in response to the third witness statement of C's director dated 7 April):

> "Without waiving privilege as to advice provided by [the adviser] or this Firm, the Second Respondent's decision to resign was driven almost entirely by the SRA referral, which took place on 6 January 2020. In short, it rendered the Second Respondent's status as arbitrator wholly untenable. Based on my own direct knowledge and on information and belief from the Second Respondent and [the adviser] (no waiver of privilege), the following factors were salient:
>
> 10.1 SRA investigations on average take 12 months to resolve; often longer. During any investigation there is usually a requirement to engage with the SRA in writing and sometimes even in person, in order to address the allegations made in detail. The process can be demanding and intense;
>
> 10.2 Although there is no general rule, the appropriate approach in cases where (i) dishonesty is alleged and (ii) ongoing interactions with the complainant are likely, is for the party subject to the investigation to step aside until the investigation is complete;
>
> 10.3 Continuing to sit as arbitrator in circumstances where the s. 24 challenge failed but an SRA investigation remained pending, could give rise to a real risk of perceived bias. It seemed that any arbitrator would have to balance their conclusions in the arbitration with the perception that any decision they made (either way) would be tainted by the fact that there was a pending regulatory investigation alleging dishonesty, in this instance instigated by the Claimant;
>
> 10.4 The view was formed that the Claimant appeared to have lost all sense of objectivity, given its strategy of overt aggression, intimidation and antagonism (demonstrated, among other things, by the tone and content of the correspondence and witness statements). The referral to the SRA seriously aggravated this and indicated that the position was not likely to change; if anything, it was likely to become more acute;
>
> 10.5 The failure of the Claimant's s. 24 challenge would not resolve the SRA issues, which would still need to be investigated and resolved. This would leave the arbitrator presiding over the arbitration proceedings with the factors above hanging over [them] and [their] conduct of the proceedings. This was neither realistic nor tenable."

43. On 10 January 2020 ("***the 10 January letter***"), X's solicitors made a proposal on behalf of X, without prejudice save as to costs, that X resign on the basis that they retain their fees to date and C and D reach an agreement as to the costs of the application. The 10 January letter explained in detail why X considered the section 24 application to be unfounded. It then stated:

> "II. THE CLAIMANT'S APPROACH TO THESE PROCEEDINGS
>
> 18. A review of the evidence and correspondence reveals that the Claimant and its legal advisors have sought to overcome the deficiencies in the Claimant's case by resorting to a strategy of overt aggression, intimidation and antagonism. The obvious aim has been to bully the Arbitrator into resigning in circumstances where the facts and authorities are entirely against such an outcome. This is unbecoming and is not an approach that should have been adopted.
>
> 19. What is now clear to us as a Firm, particularly by reference to the Claimant's latest ploy (SRA referral), is that the Claimant has lost all sense of objectivity and is not addressing the real and relevant issues in a rational manner. This is not likely to change once the proceedings are determined against the Claimant and the First Respondent. Instead, it is likely that the Claimant's lack of objectivity will only be aggravated. This will inevitably adversely impact and delay the conduct of the arbitration. This is not in the interests of the parties generally and is inconsistent with the Arbitrator's desire to diligently execute [their] role as Sole Arbitrator.
>
> III. THE PROPOSAL
>
> 20. In light of the matters addressed above, we are instructed that the Second Respondent is prepared to agree to a consent order that dismisses the court proceedings, following which the Second Respondent shall resign as sole arbitrator in the arbitration proceedings, retaining [their] fees of the arbitration to-date.
>
> 21. It is not the Second Respondent's intention to seek [their] costs as part of this proposal: [they] will leave it to the Claimant and First Respondent to agree a sensible position as to their own."

44. On 17 January 2020, C's solicitors confirmed that, if X resigned, C would not require that they repay their fees. However, they alleged that *"[t]he nature of the grounds for removal indicates that the Arbitrator may be ordered to pay, or contribute to, the costs of the application for removal. Unusually, the Arbitrator has instructed counsel and given evidence in opposition to the Claim. An order for costs is therefore likely to be made*."

45. On 11 March 2020, X's solicitors confirmed that the Arbitrator would resign forthwith.

46. X resigned on 12 March 2020, adding:

> "For the avoidance of doubt, I refute the challenges that were levelled against me by the claimant, C, in LCIA Arbitration No.

> 184118. These challenges were rejected by Professor John Uff CBE QC, Former Vice-President of the LCIA, in his decision dated 27 June 2019. Subsequent to Professor Uff's decision, the claimant made an application to the Commercial Court to remove me as arbitrator pursuant to section 24 of the Arbitration Act 1996. The claimant's Commercial Court application is essentially based upon the same challenges as were raised against me in the LCIA Court. These proceedings are ongoing.
>
> I refer to the letter from King & Spalding (my solicitors) dated 10 January 2020 that sets forth the position with regards to the challenge and my decision to resign."

The LCIA confirmed that it would revoke X's appointment on 26 March 2020.

47. On 7 April 2020, C's director filed a witness statement noting that, since X's resignation, there was "*no longer any need for the Court to make an order for [the Arbitrator's] removal"* and requesting that the Court *"make an order that the Arbitrator pays the costs of the Application*" on the basis that "*[X's] conduct, both as Arbitrator which formed the grounds for the Application, and in robustly defending these proceedings until late in the day, warrants an order that [they] pay the costs*".

## (C) APPLICABLE PRINCIPLES

### (1) Costs of matters resolved prior to trial

48. Under CPR 44:-

    i) the costs payable by one party to another are in the discretion of the court: Senior Courts Act 1981, s.51; CPR 44.2(1); and

    ii) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, but the court may make a different order: CPR 44.2(2).

49. Various judicial statements indicate that the general rule applies unless there is a good reason to depart from it (see e.g. *London Borough of Tower Hamlets v The London Borough of Bromley* [2015] EWHC 2271 (Ch) § 9 per Norris J: *"One should depart from the general rule only where the needs of justice and the circumstances of the particular case require, and a measure of caution is needed"*; *Fox v Foundation Piling* [2011] 6 Costs LR 961 § 62 per Jackson LJ).

50. CPR 44.2(4) provides that in deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including (a) the conduct of all the parties in relation to the litigation; (b) whether a party was only partly successful; and (c) any payment into court or admissible offer to settle.

51. CPR 44.2(5) states that the conduct of the parties includes:

> "(a) conduct before, as well as during, the proceedings …;
>
> (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

> (c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and
>
> (d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.
>
> …"

52. *R (Boxall) v. London Borough of Waltham Forest* [2001] 44 CCLR 258 (cited by Sedley LJ in *Menders v. London Borough of Southwark* [2009] EWCA Civ 594 § 23) provides the following additional guidance where proceedings have been resolved without a trial:

> "(i) the court has power to make a costs order when the substantive proceedings have been resolved without a trial but the parties have not agreed about costs;
>
> …
>
> (iii) the overriding objective is to do justice between the parties without incurring unnecessary court time and consequently additional cost;
>
> (iv) at each end of the spectrum there will be cases where it is obvious which side would have won had the substantive issues been fought to a conclusion. In between, the position will, in differing degrees, be less clear. How far the court will be prepared to look into the previously unresolved substantive issues will depend on the circumstances of the particular case, not least the amount of costs at stake and the conduct of the parties.
>
> (v) in the absence of a good reason to make any other order the fall back is to make no order as to costs." (§ 22)

53. In *R (M) v. Croydon London Borough Council* [2012] 1 WLR 2607 Lord Neuberger stated:

> "47 It is open to parties in almost any civil proceedings to compromise all their differences save costs, and to invite the court to determine how the costs should be dealt with. The court has jurisdiction in such a case to determine who is to pay costs, but it is not obliged to resolve such a free-standing dispute about costs. Accordingly, by settling all issues save costs, the parties take the risk that the court will not be prepared to make any determination other than that there be no order for costs not only because that is the right result after analysing all the arguments, but also on the ground that such an exercise would be disproportionate.

48 In *BCT Software Solutions Ltd v C Brewer & Sons Ltd* [2004] FSR 9 Chadwick LJ said this at para 24 (which was approved in *Venture Finance plc v Mead* [2006] 3 Costs LR 389):

> "In a case where there has been a judgment after trial, the judge may be expected to be in a position to decide whether one party or the other has been successful overall; whether one party or the other has been successful on discrete issues; whether the fact that the party who has been successful overall but unsuccessful on some issues calls for an order which reflects his lack of success on those issues; and whether-having regard to all the circumstances (including conduct) as CPR r 44.3(4) requires-the order for costs should be limited in one or more of the respects set out in CPR r 44.3(6). But where there has been no trial - or no judgment - the judge may well not be in a position to reach a decision on those matters. He will not be in a position to decide those matters if they turn on facts which have not been agreed or determined. In such a case he should accept that the right course is to decide that he should not make an order about costs. As the arguments on the present appeal demonstrate, it does the parties no service if the judge-in a laudable attempt to assist them to resolve their dispute-makes an order about costs which he is not really in a position to make."

49 However, Chadwick LJ immediately went on to say in the next paragraph, para 25:

> "There will be cases (perhaps many cases) in which it will be clear that there was only one issue, that one party has been successful on that issue, and that conduct is not a factor which could displace the general rule."

This would seem to me to be clearly right. Given the normal principles applicable to costs when litigation goes to a trial, it is hard see why a claimant who, after complying with any relevant protocol and issuing proceedings, is accorded by consent all the relief he seeks, should not recover his costs from the defendant, at least in the absence of some good reason to the contrary. In particular, it seems to me that there is no ground for refusing the claimant his costs simply on the ground that he was accorded such relief by the defendants conceding it in a consent order, rather than by the court ordering it after a contested hearing. In the words of CPR r 44.3(2) the claimant in such a case is every bit as much the successful party as he would have been if he had won after a trial.

…

60. … in Administrative Court cases, just as in other civil litigation, particularly where a claim has been settled, there is, in

> my view, a sharp difference between (i) a case where a claimant has been wholly successful whether following a contested hearing or pursuant to a settlement, and (ii) a case where he has only succeeded in part following a contested hearing, or pursuant to a settlement, and (iii) a case where there has been some compromise which does not actually reflect the claimant's claims. While in every case, the allocation of costs will depend on the specific facts, there are some points which can be made about these different types of case.
>
> 61. In case (i), it is hard to see why the claimant should not recover all his costs, unless there is some good reason to the contrary. Whether pursuant to judgment following a contested hearing, or by virtue of a settlement, the claimant can, at least absent special circumstances, say that he has been vindicated, and, as the successful party, that he should recover his costs. In the latter case, the defendants can no doubt say that they were realistic in settling, and should not be penalised in costs, but the answer to that point is that the defendants should, on that basis, have settled before the proceedings were issued: that is one of the main points of the pre-action protocols. Ultimately, it seems to me that Bahta was decided on this basis.
>
> …
>
> "63. In case (iii), the court is often unable to gauge whether there is a successful party in any respect and, if so, who it is. In such cases, therefore, there is an even more powerful argument that the default position should be no order for costs. However, in some such cases it may well be sensible to look at the underlying claims and inquire whether it was tolerably clear who would have won if the matter had not settled. If it is, then that may well strongly support the contention that the party who would have won did better out of the settlement, and therefore did win."

54. This approach was followed in *Emezie v Secretary of State for the Home Department* [2013] 5 Costs L.R. 685, in which Sir Stanley Burnton said, referring to *M v Croydon*, "*The starting point now is whether the claimant has achieved what he sought in his claim"* (§ 4). There is no "*tradition*" that where a dispute is compromised and not judicially resolved the correct order is necessarily "*no order as to costs*" (*Brawley v Marczynski (No.1)* [2003] 1 W.L.R. 813, CA § 18 per Longmore LJ).

55. *M v Croydon* and *Emezie* were Administrative Court cases, but Lord Neuberger made clear that his comments applied to other civil litigation. The Court of Appeal confirmed this in *Gresham Pension Trustees v Ivan Cammack* [2016] 4 Costs LO 691 § 35. *Marcura Equities FZE v Nisomar Ventures Ltd* [2018] 2 Costs LR 227 (QB) § 44 is an example of the approach being followed in the Commercial Court.

### (2) Costs awards against arbitrators

56. Section 29(1) of the 1996 Act provides that, absent a finding of bad faith, an arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his or her functions.

57. In *Cofely v Bingham* [2016] EWHC 240 (Comm), [2016] 2 All ER (Comm) 129, the court removed Mr Anthony Bingham as arbitrator after he had responded inappropriately to enquiries about his connections with a party's solicitor. Both Mr Bingham and the respondent participated in and resisted the section 24 application. I was also provided with a copy of the costs judgment ([2016] EWHC 540 (Comm)), in which Hamblen J held that section 29(1) did not apply to court proceedings, even if they related to arbitration matters. The claimant in that case had written to the arbitrator on 8 July 2015 asking him to recuse himself, and (following the resistance from the other party to the arbitration) issued an application on 21 July. On 13 August the claimant's solicitors proposed a resolution involving the arbitrator standing down, no repayment of his fees to date, and each party bearing its own costs. Hamblen J concluded:

> "15 So, looking at the matter in the round I take the view that once the application had been issued and its grounds explained in the supporting witness statement, both Knowles and Mr. Bingham can be criticised (1) for not responding positively to the proposals which were made to resolve the issues and also (2) for continuing to participate actively in the proceedings in the way which they did, which I accept is not quite as "neutral" as they claimed. If one looks at the points being made by them in the evidence, in the written skeletons and in oral submissions, they did involve positive points being made against the application, as the claimant submits.
>
> 16 I take the view that it would not be right to say that all the fault here lies with either Knowles or Mr. Bingham. Both of them were in a position to bring these proceedings to an end on like terms to those being proposed in August 2015 and both can be criticised for failing to take matters further forward then or subsequently.
>
> 17 That being my overall view, in my judgment in the exercise of my discretion the appropriate order for costs is that the claimant should bear the costs of issuing their application and their supporting witness statement. It was not until that was done that either defendant could be expected to adopt any positive position in relation to the allegations being put forward, which up to that time had not been particularised in any very clear manner. Thereafter both defendants should have done more to seek to resolve the matter through agreement, or through agreed revocation or resignation. In all the circumstances I consider in the exercise of my discretion that both the defendants should be liable for Cofely's costs, other than the cost of the application notice and the supporting witness statement."

58. It seems correct in principle that section 29 would not preclude an arbitrator from being ordered to pay costs in relation to a section 24 application that he had opposed. Nonetheless, costs awards against arbitrators are extremely rare. *Cofely* itself was an exceptional case, where the court found the arbitrator to have been accepting repeat instructions from a party, amounting to a significant proportion of his business, and that his response to the claimant's attempts to establish the facts as to his relationship were aggressive and hostile. In *PAO Tatneft v. Ukraine* [2019] EWHC 3740 (Ch) §§ 95-96 Cockerill J said *"Cofely was a very particular case … Cofely is therefore no safe guide in the present case"*.

59. The only other example identified by the parties is *Wicketts v Brine Builders & Siederer* [2001] App.L.R. 06/08, where HHJ Seymour QC ordered the arbitrator, Mr Siederer, who had resisted the application to remove him, to pay the costs. The judge said *"the arbitration application upon which I have adjudicated this afternoon, the matter is, as it were, even more straightforward. The claimants have succeeded. They have succeeded on substantial grounds, they are entitled to the costs and I order that Mr. Siederer should pay them."* The respondent party in that case did not participate other than to file an acknowledgement of service. *Wicketts* too was an exceptional case, the judge having removed the arbitrator pursuant to s.24(1)(d) of the 1996 Act on the basis that he had failed to properly conduct proceedings by (among other things) issuing two sets of directions which he described as "*the most outrageous I have ever seen given in any arbitration proceedings"* (§ 51) and which demonstrated:

> "55. … a pitifully inadequate comprehension of the nature of his function as arbitrator, what powers he has and what is the appropriate way in which to exercise these powers. He seems to have no conception of the fact that these powers are to be exercised in accordance with the law, or what the relevant principles of the law are."

## (D) DISCUSSION

### (1) Successful party

60. C submits, first, that it is the successful party in the proceedings as against both X and D. It contends as follows:

i) By the resignation of X, C has secured exactly the outcome which it sought. This is real-life success, on any "*common sense*" view, as Lightman J expressed the test in *BCCI v Ali (No. 4)* (unreported, 4.11.19).

ii) It makes no difference that it has become unnecessary for the court to grant the relief, claimed because another party has agreed to it. 'Success' includes cases where that same result is achieved through a concession by another party.

iii) D is an unsuccessful defendant. It contested the Second Challenge before the LCIA Court, and defended the decision of Prof. Uff, which (C contends) had failed to address the primary ground for removal; filed an Acknowledgment of Service indicating an intention to contest the section 24 application; served evidence resisting the application; sought to negotiate for the removal of X but

with no order for costs and, when C declined to agree, fought on until X conceded their position.

iv) The court should not look behind the stark result of X's resignation, and cannot hope to know, reliably, the details of X's motivations for their resignation; the result speaks for itself.

v) No detail of any advice relied upon by X's solicitors in relation to the SRA referral has been provided to the court, and this gives the court nothing to go on. The court should form its own view.

vi) The SRA referral was no barrier to the Court resolving the section 24 application and there was no need for X to resign before the section 24 hearing took place. The Arbitration was stayed whilst the section 24 application was resolved. X could have asked the SRA to await the court's decision and (on X's case) secured a finding that X had not misled C at all, whether in the CV or in response to C's queries. There is no evidence that C's approach has been aggressive or intimidating, and the report to the SRA was not a 'ploy' (as suggested in the 10 January letter) but a professional requirement.

vii) Further, if the SRA referral was, itself, sufficient to prompt X to resign, they would have done so when it was made (or shortly thereafter). Instead, various further attempts were made to negotiate matters between the referral on 6 January 2020 and X's resignation on 12 March 2020.

viii) The relief claimed in the proceedings has been conceded in full without the Claimant agreeing to a compromise and voluntarily accepting the risk of the court declining to make an order as to costs. The only other relief which C sought (an order that X return the fees paid) can only be granted ancillary to an order under section 24 and therefore is no longer available. In any event, that was very much a subsidiary part of the claim which added little or nothing to the costs. The position is analogous to that where a claim is brought to recover a sum of money and a defendant, having at first denied the claim, later pays the sum claimed in full whilst making no admission as to the merit of the claim.

61. I do not accept these submissions. The mere fact that X retired as arbitrator clearly cannot of itself mean that C should be treated as the successful party, as against X and D, for costs purposes. C accepted, for example, that had X retired as arbitrator because of illness, then it could not claim to have been 'vindicated' (or, in the phrase from *M v Croydon* which C particularly highlights, "*accorded by consent all the relief [it] seeks*") by X's retirement. Some regard must therefore be had to the reasons for the retirement. In my view, the question is whether or not, objectively viewed, X's retirement should be regarded as in substance conceding C's claim, so as to make the situation comparable to that of (for example) a defendant who pays a claimant's claim in full by way of settlement albeit without admitting liability.

62. The evidence, including the circumstances and the contemporary documents as well as X's evidence on this application, indicate that X retired in the light of C's referral to the SRA, and not because of the section 24 application or its perceived merits.

63. Prior to the referral X had resisted C's request that X stand down as arbitrator, and had opposed the section 24 application. X's position in that regard was considerably bolstered by the clear and firmly expressed conclusions reached by Professor Uff on behalf of the LCIA Court. The position changed after C's referral to the SRA on 6 January 2020, which was closely followed by the 10 January letter through which, for the first time, X offered to retire. When X did step down, on 12 March after some weeks of negotiation about the terms of their retirement, X's own letter (quoted in § 46 above) expressly referred back to the 10 January letter as indicating the reasons for their retirement. Apart from the SRA referral, nothing had changed – such as new evidence from C – that might have led X to reconsider their position.

64. There were cogent reasons why X might very well have considered the SRA referral a reason for retiring, as explained in Ms Walker's witness statement. Regardless of the point that C's solicitors felt obliged to make the referral, it represented a significant escalation of the matter. An SRA investigation could reasonably be expected to take a year or more to resolve, and to be demanding and stressful in the meantime. There could be no assurance that this court's decision on the section 24 application would resolve the matter: the court may have concluded, for example, that C's allegations did not engage section 24 because they did not go either to X's impartiality or their conduct of the arbitration proceedings (see my conclusions in section (D)(2) below). Sitting as arbitrator during an ongoing SRA investigation could also have created a reasonable perception of bias.

65. Moreover, the terms in which the SRA referral here was expressed are bound to have augmented the perception that C was actively hostile to X. The new SRA rule 3.9 required solicitors to report to the SRA *"any facts or matters that you reasonably believe are capable of amounting to a serious breach of their regulatory arrangements … by any person … regulated by them … of which you are aware"*, which would include a failure to act honestly or with integrity. C's solicitors' report in relation to X not only set out the facts and circumstances as they saw them but also set out the conclusions which they drew from the facts and circumstances, in trenchant terms:

> "In the circumstances we have concluded that [X] has admitted that [X's] CV was false and misleading, in that:
>
> 1. It stated that [X] had been appointed as arbitrator before when [X] had never been appointed as, or acted as arbitrator before;
>
> 2. It gave the impression that [X] had been appointed as arbitrator before in numerous cases when [X] had never been appointed; and
>
> 3. It listed a series of matters which [X] claimed as matters in which [X] had experience as counsel or arbitrator when, in fact, [X] had copied that list from another CV in which [X] had listed exactly the same set of matters, as cases in which [X] had experience as mediator.
>
> [X] has not provided any explanation for the falsity of [X's] CV other than effectively acknowledging that it was prepared in

> order to try to attract more arbitration appointments. [X] has not provided any explanation for creating the list of arbitration cases in which [X] claimed to have experience by copying the list of cases from [X's] mediation CV in which [X] had acted as mediator."

66. The tone of the above passage is in my view more that of a direct attack on X than a neutral report. Further:

    i) the suggestion that X had "*effectively acknowledge[ed]"* having used a false CV *"in order to try to attract more arbitration appointments*" is a highly tendentious and unfair characterisation of X's evidence quoted in § 36 above;

    ii) whilst the report attached a copy of the decision of Professor Uff on behalf of the LCIA Court, it made no reference to it or to the fact that C's complaint against X had been rejected: regardless of C's complaint that Professor Uff did not fully address its complaint, that is a striking omission; and

    iii) the report also contains the statement that *"When we asked [X] about [X's lack of previous appointments] X did not respond directly but referred us back to [X's] CV (copy of email correspondence at Appendix 4)".* That statement implies that – as C submitted before me – X's 1 May communication relied on X's CV as demonstrating prior arbitration experience. As indicated in § 85 below, that is in my view an incorrect interpretation of X's response.

67. In all these circumstances, it is entirely unsurprising that X came to the conclusion that it would be inappropriate to continue as arbitrator, in the light of C's evident approach towards X and the inception of a potentially burdensome and long-running SRA process running in parallel with the arbitration.

68. It makes no difference that, C submits, the SRA report was based on the same matters as the section 24 application. Those matters did not lead X to resign until the SRA referral. It was the referral that made the difference, by reason of its practical implications, what it indicated about C's attitude towards X, and the risk of a perception of bias were X to sit during the pendency of the referral.

69. For these reasons, C is not to be regarded (either in whole or in part) as the 'successful party' for costs purposes as against either X or D. In relation to D, there is the further point that D played no part in X's resignation and thus cannot on any view be regarded as having conceded the claim.

**(2) Merits of section 24 application**

70. It follows from my conclusion above that the present case does not fall within Lord Neuberger's categories (1) or (2) in § 60 of *M v Croydon*. It is closest to a category (3) case, where the natural starting point is that there should be no order for costs, unless perhaps it is tolerably clear who would have won if the case had not been resolved short of trial.

71. In the present case, it cannot be said to be tolerably clear that C would have succeeded on its section 24 application. On the contrary, I consider it likely that C would have lost.

72. As a preliminary point, C submits that:

> "58. … the merits of the s.24 Application can only provide a reason to depart from the usual rule if [D] or [X] can establish that the s.24 Application had no merit (perhaps on the strike-out standard), that it was pursued in bad faith and without belief in its merit and that [X]'s resignation was only secured by such bad faith conduct.
>
> 59. This is because, in an ordinary case, where the relief sought has been conceded, a Defendant cannot realistically be heard to say that the claim had no merit. If the Defendant properly maintained that the claim was hopeless, it would (and should) simply have contested it to a hearing and won. The authorities referred to in § 44 above are relevant. Exceptional circumstances (such as fraud, abuse of process or bad faith) should be required before the Court will allow a Defendant who has conceded the result to argue the merits of a case, with a view to avoiding a costs order.
>
> 60. This is particularly important in a case such as this, because the availability of a challenge procedure is fundamental to the legitimacy of arbitration. A Claimant should not be criticised for challenging an arbitrator (or denied his costs in the event the challenge succeeds) unless either (1) the challenge is dismissed or (2) the Court is convinced that it was brought abusively or in bad faith. …"

73. No authority is cited in support of this proposition. It is in any event premised on the claim having been conceded. I have found that not to be the case, and therefore the relevant question is as indicated in § 70 above.

74. Section 24 of the 1996 Act provides, so far as relevant:

> "(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;
>
> …
>
> (d) that he has refused or failed –
>
> (i) properly to conduct the proceedings, or …

> and that substantial injustice has been or will be caused to the applicant."

75. It has been stated that the removal of an arbitrator is an "*extreme step*" that is only likely to occur in "*the rarest of cases*": *Brake v. Patley Wood Farm LLP* [2014] EWHC 1439 (Ch) § 166.

76. In considering the question of impartiality in section 24(1)(a) it is relevant to bear in mind the case law on bias, which indicates the following:

    i) The 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: *Porter v. Magill* [2002] 2 AC 357 at §103.

    ii) The fair-minded observer is gender neutral, is not unduly sensitive or suspicious, reserves judgement on every point until he or she has fully understood both sides of the argument, is not complacent and is aware that judges and other tribunals have their weaknesses. The informed observer is informed on all matters which are relevant to put the matter into its overall context. These include the local legal framework including the law and practice governing the arbitral process and the practices of those involved as parties, lawyers and arbitrators: *Helow v. SSHD* [2008] 1 WLR 2416 at §§ 1-3.

    iii) The test is an objective one. The fair-minded observer is not to be confused with the person who has brought the complaint, and the test ensures that there is a measure of detachment: *Harb v. HRH Prince Abdul Aziz* [2016] EWCA Civ 556 § 69.

    iv) All factors which are said to give rise to the possibility of apparent bias must be considered not merely individually but cumulatively: see, e.g., *Cofely* § 115.

77. In the present case, X's evidence is that they told the LCIA at the outset that they had no prior experience sitting as arbitrator. C has put forward no real basis on which that evidence could be challenged, other than to complain that X is not specific as to the identity of the LCIA officer to whom they spoke and has not given permission to the LCIA to provide documents in this regard. C refers to a passage in the LCIA's 2018 Annual Casework Report stating:

> "The LCIA's figures for appointing first-time arbitrators are lower than that of the parties, in part reflecting the fact that the LCIA Court selects three times as many sole arbitrators and five times as many chairs as the parties select, for which roles prior experience of LCIA arbitration is typically required."

78. C submits that it is therefore 'vanishingly unlikely' that the LCIA would have appointed as sole arbitrator a person who had never been appointed as an arbitrator in any previous case. I disagree:

    i) The passage quoted above refers to prior experience of LCIA arbitration, and is not confined to experience sitting as arbitrator.

ii) It is in any event qualified by the word 'typically'.

iii) This was not a particularly large-scale dispute, and as set out in X's evidence it had specific features which made X's mediation and IP experience particularly appropriate.

iv) On C's evidence, the LCIA already knew that X had no prior experience as an LCIA arbitrator. C's director states that in a telephone call on 2 or 3 January 2019, Ms Emma Reade (Counsel) of the LCIA – who had in fact written the letter announcing X's appointment – told her that the present case was X's first appointment as an LCIA arbitrator.

v) So far as appears from his report, Professor Uff, a former member of the LCIA Court, was unperturbed by the possibility that X had no previous experience sitting as an arbitrator.

79. Accordingly, it is in my view likely that X's evidence about the conversation with the LCIA would have been accepted by this court, leading to the conclusion that the LCIA itself cannot have been misled about X's experience.

80. Nor can C have been misled in any relevant respect by X's CV, for the simple reason that following the expedited appointment of a tribunal (at C's request), X's lack of experience as an arbitrator would not have provided any ground on which C could have challenged X's appointment.

81. In any event, any cause for complaint on C's part about the contents of X's CV:

i) would not have provided any justifiable doubts about X's impartiality within section 24(1)(a); and

ii) would not have amounted to a failure by X *"properly to conduct the proceedings"* (the production of an arbitrator's CV forming in my view no part of such conduct) and, in any event, would not have caused substantial injustice to C within section 24(1)(d).

82. As to X's 1 May 2019 response to the parties, C relies in particular on the passage:

> "2. In so far as allegations against me regarding my competence, I simply point out that I have been a qualified lawyer for over 35 years; undertaken many LCIA arbitrations as counsel and have been familiar with their rules for many years now. Further, I was a Disputes partner in one of the foremost IP law firms in the country for over 10 years and understand well the IP issues in this matter. I object strongly therefore to any suggestions that I lack competence to hear the case . Finally, my resume was before the parties on my appointment last year and no objections were taken as to my competence at that stage." (my emphasis)

83. C contends that X thereby sought to answer their 'query' about X's experience as an arbitrator by referring back to, and hence further and misleadingly relying on, their CV. I reject that submission.

84. First, X was here responding not a query but to the complaint levelled by C in the First Challenge, which in particular stated:

> "The Claimant has since been informed that this was [X]'s first appointment in any arbitration under the LCIA rules. [X] is an experienced mediation practitioner. However, from [X]'s CV it appears to the Claimant's counsel that [X] has been appointed in very few arbitrations at all, if any. Sadly, and perhaps due to a lack of experience, since the commencement of the arbitration the Arbitrator has handled the arbitration in a manner which has dramatically failed to provide the Claimant with a level playing field, or an appropriately balanced consideration of her submissions. Further details of this treatment is provided below. " (§ 18)

85. Thus the complaint was that, on the basis of X's CV, X had been appointed in very few arbitrations if any. On a fair reading of X's response quoted above, X was not relying on the CV in order to suggest that X had been so appointed. Rather, as the word "*therefore*" in the third sentence indicates, it is the contents of the preceding two sentences which X considered demonstrated their competence. X's point in the final sentence was a separate one, namely that any lack of experience evinced by the CV had been known to C from the outset, since C had received the CV when X was appointed. In my judgment, C's contention that the final sentence of X's response was a dishonest attempt to bolster their claimed experience by reference to the CV is entirely baseless.

86. Secondly, the evidence indicates that C itself did not understand X to be claiming, by the 1 May response, to have had prior experience as an arbitrator. On the contrary, the witness evidence and correspondence quoted in § 22 above indicates that C assumed, following the lack of any further response from X, that X had no such experience.

87. As a result, there would in my judgment have been no credible case either that X's 1 May 2019 response had been misleading, or that C had in fact been misled by it.

88. In any event, X's 1 May 2019 response on no realistic view gave rise to justifiable doubts about X's impartiality, nor did it form part of X's conduct of the proceedings (nor, in any event, did it cause substantial injustice to C).

89. C maintains that X's choice of words in the 1 May response indicated that X was responding defensively to C's enquiry, setting themself against C, and that:

> "Any fair-minded observer would not be able to ignore the likely feelings of anger and discomfort that this may give rise to on the part of [X], and the potential professional difficulties it might cause [X], giving rise to justifiable doubts as to [X]'s ability to treat C fairly and impartially (or without the "ill-will" which was identified as a hallmark of partiality by the Chief Justice, Vice-Chancellor and Master of the Rolls in *Locabail (UK) Ltd v Bayfield Properties* at [2]."

90. However, it is important to bear in mind in this context the statements of Popplewell J in *H v. L* [2017] 1 WLR 2280 §§ 62-65:

> "62. If, as I have found, there is no other justifiable ground for doubting M's impartiality, it is immediately apparent that the point is misconceived. If there are no circumstances which objectively give rise to the possibility of an appearance of bias, it can never be a proper ground for removal of an arbitrator that the process of unsuccessfully advancing misconceived submissions to the contrary has of itself created such a possibility. The argument is in effect that the possible offence taken by an arbitrator at an unmeritorious attempt to remove him should itself raise justifiable doubts as to his future conduct of the reference, with the paradoxical result that the more obnoxious the challenge the stronger this ground will be. It is self-evidently misguided.
>
> 63. The argument also has wider ramifications. In order to uphold the principle of party autonomy and the efficacy of the arbitral process, arbitrators and the courts should be vigilant not to accede to removal applications merely because the arbitrator would feel more comfortable if he or she did not have to sit in judgment over a party who has been critical and avowed a lack of confidence in the impartiality of the tribunal, albeit one which no fair-minded observer would feel. No tribunal wishes a party to be nursing a sense of grievance, however unjustified. However that is not a good reason for resignation or removal.
>
> …
>
> 65. Moreover courts and tribunals will be vigilant to detect and guard against improper tactical deployment of such challenges which are made in the hope that the tribunal will provide some grounds for removal in its response to the challenge."

91. Professor Uff considered the tone of X's response, concluding that whilst the second paragraph could be viewed as unnecessarily strident, there was *"nothing in the arbitrator's response to suggest that [X] will be unable to continue to act in an independent and unbiased manner."* I respectfully agree, and consider that C's section 24 challenge is also unlikely to have succeeded on this ground.

92. For all these reasons, in my judgment it cannot be said to be tolerably clear that C's section 24 challenge would have succeeded. On the contrary, I consider it far more likely to have failed.

93. D, in particular, submits also that C's challenge would have been too late, in the light of section 73(1) of the 1996 Act, but in the light of my conclusions above it is unnecessary to consider that further point.

### (3) Other factors

94. The parties referred me to correspondence in which attempts had been made to settle the case. Briefly:

i) On 29 October 2019 D's solicitors A&O made a proposal, without prejudice save as to costs, in order to find an expeditious resolution and despite considering C's application to have no merit, that the parties jointly invite X to resign, with each side bearing its own costs and no impact on prior steps or decisions in the arbitration.

ii) C's solicitors responded on 20 November 2019, rejecting the offer, but proposing a resolution in which C would receive €130,000 in settlement of the claim as a whole. Alternatively, C was willing to negotiate settlement of the section 24 application alone if D were willing to propose a reasonable settlement of C's costs. C said its current costs of the section 24 application in the Commercial Court were £42,264 and its costs of the challenge before the LCIA *"which it also seeks to recover in the Commercial Court proceedings"* were £24,489. C estimated its total costs of the Commercial Court challenge, if it proceeded, as being at least £100,000.

iii) On 29 November 2019, A&O rejected C's offer but repeated their 'drop hands' proposal as set out in their 29 October letter.

iv) C's solicitors reiterated their existing offer on 11 December 2019.

v) On 10 January 2020 X's solicitors made the settlement proposal quoted earlier, involving X retaining fees to date but not seeking costs.

vi) C's solicitors responded on 17 January 2020 proposing that X retain fees to date but pay C's costs of the claim, though adding there was a case for D instead bearing all or part of those costs.

vii) On 23 January 2020 A&O proposed that X retain fees to date and that each party bear its own costs.

viii) C's solicitors by a letter of 19 March 2020 adhered to the position that the defendants should pay C's costs of the application, including their costs of the challenge before the LCIA Court, which in total they now put at £95,000 including VAT.

ix) A&O on 23 March 2020 once again proposed a 'drop hands' settlement.

x) Further correspondence ensued with no party altering its position on costs.

95. Given that under Article 29 of the LCIA's rules the decisions of its Court are final, it is at least arguable that C could not reasonably have recovered from the Defendants its costs of the proceedings before the LCIA Court – even though, as C points out, it was required to take that step before making an application under section 24. In any event, however, the offers made by both defendants to settle with each party bearing its own costs were reasonable offers which, at least given the outcome of this application, can now be seen to be offers that ought to have been accepted. It is unfortunate that C pressed on, incurring ever-increasing amounts of costs, in a dispute which from 10 January 2020 onwards has been a dispute only about costs.

## (E) CONCLUSIONS

96. For reasons set out above, C's application for costs fails. It was not the 'successful party' as against either defendant, and it is not tolerably clear that C would have succeeded in its section 24 application: the reverse is true. In addition, C rejected settlement offers which would have enabled the matter to be resolved at far less cost than has turned out to be the case.

97. The considerations set out in sections (D)(2) and (3) above give rise to the question of whether C should be ordered to pay the defendants' costs of the application. It appears that both defendants were represented on a *pro bono* basis, apart from junior counsel for X, which meant (Mr Sprange QC, leading counsel for X told me) that any costs award in the Defendants' favour over and above junior counsel's fees would be paid to charities.

98. In their respective skeleton arguments:

i) X invited the court to order that there be no order as to costs or, alternatively, that C pay the costs of the application.

ii) D submitted:

> "55. The parties are before the Court due to C's insistence in pursuing a costs order. As the correspondence shows, D1 would have been content for the proceedings to be concluded with each party agreeing to bear its own costs. However, now that the parties are, unfortunately, before the Court, D1 submits that an order for costs in its favour is appropriate.
>
> 56. D1's legal representatives are acting pro bono. D1 therefore seeks a PBCO against C. A case could be made for such an order in respect of the time incurred by D1's legal representatives for the entire duration of these proceedings. However, D1 will limit itself to seeking a costs order in respect of the period since C rejected D1's offer of 29 October 2019, whereby the parties would agree to invite the arbitrator's resignation on the basis that each party would bear its own costs of both the s24 proceedings and the LCIA Challenges (even though D1 had a costs order in its favour). This was an eminently reasonable offer, which gave C the substantive relief that it was seeking. The offer was made, without any concession on the merits of the s24 application, as soon as D2's evidence had been served. Only C's unnecessarily aggressive approach to these proceedings has prolonged them beyond October 2019 and caused further time or costs to be incurred by all parties.
>
> 57. D1 therefore seeks an order pursuant to s194 Legal Services Act 2007 that C should be ordered to pay £44,867.50 to the prescribed charity. This amount represents the costs that D1 would have incurred (albeit using rates prescribed by the Senior Courts Costs Office, rather than Allen & Overy's normal rates),

> and which C would have been ordered to pay, following its offer of 29 October 2019 to the end of the hearing, had it not been represented free of charge."

99. Section 194(4) of the Legal Services Act 2007 indicates that *"[i]n considering whether to make such an order and the terms of such an order, the court must have regard to – (a) whether, had R's representation of P not been provided free of charge, it would have ordered the person to make a payment to P in respect of the costs payable to R by P in respect of that representation, and (b) if it would, what the terms of the order would have been."*

100. In oral submissions, X's position was not to seek costs unless the court concluded that it was tolerably clear that C's section 24 application would have failed. D's position was that "*any order for costs should be against the claimant rather than even an order for -- rather than the position being no order as to costs*".

101. I have given this aspect of the matter careful consideration. I consider it probable that C would have failed in its section 24 application; it has failed in its application for costs (including the costs of the hearing before me); and it refused to accept reasonable offers to settle. Nonetheless, it seems to me that it is appropriate also to take account of C's director's evidence that, at least in so far as its business relates to the modified app, C started it *"as a free-to-use philanthropic project after seeing the tragic losses of life associated with the so-called 'migrant crisis', associated with increased movement of displaced people into Europe".* C is thus operating here in what its director refers to as *"this philanthropic sector".* I am told that C's director represented C herself in the arbitration. I am not immediately attracted by the idea of a substantial costs award requiring, in effect, a large payment from one philanthropic enterprise (C) to others (the prescribed charity). C will, as a result of its regrettable pursuit of this matter, already have to bear its own legal costs, which are put in its costs schedules as £114,320 in respect of the section 24 application and £17,448 in respect of the Second Challenge before the LCIA Court. I do not understand it to have been suggested that C's lawyers have represented C on a *pro bono* basis in this matter.

102. In all the circumstances, I have concluded that justice is best served by making an order that C pay the costs of X's junior counsel in respect of the section 24 application, i.e. the representation which was not provided on a *pro bono* basis, but that there otherwise be no order as to costs.

103. I am grateful to each of the advocates for their clear and helpful written and oral submissions.