Morison J:
1. This is an application made under section 68 of the Arbitration Act 1996. The arbitration arose out of disputes between owners A.S.M. Shipping Ltd of India ['the owners'] and charterers, T.T.M.I. Ltd of England ['the charterers']. The essential ground upon which this application is based is that one of the three arbitrators, namely X QC [nominated by the other two arbitrators] should have recused himself. The Owners' principal witness was a Mr Moustakas. In a previous arbitration, X QC had been involved as an advocate on behalf of other charterers against other owners. In that arbitration serious allegations had been made against Mr Moustakas.

2. The background to the arbitration can be taken from a judgment of Mr Justice Christopher Clarke on a matter relating to security for costs. He said:

"2. The background to this application is as follows. On 11th December 2002 TTMI Ltd. chartered from ASM Shipping Ltd. of India the AMER ENERGY to carry a cargo of gas oil from one or two safe ports in the Arab Gulf to one or two safe ports in the Red Sea or Egyptian Mediterranean. The vessel was described in the fixture recap as "expected ready around 20th December all going well" and the laycan dates were 25th December to 27th December. The vessel was at this time anchored at Fujairah undergoing repairs. Whilst there, she was arrested by Shell on 7th November for bunkers and on 26th November by Inchcape for services, those arrests being in respect of very modest sums.

3. The arrests were not lifted until 2nd January 2001 and she departed from Fujairah the next day. She arrived at the nominated load port of Mina al-Ahmadi only on 6th January 2001. The charterers claimed that by reason of the vessel's late arrival they suffered substantial losses because of an increase in the price of the cargo and because they lost their intended purchase contract. The dispute was referred to arbitration in March 2001. The owners counterclaimed that they were entitled to substantial unpaid freight and demurrage. The cargo was in the end carried to Indonesia.

4. During the course of the still unconcluded arbitration, the arbitrators have made a number of awards. On 26th April 2001 the Tribunal made an award in owner's favour in respect of freight in the sum of US$640,100 together with interest at 7.5 per cent to be compounded at three monthly rests and costs. By an agreement between the parties a sum of $707,500 was paid into a joint interest-bearing escrow account at the Royal Bank of Scotland on 28th June 2002. On 23rd October 2002 owners applied to the Tribunal for an immediate award in their favour in respect of the demurrage claimed of $202,390. On 18th November 2002 the Tribunal dismissed that application and ordered the owners to pay to the charterers their costs of the application for such an award.

5. There has been a substantial dispute as to whether the owners had properly complied with their obligation to give disclosure. The Tribunal made serious criticism of the owners' behaviour in this respect and on 16th July 2004 ordered them to pay all the charterers' costs relating to the charterers' application for disclosure of owners' files within 14 days of the amount of those costs being fixed.

6. On 24th September the Tribunal made another award in which they declined to review or withdraw their July award and in which they determined that the charterers' costs covered by that July award were £14,825.09. They ordered the owners to pay those costs plus interest together with £9,085.00, the costs of the September award, making £23,910.59 in all. They also ordered owners to pay the charterers' costs of the application to review the earlier award.

7. On 23rd December 2004 the Tribunal determined a number of preliminary issues largely in the charterers' favour holding, amongst other things, that owners had been obliged to ensure that the vessel embarked upon her approach voyage within such time that it was reasonably certain that she could arrive at the load port so as to comply with the laycan of 20th to 27th December and holding that an exceptions clause in the charter did not avail the owners for their failure so to do. The owners took up this award in January 2005 paying the cost of the same, that is to say, £43,600."

3. The parties were notified of X's appointment as third arbitrator on 4 August 2004, by which date the hearing of a number of preliminary issues had been fixed for three days, between 5 to 7 October 2004. On 27 September 2004, Mr Siberry QC, who had been retained by owners in this dispute and was instructed to act for them at the forthcoming hearing, informed his instructing solicitors that he would be unable to represent them at the hearing because of a family bereavement. He suggested that a request be made for a short adjournment. A letter was sent to X QC on that day and by letter dated 28 September the application was rejected. With great reluctance a new QC was retained at short notice. The hearing commenced on 5th October and Mr Moustakas was due to give evidence shortly after lunch that day. During
the morning, the owners’ solicitor [Mr Zaiwalla] greeted X QC and Mr Moustakas, having inquired who he was, told Mr Zaiwalla that X QC had close connections with the charterers’ solicitors [Waterson Hicks] and suggested that an objection to X QC continuing to act as an arbitrator should be made. Mr Zaiwalla was not, at that time, aware of the grounds for his client's misgivings and because the time for the hearing had arrived there was no opportunity to discuss what Mr Zaiwalla had been told with leading counsel, Mr Simon Crookenden QC, although it was mentioned to him.

4. Mr Moustakas had also spoken to Mr Zaiwalla's assistant and had told her that X QC had been instructed on the 'B' case by Messrs Waterson Hicks, the charterers' solicitors, and that in that case serious allegations of a personal nature had been made against Mr Moustakas. Waterson Hicks were acting for the charterers in this arbitration. That evening, Mr Moustakas had not completed his evidence and the case was to resume the next day. Mr Zaiwalla considered the position and concluded that had X QC been involved as Mr Moustakas was saying then he surely would have recused himself and that he could not talk with Mr Moustakas about this, to make further inquiries, as he was in the middle of his evidence. It was only after Mr Moustakas had completed his evidence that X QC intervened and said he wanted to make a disclosure about his involvement with the B case against Mr Moustakas and he invited the parties to consider what he had said. At that stage Mr Zaiwalla immediately took instructions from Owners' representatives and was instructed to object to X QC continuing to sit as an arbitrator. Mr Crookenden QC suggested that as he had not had time or the opportunity to consult with his clients, the hearing should continue with Owners reserving their position on their stated objection to X QC continuing to sit.

5. Later that day, owners' solicitors wrote to X QC setting out their reservations about him continuing to sit. The essence of the objection is to be found in the third, fourth and fifth paragraphs of that letter:

"We have now spoken with Mr Moustakas and he tells us that all his papers have been sent by him to his Greek Lawyer and, therefore, he is not in a position to immediately provide us with documents concerning the nature of the allegations which Waterson Hicks had made against him in the case of the vessel B. However, we understand from Mr Moustakas that in that case, like in this case, Waterson Hicks had mounted an attack on their opponent alleging impropriety in giving discovery and in the correspondence had personally accused Mr Moustakas of producing fraudulent and fabricated documents and had threatened forensic investigation to verify the authenticity of those documents in Mr Moustakas' file. In other words in that case Waterson Hicks had alleged a criminal act on part of Mr Moustakas. In the end Mr Moustakas' file was disclosed and we are told nothing of interest was found and the allegations were totally unfounded.

As you had acted for Waterson Hicks’ clients in the B case, it is most likely that Waterson Hicks would have mentioned those unfounded allegations against Mr Moustakas to you in the course of your instructions. This in Owner's view would have made you unsuitable to accept a judicial office in a case where you knew that Mr Moustakas was going to be one of the two key witnesses for one of the parties.

In the circumstances, we would request you to please provide full documents concerning the B and provide details of each and every allegation which were made by your then instructing solicitors Waterson Hicks against Mr Moustakas. In the event that you do not have the documents then would you be so good to request your instructing solicitors Waterson Hicks in the B case to make available the documents. Perhaps, Waterson Hicks could check with the partner concerned and confirm that what is said above is indeed correct about the nature of the allegation they have made against Mr Moustakas in the B case."

6. At the beginning of the third day, the charterers told the owners' representatives that if X QC recused himself they would agree to the arbitration continuing with the two other arbitrators. That was agreed in principle, but was not put to the Tribunal as X QC indicated that he was not intending to stand down. He had prepared a lengthy statement which he read out.

1. I have now had the opportunity to refresh my memory by reviewing my own papers in the B overnight and consider further the position in relation to Mr. Moustakas. For reasons which will become apparent I do not have public documents in relation to the case or indeed any of the papers sent to me in connection with it, but for reasons which will also become apparent I do not consider that a matter of concern.

2. The B involved a dispute in arbitration between Owners and Charterers under a charter in which Mr. Moustakas was
the broker. The dispute appears to have concerned, among other things, an issue as to the terms of the charter in circumstances where there was no signed charter document, not an uncommon factor.

3. I became involved in the case shortly before the hearing of an application to the High Court under section 43 of the Arbitration Act 1996 for Mr. Moustakas to produce his fixture file. I was not originally instructed in the matter and indeed did not prepare the application; other Counsel were previously (and for that matter subsequently) involved who were unavailable for the hearing.

4. The application was a perfectly standard application for production of documents.

5. As I indicated yesterday, production was being resisted on the grounds of confidentiality and privilege. The application raised no allegations of impropriety, let alone criminal conduct, on the part of Mr. Moustakas that I am aware of. As is perfectly normal in such cases, the production of the whole file was considered important so that the chronological sequence of documents be retained.

6. The application came on before Cresswell J who promptly indicated in argument that he felt matters of privilege and confidentiality were properly to be addressed by the Tribunal before whom the substantive hearing was to take place. He accordingly urged the parties to reach accommodation with each other. Discussions were held between the respective lawyers so far as I am aware, Mr. Moustakas was not present and I have never met him before this hearing or had any contact with him as far as I am aware. This makes somewhat surprising the suggestion in Mr. Zaiwalla’s fax of 6 October 2004 that Mr. Moustakas reacted to having seen me in the corridor, since I am not aware of his having set eyes on me before. In any event, a consent order was agreed between the lawyers whereby the file would be produced to the Tribunal on certain terms.

7. I made no further application. I am aware of the fact that there was a complaint that the consent order was not complied with. I did not make the application or applications, if there was more than one, relating to that as the Counsel previously involved resumed conduct of the case and I was in any event taken up with other matters and unable to assist. I have absolutely no idea whether the complaint of non-compliance with the consent order was good or bad or as to what happened on any subsequent application or applications as I have not since been involved in the case and as I indicated earlier I have not retained the papers I was sent.

8. Mr. Zaiwalla yesterday raised the suggestion of criminal allegations. I cannot hazard what they might be, save I suppose criminal contempt for non-compliance with the consent order. As I have indicated, I do not know what happened in relation to the allegation of non-compliance with the order. I note however from Mr. Zaiwalla’s fax to me, copied to the other members of the Tribunal and to Waterson Hicks, of 6 October 2004 that the file was subsequently disclosed and nothing of interest was found. I have no reason to doubt that. I do not recall making or Waterson Hicks or their clients making any allegation of producing fraudulent and fabricated documents and threatening forensic investigation and there is no reference to this in the preparatory note of oral submissions which I prepared for the hearing, but again I have no basis for thinking that any such allegation, even if made, was ever substantiated. There does appear to have been an argument raised by the other side in that case and contested by Waterson Hicks’s clients that 2 documents were shams drawn up at a later date. I have no idea what happened, if anything, to that allegation but it was certainly not one being made by or on behalf of Waterson Hicks’s clients.

9. As far as I am concerned nothing relating to that case gives rise to any doubt in my mind as to the propriety of Mr. Moustaka’s conduct.

10. The question has been raised as to why I did not raise the matter earlier. The simple answer is that I did not have my short involvement in the B case in mind and had simply not made any connection with a Mr. Moustakas who was to be a witness in this case until shortly before I raised the matter with the parties. My involvement in the B related to an utterly innocuous hearing applying for a 3rd party to produce documents in respect of which he expresses perfectly proper and
common place reservations about confidentiality and privilege and the facts had made no profound impression on me. The first occasion on which I made the connection was when Mr. Moustakas towards the very end of the second day of his evidence referred, it seemed to me somewhat pointedly, to another case to do with the production of a file which for the first time rang bells with me.

11. Mr. Moustakas's evidence finished a few minutes later and I immediately raised the matter with my co-arbitrators and made a declaration to the parties to address the matter.

12. I considered then and I still consider now that there is no basis for recusing myself as I do not believe that any circumstances exist which give rise to justifiable doubts as to my impartiality. Indeed, I believe that it would be thoroughly inappropriate to recuse myself in the absence of any such circumstances and in the light of the extent of my involvement at the stage reached in the proceedings so far.

13. I observe from Mr. Zaiwalla's fax of 6 October 2004 that Mr. Moustakas had raised my involvement in the B before he began to give evidence. I do not consider that anything that has emerged since has altered the position. If there was an objection to be made it could and should have been made then and could have been addressed then. Owners were clearly at the very least put on inquiry simply on the basis of what Mr. Zaiwalla says in his fax.

14. I also observe that Mr. Zaiwalla's fax of 6 October 2004 suggests some similarity of tactics on the part of Waterson Hicks in making allegations about impropriety in connection with disclosure. It is a feature of a very large number of cases these days that such allegations are made, they are not the trademark of any one firm.

15. I have already addressed the question of the extent of my connections with Waterson Hicks and produced the necessary and relevant figures which frankly speak for themselves: since February 1994 I have been instructed as counsel by Waterson Hicks on 10 cases and as mediator in one case; over the same period I have been instructed to act in over 400 cases. Mr. Zaiwalla asks for written disclosure of the number of cases in which I have acted for Waterson Hicks's clients in the last two years. Other than the B, my only other work for Waterson Hicks in the last two years was appointment as mediator on 27 November 2003 for a mediation which took place on 3 December 2003.

16. Without wishing to cause any offence to Waterson Hicks, my professional contact with them (as the figures show) is very small in the context of my practices as a whole, representatives of their firm are amongst the approximately 500 people who attend my Chambers' summer party and I have no personal contact with any person at Waterson Hicks. I have also met them at public professional functions such as the LMAA dinner; I have also in fact sat with Mr. Zaiwalla at an LMAA dinner and enjoyed a perfectly pleasant evening, though he seems to have no recollection of the occasion, a matter which I certainly do not hold against him.

17. I have read Mr. Zaiwalla's account of a matter concerning the clerks' room at 20 Essex Street. I had no previous knowledge of this prior to Mr. Zaiwalla's letter. I am grateful to be made aware of it and will, with the consent of both parties, pass Mr. Zaiwalla's letter to my Head of Chambers for further investigation, though it appears rightly that the Owners do not make any complaint of my position in relation to that.

18. I consider that we should now get on with this case; this unfortunate distraction has absorbed a lot of time and energy. I am satisfied that there is no basis for any objection to my continuing and considerable basis for objecting to my ceasing to do so. I consider it would be wrong in principle for me to recuse myself and the Owners dealing fairly with the situation should now acknowledge the same.

7. There was subsequent correspondence about X QC's impartiality. The owners and X QC maintained their previously expressed views. It is X QC's contention that his connection with the B was not a relevant connection; he maintains that he was "unaware" of the allegations made against Mr. Moustakas in the B case and that "had I recused myself a substantial way into the hearing and an umpire had to be reappointed, costs would indeed have been wasted". "On the basis of the information provided by the Claimant and for the reasons already given I did not think I was entitled to recuse myself."
The parties’ submissions

8. For the Owners, Mr Beloff QC said that he wished to rely on two matters, separately or cumulatively: namely “apparent bias” on the part of the tribunal and their refusal of an adjournment when requested following Mr Siberry QC’s inability to present owners’ case through no fault of his own. He submitted that both grounds could be categorised as examples of a breach of the rules of natural justice or fairness. Section 1(1) of the 1996 Act provides as one of the foundations of the provisions of the Act, the principle that the object of arbitration is to

"obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense."

To this end, section 33 imposes on the arbitral tribunal a duty to

"act fairly and impartially as between the parties ... "

9. And section 68 provides that a breach of that duty is one form of "serious irregularity". In Merkin: Arbitration Law it is stated that "the impartiality of arbitrators is central to the entire arbitral process". Actual or apparent bias on the part of an adjudicator is sufficient ground for setting a determination aside: in this case reliance is solely based upon ‘apparent bias’ although actual bias has also been alleged. The common law test of apparent bias has been modified to align itself with the Strasbourg jurisprudence. The test now is slightly more favourable to a person objecting than it had been before. The test is formulated by Lord Hope in Porter v Magill [2002] AC 357 at paragraphs 102 – 103:

"The question 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."

10. Reference was also made to Lawal v Northern Spirit [2003] UKHL 35. As Lord Steyn put it at paragraph 22:

"What the public was content to accept many years ago is not necessarily acceptable in the world of today. The indispensable requirement of public confidence in the administration of justice requires higher standards today than was the case even a decade or two ago. The informed observer of today can perhaps be expected to be aware of the legal traditions and culture of this jurisdiction as was said in Taylor v Lawrence [2002] EWCA Civ 90 at [61] – [64] ... per Lord Woolf CJ. But he may not be wholly uncritical of this culture. It is more likely that in the words of Kirby J in Johnson v Johnson [2000] 201 CLR 488 at 509 [53] he would be "neither complacent nor unduly sensitive or suspicious"."

11. At paragraph 19 of the same case, Lord Steyn indicated that "the threshold is only a real possibility of unconscious bias". Mr Beloff QC submitted that Lawal was of particular interest having regard to the arguments advanced on behalf of the DCA which did not prevail, namely

(1) the lay members of the EAT were of “very high calibre and standing”;
(2) they could "differentiate between the neutral judicial function and the partisan advocacy function";
(3) "legal traditions and culture" vouched for the practice.

12. The essence of the objection to X QC stemmed from his prior and recent involvement as an advocate in legal proceedings in which serious allegations had been made against Mr Moustakas, a key witness in the present arbitration. Such a previous involvement is capable, on appropriate facts, of giving rise to a finding of apparent bias. In Rustal Trading Ltd v Gill & Duffus SA [2000] 1 Lloyd's Law Reports 14, the commercial character of one of Rustal's consultants was being impugned. One of the arbitrators had, two years before, been involved

in a trade arbitration against the consultant. Moore-Bick J held on those facts that the previous dispute was over two
years before and could not really be described as recent and there was little to indicate that that earlier dispute was out of
the ordinary or was of such a nature as might be expected to have left the arbitrators with a sense of animosity against
the consultant. Accordingly, he refused relief under section 68. In the course of his judgment, the Judge referred to
section 24 of the 1996 [the power of the court to remove an arbitrator on the grounds that "circumstances exist that give
rise to justifiable doubts as to his impartiality"] and said, with approval, that it was common ground that it was the same
test as that in R v Gough [1983] AC 646, the predecessor of the modern test set out above. The Judge was influenced by
the fact that this was a trade arbitration appointed under the rules of a trade association where it can

"fairly be assumed that one of the reasons why the parties have agreed to trade arbitration is that they wish to have their
dispute decided by people who are themselves active traders and so have direct knowledge of how the trade works.
However, if the arbitrators themselves are to be active traders there is every likelihood that at least one member of the
tribunal will at some time have had commercial dealings with one or both parties to the dispute. That is something which
the parties must be taken to have had in mind."

13. Mr Beloff QC drew an analogy with a case in which an objection was successfully taken against his participation in
one arbitration on the grounds of his involvement as an advocate in another arbitration against one of the same parties:
TAS 98 Celtic Plc v UEFA Decision of ICAS: 2 October 1998. In giving their decision the Board of the International
Council of Arbitration for Sport recited the representations made to them by Mr Beloff QC who referred to the cab rank
rule; the fact that a barrister is not employed by his client nor identified with him: "he is a professional person putting
forward his client's case against the other side in the particular matter in which he is instructed. The next day he might
well be acting for the other side in another case."

"As a result of these factors it is impossible to assert that simply because I act against UEFA in one case, I cannot
impartially arbitrate in another case in which UEFA are a party, especially when the cases have no connection other than
UEFA's participation in them. To hold otherwise would be to deny the independence of any English barrister of his client."

14. The Board referred to the Code which governed their proceedings, which is in similar terms to section 24 of the 1996
Act although it refers to "independence" rather than "impartiality" [a difference without distinction]. They held that
"independence" meant that an arbitrator may not have any link with the parties involved in the arbitration and that an
arbitrator's independence

"must be assessed according to the circumstances of the case and thus not on the basis of general or subjective
assumptions which are not objectively verified in the case in hand. "a serious doubt regarding an arbitrator's
independence must be based on concrete facts that can justify, objectively and reasonably, a lack of confidence on the
part of a person reacting in a reasonable manner".

15. That was the test which they applied and led to the disqualification of Mr Beloff QC, although, of course, they made it
clear that "the qualities and integrity of Mr Beloff are not
called into question at any moment".

16. Mr Beloff QC submitted that it was a point of significance that the Owners, and Mr Moustakas, were foreign. He put
the submission this way:

"It is respectfully submitted that X should have recused himself in accordance with the principles set out in [Porter v
Magill] ... especially where objection was taken by a foreign party."

17. And in support of the last phrase he referred to the decision of Laker Airways v FLS Aerospace & Burnton [1999] 2
Lloyd's Law Reports page 45 at page 54, where Rix J. said:

"In conclusion, in considering the submissions of Mr Sullivan and Mr Leggatt, I have sought to resist the temptation, to
which a person such as I, who has spent many years growing familiar with the English legal system may be prone, to
assume that what is so familiar to me would be clear to foreign parties, or to overlook or underestimate concerns which
such foreign parties may have. Thus I have borne well in mind that Laker is a foreign party. That is why I have been
particularly assisted by the findings and conclusion of such foreign or international tribunals as the Paris Court of Appeal
or the LCIA Court of Arbitration."
18. Mr Beloff QC, anticipating opposing counsel’s arguments referred to the decision of the Court of Appeal in Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451. At page 480, paragraph 25, the court stated that “at any rate ordinarily” an objection could not “be soundly based on previous receipt of instructions to act for or against ... any party engaged in a case before him.” He submitted that the Court was not seeking to lay down a rule; rather the court was seeking to give guidance following the embarrassment in the Pinochet case. As the court noted, each case had to be decided on “the facts and circumstances of the individual case” and that “if in any case there is real ground for doubt, that doubt must be resolved in favour of recusal.”

19. Mr Beloff QC also drew attention to a statement in paragraph 19 where the court said:

"Nor will the reviewing court pay attention to any statement by the judge [defined to include any judicial decision maker such as an arbitrator] concerning the impact of any knowledge on his mind or his decision: the insidious nature of bias makes such a statement of little value, and it is for the reviewing court and not the judge whose impartiality is challenged to assess the risk that some illegitimate extraneous consideration may have influenced his decision."

20. On the question of the refusal of the adjournment, Mr Beloff QC submitted that justice must take precedence over convenience. Any damage to charterers could have been remedied in costs and interest on sums eventually found due. The grounds for the application were through no fault of the owners. Account should have been taken of the need for overseas clients to have the counsel of their choice, especially where, as here, the clients had been advised by that counsel to pursue their claim and had agreed tactics with him. The alternative counsel (whose competence as a commercial silk is not impugned) was briefed on grounds of his availability after alternative opportunities had been unsuccessfully pursued. Whereas Mr Siberry QC had been engaged since June 2004, Mr Crookenden QC was engaged for the first time on 28 September 2004, and the hearing began on 5 October. In the overall scheme of things an adjournment for a few months in relation to a claim arising out of events 4 years previously was small. Charterers did not intend to call and did not call any witnesses, and, any adjournment could have caused no difficulty in that regard. There was no 'recollection' issue for them. If an adjournment has been wrongly refused, it will be assumed that prejudice has been caused thereby although it is not for the court to speculate as to its extent.

21. For the charterers, Mr Croall of counsel argued as follows:

Section 33 of the Act provides that:“(1) The Tribunal shall:

"act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and adopt procedures suitable for the circumstances of the particular case....So as to provide as fair means for the resolution of the matters failing to be determined.

(2) The Tribunal shall comply with that general duty in conducting the arbitral proceedings in its decisions on matters of procedure and evidence and in exercise of all others powers conferred on it."

22. However, he submitted that to justify intervention under section 68, the serious irregularity must give rise to "substantial injustice". Not all irregularities will justify the court’s intervention: some real and substantial injustice must result. Mr Croall relied upon dicta of Thomas J in Hussman v Al Ameen [2000] 2 Lloyd’s Law Reports 83 at paragraphs 49 and 50.

23. This position reflects the policy behind the act as set out the Departmental Advisory Committee on Arbitration Law, Report on the Arbitration Bill. Paragraph 58 of the Report (cited and relied upon in Hussman v Al Ameen and PetroRanger [2001] 2 Lloyd's Rep. 348) provides:

"The Court does not have a general supervisory jurisdiction over arbitrations. We have listed the specific cases where a challenge can be made under this clause. The test of "substantive injustice" is intended to be applied by way of support for arbitral process, not by way of interference with that process. Thus it is only in those cases where it can be said that what has happened is so far removed from what could reasonably be expected of the arbitral process that we would expect the Court to take action. The test is not what would have happened had the matter been litigated. To apply such a test would be to ignore the fact that the parties have agreed to arbitrate, not litigate. Having chosen arbitration, the parties..."
cannot validly complain of substantial injustice unless what has happened cannot on any view be defended as an acceptable consequence of that choice."

24. In *Groundshire v VHQ* [2001] 1 BLR 395 the court considered further the meaning of substantial injustice at pp.400 HH Judge Bowsher stated:

"29. The 1996 Act was intended to change the law. It was not merely a codifying statute. The court may be required in some circumstances to enforce or not to disturb an arbitrator's decision, even when the court disagrees with that decision in law or in fact.

30. So also under the 1996 Act the court may be required to enforce or decline to disturb an arbitrator's decision even when the court discerns an element of unfairness.

31. Both sections 68 and section 24 of the Act justify action by the court only when substantial injustice has been or will be caused to the applicant, not when a substantial injustice may be caused to the applicant. It follows that even unfairness does not of itself and without more vitiate an arbitral award.

32. It is more important to look at the decisions that the courts made after the 1996 Act came into force than to consider the earlier decisions.

33. For example, counsel for GS relied on *Interbulk Ltd v Aiden Shipping Co Ltd* (The Vimeira) [1984] 2 Lloyd's Rep 66, before the Act. In that case, at page 76, Lord Justice Ackner said:

"Where there is a breach of natural justice as a general proposition it is not for the Courts to speculate what would have been the result if the principles of fairness had been applied. I adopt, with respect, the words of Mr Justice Megarry in *John v Rees* [1969] 2 all ER 274 at p 309 where he said:

"As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.

34. Though entirely attractive as a general proposition, that is no longer the law as a result of the 1996 Act. The Act does not require the court to speculate what would have been the result if the principles of fairness had been applied, but the Act requires that the court is only to interfere if the court considers, not speculates, that the irregularity or unfairness has caused or will cause substantial injustice to the applicant.

35. It follows that there must be some instances of unfairness on the part of an arbitrator where the court should not intervene. It may be that some instances of unfairness that in fact caused substantial injustice to the applicant will not be the occasion for the court intervening simply because there is insufficient evidence to lead to the court to consider that the irregularity or unfairness has caused or will cause substantial injustice to the applicant.

38. The policy of the 1996 Act is to make it more difficult to question the decisions of arbitrators, not to make challenges easier.

39. The word "substantial" appears in many contexts in our law. One simply cannot take a definition of the word from one context and apply it without question to another totally different context. I reject totally Mr Acton Davis's submission as to the meaning of the word "substantial". In the present context, I prefer such dictionary meanings as "having a real existence", "essential", "of ample or considerable amount, quantity or dimensions".
40. In the present context, Parliament plainly meant to refer to some injustice that had some real effect as opposed to a failure to deal with arguments that causes affront or disquiet without substantial effect. The highest requirement that justice should manifestly be seen to be done may require that a judicial decision be overturned because of the manner in which it was reached, without it being demonstrated that the result produced injustice. But that is not the system applied to arbitrations by the 1996 Act."

25. Accordingly, as a matter of law, Mr Croall submitted that the requirements of section 68 are precise and exacting. Ordinary and foreseeable incidents of the chosen arbitration cannot found such a challenge.

26. This was emphasised by Moore-Bick J. (as he then was) in the context of an allegation of apparent bias in Rustal Trading v Gill & Duffus [2001] 1 Lloyd's Rep 14 at pp. 18-9:

"The power of the Court to remove an arbitrator on the grounds of bias is now to be found in s. 24(1) of the Arbitration Act, 1996, the material parts of which provide as follows:

"A party to arbitral proceedings may...apply to the court to remove an arbitrator on any of the following grounds:- that circumstances exist that give rise to justifiable doubts as to his impartiality;"

...It was common ground between the parties, rightly in my view, that the same test applies in relation to the Court's power to set aside an award for serious irregularity under s. 68 of the Act when the application is made on the grounds of bias. In R. v. Gough, [1993] A.C. 646 Lord Goff of Chieveley summarised the principles which apply at common law to the question of apparent bias in the following way at p. 670C:

"...having ascertained the relevant circumstances, the court should ask itself whether having regard to those circumstances, there was a real danger of bias on the part of the relevant number of the tribunal in question in the sense that he might unfairly regard (or have unfairly regarded) with favour or disfavour the case of a party under consideration by him."

Although the test in s. 24 of the Act is worded differently ("justifiable doubts as to his impartiality" as opposed to "real danger of bias") I respectfully agreed with Mr. Justice Rix in Laker Airways Inc. v. FLS Aerospace Ltd. [1999] 2 Lloyd's Rep. 45 at p. 48, col. 2 that s. 24 lays down an objective test which reflects the position at common law. Accordingly, the discussion of the common law principles to be found in R. v. Gough and similar cases illustrates the approach which ought to be adopted when a question of this kind arises in the context of arbitration.

The second of these principles calls for particularly careful consideration when one is dealing with arbitrators appointed under the rules of trade associations. In such cases it can fairly be assumed that one of the reasons why the parties have agreed to trade arbitration is that they wish to have their dispute decided by people who are themselves active traders and so have direct knowledge of how trade works. However, if the arbitrators are themselves to be active traders there every likelihood that at least one member of the tribunal will at some time have had commercial dealings with one or both of the parties to the dispute. That is something which the parties must be taken to have had in mind. As Mr. Justice Staughton pointed out in Tracomin S.A. v. Gibbs Nathaniel (Canada) Ltd., [1985] 1 Lloyd's Rep. 586 at pp. 588-589, there are many well established features of commercial arbitration which find no parallel in the more formal procedures adopted in Courts of law. They are known to and accepted by the parties and many people number them among the advantages of arbitration over litigation as a means of resolving commercial disputes. In the case of a trade tribunal the fact that an arbitrator has previously had commercial dealings with one or both parties has never been regarded as sufficient of itself to raise a doubt about his ability to act impartially. Moreover, Mr. Nolan was right in my judgment to accept that the fact that those dealings had on occasions given rise to disputes would likewise not of itself provide grounds for doubting an arbitrator's impartiality. Disputes are part and parcel of commercial life in general and commodity trading is no exception. The vast majority are resolved amicably and those which are not are generally resolved by arbitration without generating any lasting animosity. However it might strike an outside, I am confident that most traders take a fairly robust view of such
matters and would not regard them as being of any significance when considering an arbitrator's ability to act impartially. Certainly the evidence put before the Court in the present case supports that conclusion. This is important because when judging a matter of this kind one has to take into account the complainant's knowledge and experience of the trade in question and the manner in which disputes are habitually resolved: see Bremer Handelsgesellschaft m.b.H. v. Ets. Soules et Cie. [1985] 1 Lloyd's Rep. 160 per Mr. Justice Mustill at pp. 164-165. On the other hand, one cannot ignore the fact that from time to time events occur which cannot be regarded as simply part of the ordinary incidents of commercial life and it is important for every trade arbitrator to be alert to the possibility that the particular circumstances of the case may, viewed objectively, give rise to justifiable doubts about his ability to act impartially. That is all the more important given the fact that, as both Lord Goff and Lord Wolf emphasized in R. v. Gough, bias may be unconscious.”

27. Section 73(1) of the 1996 Act provides as follows:

"(1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is

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allowed by the arbitration agreement or the tribunal or by any provision of the Part, any objection –

... that the proceedings have been improperly conducted. ...

(d) that there has been any other irregularity affecting the tribunal or the proceedings, he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection.”

28. The effect of the section is summarised by Moore-Bick J in Rustal at p. 19:

"The effect of this section is that a party to an arbitration must act promptly if he considers that there are grounds on which he could challenge the effectiveness of the proceedings. If he fails to do so and continues to take part in the proceedings, he will be precluded from making a challenge at a later date. Moreover, it is clear from the language of sub-s. (1) itself that it is unnecessary for an applicant to have had actual knowledge of the grounds of objection in order for him to lose his right to challenge the award. If the respondent can show that the applicant took part or continued to take part in the proceedings without objection after the grounds of objection had arisen, the burden passes to the applicant to show that he did not know, and could not with reasonable diligence have discovered, those grounds at the time. It may often be necessary, therefore, to consider the applicant's conduct of the proceedings against the background of his developing state of knowledge.”

29. In Margulead v Exide [2005] 1 Lloyd's Rep. 324 (Colman J) the court made clear that this required the objection to be raised as soon as reasonably possible given the exercise of due diligence (see p.330 at para 35).

30. Although Mr Croall accepted that each case on apparent bias must be decided on its own facts he contended that the authorities and relevant materials do provide real and useful guidance as to what type of matters might objectively be capable of giving rise to a real possibility of bias to the fully informed fair minded observer.

31. In Locabail v Bayfield Properties [2000] QB 451 the Court of Appeal sought to give guidance as to the type of circumstances that could not provide a basis for an allegation of apparent bias. They did so because of the importance they attached to an avoidance of waste of time and costs and the injustice arising from inappropriate attempts to abort hearings or set aside judgments (see p. 479). The Court stated (at p. 480) that:

"It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or
sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extracurricular utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or membership of the same Inn, circuit, local Law Society or chambers (see K.F.T.C.I.C. v. Icori Estero S.p.A (Court of Appeal of Paris, 28 June 1991, International Arbitration Report, vol. 6).

32. Further guidance, counsel submitted, is available from the Guidelines on conflicts of interest in international arbitration [prepared by the International Bar Association], where there are three lists: red, orange and green. Only items on the red list would give rise to any real possibility of an objective appearance of bias. The situation in this case does not appear on any of the lists.

33. Mr Croall submitted that on the facts, the B case involved a charterparty dispute between unrelated parties which was arbitrated in London; X QC was not counsel retained generally for the case; his involvement stemmed from January 2004 in relation to a preliminary issues application and an application to the court for disclosure of the brokers' files; the preliminary issue application did not proceed “and is irrelevant in the present context”. The application for disclosure did proceed and was resisted on the grounds of confidentiality and privilege. The matter was resolved by agreement on the basis of the brokers agreeing to produce the file to the B arbitrators and X QC ceased to be involved in the B in March 2004 when the papers were handed back to the counsel retained for the trial. Mr Croall suggested that "there was no conceivable basis upon which the objective fair-minded observer would conclude that these matters give rise to a real possibility that X was biased".

34. Mr Croall argued that, on the question of "appearance of bias" the objection raised here was considerably more tenuous than the type of case referred to in Locabail. He went on to suggest that if the grounds advanced here were to succeed, then any advocate who had challenged an expert in a previous case would be prohibited from sitting as an arbitrator where the same expert was giving evidence and the practical consequences of such a position would be enormous especially in the context of specialist courts and arbitration panels. Mr Croall pointed out that here the parties have chosen arbitration by specialist marine arbitrators and that this is a specialist activity involving a limited class of people. He suggested that this perceived virtue increases the likelihood that a member of the tribunal will at some time or another have had some contact or dealings with one or both of the parties or other people involved in the dispute. The parties will have had this in mind when agreeing to such an arbitration. Thus, he suggested, an objective observer would not, in the ordinary course of things regard previous contact with parties or witnesses as being of any significance. He replied upon the fact that X QC was acting as an independent advocate when he appeared in the B case; he was not personally involved in the dispute; whereas in Rustal the arbitrator had been involved in a dispute with one of the parties in which he did have a financial interest.

35. In any event, Mr Croall argued that the owners in this case cannot satisfy the requirement of demonstrating that the matters complained of caused them substantial injustice. He submitted that the evidence of Mr Moustakas was of limited importance and was regarded as irrelevant by the Tribunal when it made its award; they also accepted his evidence where it was disputed. In any event, he suggested that because the other two arbitrators have said that they would have reached the same conclusions in respect of the preliminary issues if they had been sitting as sole arbitrators "so there is no realistic prospect of showing [that] any appearance of bias would have led to a different result."

36. Mr Croall submitted that in any event the Owners had lost their right to object. In the first place he submitted that on the evidence, Mr Moustakas and his lawyers knew the facts on which they now rely. Mr Moustakas had told them that X QC could not be independent because he had aligned himself with the Charterers solicitors in the B case, in which the firm was also acting for charterers. He had told them of the serious allegations that had been made against him in relation to the topic on which X QC had been appearing as an advocate. In his skeleton argument Mr Croall put it this way:

"Accordingly Owners knew, or with reasonable diligence could have known of everything of which they now object."
Despite this they continued with the arbitration and permitted Mr Moustakas to commence his evidence knowing that once he did so no further instructions could be taken from him until he completed his evidence."

37. Mr Croall submitted that the inference that owners were keeping the objection up their sleeve to be used only if and when they decided it might be advantageous to make it is supported by the fact that at no point did they apply under section 24 to remove X QC as an arbitrator on grounds of bias "but instead took their chances in the hope the Award might be favourable."

38. As to the refusal of an adjournment, the test is whether the decision to refuse an adjournment was "so far removed from what could reasonably be expected of the arbitral process that it must be rectified." On the facts, Charterers were objecting to the application for an adjournment; owners retained their junior counsel; alternative leading counsel was available, as the arbitrators had contemplated; there was no request to the tribunal they should review their decision and an adjournment would have caused an unnecessary wastage of costs.

The Decision

39. There are a number of preliminary observations which I would like to make.

(1) Both parties agreed that the test for apparent bias is that stated in Porter v Magill: namely, the test of what a fair minded and informed observer would conclude having considered the facts. It is this notional person who must be asked whether (s)he would conclude that there was a real possibility that the tribunal was biased. In Gough Lord Goff said that he thought

"it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time. Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias."  

The new test, using the words "real possibility" as opposed to "real danger", was not significantly different in that respect; although the imposition of a fair minded observer (to bring the test into line with Strasbourg jurisprudence) was different. The threshold is "a real possibility of unconscious bias".

(2) As Lord Steyn's judgment in Lawal illuminates, the position of barristers who take up part-time judicial appointments can cause difficulties and the DCA takes steps to guide appointees to avoid the more likely problems: thus MPs are advised not to sit as recorders in their constituency, solicitors who are justices in an area are not permitted to act as a solicitor before justices in that area and as a general rule barristers and solicitors ought not to sit in a judicial capacity in the courts in which they practice. The facts in Lawal illustrate the problems which may be encountered. If the Gough test had been applied, without the interpolation of the objective observer then it is debatable whether Lawal would have been decided the same way. As Lord Steyn indicated, times have moved on. It is no longer necessary, in my judgment, to draw a distinction between cases where there is a foreign party and those where there is not. The objective observer is there to ensure an even handed approach to apparent bias, whatever the nationality of the parties. The only possible justification for treating foreign parties differently could be on the basis that they may not understand as well as an indigenous party the way the legal professions in England are organised or their conventions and rules of conduct: the sorts of points, if I might say so, made by Mr Beloff QC in his submissions to the Board of the International Council of Arbitration for Sport. The interpolation of the observer does, I think, make it unnecessary in future to have to give special regard to foreigners. "In determination of their rights and liabilities, civil or criminal, everyone is entitled to a fair hearing by an impartial tribunal. That right ... is properly described as fundamental." [paragraph 2 of Locabail]. The entitlement to that right is universal [see for example Article 12(2) of the Uncitral Model Law] and not parochial and it is not to be determined by awareness or otherwise of local rules and customs.

(3) In my judgment, if the properly informed independent observer concluded that there was a real possibility of bias, then I would regard that as a species of "serious irregularity" which has caused substantial injustice to the applicant. I do not
accept Mr Croall's submission that even if that conclusion was reached the court must then inquire as to whether substantial injustice has been caused. In my judgment there can be no more serious or substantial injustice than having a tribunal which was not, ex hypothesi, impartial, determine parties' rights. The right to a fair hearing by an impartial tribunal is fundamental; the Act is founded upon that principle and the Act must be construed accordingly. In these circumstances, upon a proper construction of sections 1, 33 and 68(1) & (2), if the tribunal were not impartial, then the requirements of section 68(1) & (2) are satisfied. I profoundly disagree with paragraphs 33 and 34 of HHJ Bowsher's judgment in the Groundshire case. It is contrary to fundamental principles to hold that an arbitral award made by a tribunal which was not impartial is to be enforced unless it can be shown that the bias has caused prejudice. The problem with unconscious bias is that it is inherently difficult to prove and the statements made about it by the judges themselves cannot be tested. Nor can the court know whether the bias actually made any difference or not.

Apparent Bias

40. I start with the question whether as a result of X QC's involvement in the B he should have recused himself when objection was taken on the second day of the arbitration.

41. The facts which the independent observer would have known are these:

(1) In the B arbitration he was instructed by the same solicitors who were instructed on the charterer's behalf in the present arbitration;

(2) In the B arbitration there were serious allegations made against Mr Moustakas in relation to disclosure of documents and to his failure to make proper disclosure and to the authenticity of documents in his possession;

(3) The extent of X QC's knowledge of these allegations in the B is not entirely clear and would ultimately depend upon seeing the instructions [which have not been made available] which were given to him in connection with the application for disclosure which he made to the court. The observer would know that X QC said in his prepared statement to the Tribunal that he did not "recall" [and that the note for his oral submissions did not refer to] making, or Waterson Hicks or their clients making, any allegation of producing fraudulent and fabricated documents and threatening forensic investigation "but again I have no basis for thinking that any such allegation, even if made, was ever substantiated."

(4) Immediately Mr Moustakas knew X QC's name, he was concerned about his involvement with the same solicitors in the B. It is not clear whether Mr Moustakas recognised X QC before he was told his name nor whether Mr Moustakas had seen X QC at the B hearing. The evidence on this is equivocal; but the immediacy of his concern when he knew who X QC was [whether as the umpire or not] is a fact.

(5) In the present arbitration, there was a 'heavy' challenge to the way disclosure had been handled. In their skeleton opening argument the charterers submitted as follows:

"(i) The Owners have breached virtually every order as to disclosure ..

They have been engaged with their previous solicitors in suppressing documents and subsequent failure to claim privilege in respect of it before Gross J on grounds that the fax evidenced iniquitous conduct leading to the order of 21/05/03."
They have on a number of occasions claimed to have provided full disclosure on oath when subsequent events have shown this was not true ... 

The Owners' record on disclosure is disgraceful. They have adopted a tactic of giving disclosure only when forced to do so and even then getting away with as little as possible. It is for example breathtaking that the Foresight File was only disclosed on 14/5/04 despite the fact that;

Owners had already by that period had a series of orders against them in relation to disclosure

They had, prior to this point confirmed that they have given full disclosure on numerous occasions

Even then they disputed as order for disclosure of that file;

As it transpired much of the file was very damaging to Owners ... and it became clear why they resisted disclosure so vigorously."

(6) These sorts of points had been made by the same solicitors in the B arbitration, and the uncomfortable feeling which Mr Moustakas had that X QC would or might have detected a 'pattern' of misbehaviour in relation to disclosure based upon his knowledge acquired as a barrister in the B action was genuine.

(7) The objection to X QC was not an attempt to disrupt the arbitration, as the owners had indicated their wish to continue with the two appointed arbitrators and without an umpire and, unless they disagreed, a replacement umpire was not needed.

42. In my judgment, the independent observer would share the feeling of discomfort expressed by Mr Moustakas and concluded that there was a real possibility that the tribunal was biased. I pay no attention to the evidence of the other two arbitrators that had they sat on their own the result would have been the same simply because such evidence is not relevant to the issue which the objective observer must decide. The question is whether X QC should have recused himself at the beginning of the third day, by which time the arbitration had not been completed and the other two arbitrators would have retained an open mind as to the result.

43. It is true that in specialist arbitrations prior contact between parties and their lawyers and arbitrators is to be expected. The mere fact, for example, that a person selected as arbitrator had previously had a trade dispute with one of the parties would not thereby have caused an objectionable situation. But even in such a case, much would depend on the facts: if the dispute had involved allegations of dishonesty of a similar nature to the allegations in the second arbitration, the position could well be different. Again, there would be no problem with a barrister sitting as an arbitrator in a case in which an expert witness whom he had previously cross-examined was to give evidence. But, again, if the contact had been a short time before, and allegations of dishonesty had been made, the position could be different.

The Armageddon theory espoused by Mr Croall, were this application to succeed, is unreal. In this case there was a pattern of complaint amounting to dishonesty in relation to disclosure being made by the same solicitors in each case; and X QC had played a part in the B disclosure exercise 7 months before the arbitration. The nature of the allegations; the pattern of them; the involvement of the same solicitors; X QC's involvement in the disclosure process a short time before sitting as an arbitrator in judgment on the alleged dishonest party persuades me, for the reasons I have given that X QC should have recused himself after objection was taken.

44. In reaching my conclusion I have not taken into account any of the interlocutory decisions which the tribunal had made which at some stage had led to an allegation of actual bias. The position is clear, I think. If the decisions were to be challenged on grounds of prejudice or bias, then that is one thing. But they were not. In those circumstances I cannot take into account any feeling which Mr Moustakas and his team may have felt that 'odd' or unusual interlocutory decisions were being made [for example in relation to security for costs]. I cannot be asked to take those decisions into account in support of the allegation of apparent bias.

Refusal to adjourn
45. The next question relates to the refusal of the adjournment in the light of Mr Siberry QC’s personal position disabled him from carrying out his instructions to represent the owners. Here there is an allegation that the refusal of an adjournment was a ground for objection. But again, it seems to me that there is either a claim for actual bias which this refusal is said to evidence or the claim is apparent bias where no actual bias is being alleged. However, I am prepared to deal with this ground shortly. It is always unfortunate when professionals’ personal circumstances impinge on their ability to fulfil their commitments. Such events are rare. The arbitral process is supposed to be speedy; tribunals comprising professional arbitrators are often difficult to convene and the other party has an interest in the proceedings coming to a timely end. The charterers were not calling any witness, so that replacement counsel would not have to prepare a cross-examination; he could concentrate on the presentation of his own case, assisted by a competent junior. Had Mr Crookenden QC submitted to the Tribunal on the first day that he had not had sufficient time to prepare the case he could and, no doubt, would have asked for the case to be adjourned and his application would have been listened to. The choice between adjourning the case for a relatively short period at some inconvenience to the tribunal and the charterers or giving owners a chance to find another experienced QC, albeit not their first choice, was not easy, but I can see nothing wrong with the decision which was taken; indeed, it seems to me to have been the right decision in the circumstances. The refusal to grant the owners’ application for an adjournment is, in my view, no evidence of bias, whether actual or apparent.

Waiver

46. I turn to the final question which relates to waiver. The point may have some significance since the interim award dealt only with certain preliminary issues. The arbitral process is not yet at an end; there will have to be another hearing, assuming no settlement is reached. If the right to object to X QC was waived through conduct, does that waiver apply only to the award which has already been made or does it apply to the whole arbitration so that X QC can continue to sit as an umpire in relation to the future conduct of the case?

47. I start with waiver in relation to the Interim Award. Mr Croall seemed to me to put his case under this head too high. He suggests that on the first day owners knew all the facts and "despite this they continued with the arbitration and permitted Mr Moustakas to commence his evidence knowing that once he did so no further instructions could be taken from him until he completed his evidence. … By failing to make the objection at that time and by continuing with the arbitration hearing they lost the right to object and it now not open to them to do so, on this ground. This is the clear effect of section 73.” He suggested that this would be a just conclusion.

48. I have already outlined what happened at the Tribunal. I reject Mr Croall's submission that the owners had somehow waived their rights at 2.00 pm on the first day. The reality is that the arbitration was about to resume at that time; Mr Moustakas had had only a brief word with the partner in the solicitors, although he had spoken more fully to the assistant solicitor; Mr Crookenden had not been consulted. In those circumstances the owners cannot, in my view, be criticised for letting Mr Moustakas start his evidence. It is common ground that after that moment it was not really feasible for further instructions to be taken from him until after his evidence had been completed. The completion of his evidence coincided with X QC making his disclosure. In my judgment, when the case resumed on the third day, after X QC had declined to recuse himself, Mr Crookenden QC should have indicated that that decision was not acceptable and that an application would be made to the court to have him removed but that the hearing should be concluded, without prejudice to owners’ rights. Following the hearing, an application should have been made to this court under section 24. Although X QC was appointed as an umpire he was treated as one of a panel of three [I assume the curtain had been lifted] and no submission was made to me that section 24 was not applicable. Instead what happened was a continuing objection to X QC’s continued involvement in that part of the arbitral process. It is unacceptable to write making further objections after the hearing was concluded. X QC had made his decision not to recuse himself, rightly or wrongly, at the beginning of the third day. Owners were faced with a straight choice: come to the court and complain and seek his removal as a decision maker or let the matter drop. They could not get themselves into a position whereby if the award was in their favour they would drop their objection but make it in the event that the award went against them. A 'heads we win and tails you lose' position is not permissible in law as section 73 makes clear. The threat of objection cannot be held over the head of the tribunal until they make their decision and could be seen as an attempt to put unfair and undue pressure upon them.
50. In my view, given the facts and conclusions I have stated, X QC should not continue to act in this matter. I have not heard argument about the continuation of the other two arbitrators but would express the hope that they could continue.

51. I will hear the parties on the question of costs and the form of the order.

Referring Principles:
XIII.2.3 - Grounds for challenge of an arbitrator