


**The United Kingdom, The High Court of Justice, Queen's Bench Division, Commercial Court, [2016] EWHC 240 (Comm), Cofely Limited v. Anthony Bingham et al., first instance, 17 February 2016.**

Member State

 United Kingdom

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Topic

Independence and impartiality of arbitrators, with a special focus on the lack of impartiality or equidistance from the parties (internal aspect).

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Deciding Court Original Language

The High Court of Justice, Queen's Bench Division, Commercial Court

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Deciding Court English translation

The High Court of Justice, Queen's Bench Division, Commercial Court

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Registration N

N/A

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Date Decision

17 February 2016

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National Follow Up Of (when relevant)

Not applicable

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EU legal sources and CJEU jurisprudence

Not directly mentioning EU law but relevant to it in light of Opinion 1/17 and the ECJ's case law on independence and impartiality of judicial organs.

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### ECtHR Jurisprudence

Not applicable

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### Subject Matter

In this dispute, the internal aspect of independence is at stake. In particular, the arbitrator is thought to have a potential bias in favour of one of the disputing parties.

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### Legal issue(s)

The case is related to impartiality.

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### Request for expedited/PPU procedures

Not applicable

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### Interim Relief

Not applicable

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### National Law Sources

Not applicable

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### Facts of the case

The challenge concerning the lack of impartiality of the arbitrator was based on several grounds, the most interesting of which for the purpose of this training, is the fact that said arbitrator had raised a considerable part of his income from previous appointments made by the same disputing party.

Cofely is a major construction company. Knowles is a well-known firm of claims consultants in the construction field. Mr Bingham is a very experienced arbitrator and adjudicator in construction

disputes. He worked in the construction business for a number of years before selling his business in 1988 to concentrate on his arbitration career. He is a qualified barrister and has practised from 3 Paper Buildings since 1991-2. Cofely East London Energy Limited (a company related to Cofely) entered into a contract with Stratford City Developments Limited and the Olympic Delivery Authority (the "Employers") to design, build, maintain and operate district energy services for the Olympic Park and Westfield Shopping Centre in Stratford, London (the "Concession Agreement"). Various disputes arose between the parties under the Concession Agreement and Cofely appointed Knowles to advise upon and then progress its claims arising under it for an extension of the time (the "Time Claim") and associated additional costs caused by the delay in completion of the works (the "Money Claim"). Knowles was initially appointed by Cofely pursuant to a written agreement dated 19 August 2010 ("the Appointment") and Knowles was subsequently paid £1,187,082 by Cofely on a time basis pursuant to the Appointment to prepare the Time Claim and Money Claim on Cofely's behalf. Cofely, however, became concerned about the escalating costs and delay in Knowles pursuing the Time Claim and Money Claim and new terms of remuneration were therefore discussed between the parties. This culminated in the conclusion of a success fee agreement dated 26 October 2011 (the "Success Fee Agreement"), pursuant to which Knowles was entitled to payment of certain sums and, potentially, a success fee on the occurrence of certain events (set out at sub-headings entitled "AGREEMENT" Nos 1-6). An adjudication was thereafter commenced by Knowles on behalf of Cofely against the Employers in relation to the Time Claim ("the Adjudication"). However, prior to the conclusion of the Adjudication, Cofely says that it became concerned about the advice being provided by Knowles and the approach being taken in the Adjudication. It therefore entered into direct settlement negotiations with the Employers and reached a settlement of the Time Claim, the Money Claim and other issues that had arisen under the Concession Agreement. Knowles then alleged that in settling their claims without the involvement of Knowles, Cofely had acted in breach of various provisions of the Success Fee Agreement and claimed at least £3.5 million was payable as fees by Cofely.

On 21 January 2013, Knowles gave notice of arbitration to Cofely and applied to the Chartered Institute of Arbitrators ("CI Arb") for the appointment of an arbitrator. It was stated that it was preferable that the arbitrator had both quantity surveying ("QS") and delay analysis experience, and the appointment of Mr Bingham was sought.

On 30 January 2013, Cofely's solicitors, Stephenson Harwood ("SH"), wrote to the CI Arb stating that it did not agree to the appointment of Mr Bingham, explaining that whilst it was agreed that the arbitrator should have legal experience, it was not considered that experience in QS or construction delay was needed. It was proposed that Ms Krista Lee, a barrister at Keating Chambers, be appointed.

On 4 February 2013, the CI Arb confirmed the appointment of Mr Bingham as arbitrator.

Knowles served its Particulars of Claim on 2 April 2013 and at the same time made an application for a Partial Award in relation to the Time Claim and Money Claim pursuant to section 47(2) (a) (b)

of the Act.

Knowles requested that the Arbitration should proceed in two parts: the first dealing with claims made by Knowles which related to defined sums payable under the Success Fee Agreement and the second dealing with Knowles's alleged entitlement to a success fee based on the outcome of the settlement negotiated between Cofely and the Employers.

This application was acknowledged by Mr Bingham the next day and on 17 April 2013 Mr Bingham requested that Cofely indicate its position in relation to Knowles' application.

Cofely served its Defence on 23 April 2013 and a hearing was held on 19 July 2013.

On 21 August 2013, Mr Bingham made a Partial Award entitled ``Arbitrator's Decision No 1'', finding in favour of Knowles on its claims in relation to defined sums and directing Cofely to pay Knowles £1,000,000 plus interest. No challenge was made to the Partial Award and the sum awarded was duly paid by Cofely.

The parties then tried to agree how the referral would proceed but were unable to do so because of a difference of opinion as to how any entitlement under AGREEMENT SIX of the Appointment (in relation to a success fee) should be approached.

On 11 November 2013, Cofely made its own application for Partial Awards under section 47 of the Act regarding the approach to be taken in connection with AGREEMENT SIX. The application sought a decision on the following issue:

"Whether, on a proper construction of AGREEMENT SIX, the sum which is due to the Claimant (if any) is:

- (a) The actual value of the Knowles Money Claim within the Deed of Settlement; or
- (b) Some other sum and, if so, what."

Mr Bingham acknowledged receipt of this application by email dated 9 November 2013 in which he stated he would "read in and revert".

Thereafter there was a period of inactivity. Mr Bingham did not revert, nor did Cofely chase him to

do so.

On 9 April 2014, Mr Bingham responded to the proposed application by issuing "Arbitrator's Memo No. 1 About AGREEMENT SIX" containing his "observations" on the correct approach to be taken regarding the outstanding claims of Knowles and concluding that "the Arbitrator in short ought to investigate the £23 million claim" but stating that "This is not a Direction or Decision" and "Comment invited".

On 6 June 2014, SH wrote to Mr Bingham regarding the memorandum, stating that Mr Bingham had not addressed Cofely's section 47 application and providing various comments on Mr Bingham's memorandum.

On 4 July 2014, Mr Bingham acknowledged receipt of SH's letter and asked for comments from Knowles.

Thereafter there was a further period of inactivity in the arbitration.

On 24 December 2014, Knowles made an application to Mr Bingham for Cofely to disclose certain documents referred to in the Settlement Deed between the Employers and Cofely. Mr Bingham responded by email almost immediately.

On 22 January 2015, Cofely enquired of Knowles as to when it would be responding to its section 47 application.

On 18 February 2015, Cofely wrote to Knowles requesting information in relation to its dealings with Mr Bingham in light of the decision of Mr Justice Ramsey in *Eurocom Ltd v Siemens Plc* [2014] EWHC 3710 (TCC) [2015].

On 27 February 2015, Knowles wrote to SH answering five of the questions contained in SH's letter dated 18 February 2015.

On 11 March 2015, SH replied to this response and posed further questions in light of the responses provided by Knowles in that letter.

On the same day, SH also wrote to Mr Bingham for the first time requesting related information. The letter enclosed SH's letter dated 18 February 2015 to Knowles and included the following specific requests:

"How many times in the last 3 years have you acted as adjudicator or arbitrator in disputes where Knowles represented, or was itself, the claimant/referring party?

Please would you break your answer in 1 down so as to clarify how many of the above relate to:

appointments first made in the last 3 years; and

appointments made more than 3 years ago in respect of matters which are ongoing or have been decided in the last 3 years.

How many times have you made an award or decision in favour of the claimant/referring party (either in whole or in part) in the adjudications and arbitrations referred to above?

What proportion of your professional income as a barrister/adjudicator/arbitrator was accounted for from the referrals covered by requests 1 and 2 above for each of the 3 years in question?

What proportion of your professional income as a barrister/adjudicator/arbitrator for from the referrals covered by request 3 above for each of the 3 years in question?

What, if anything, have you done during this Arbitration to satisfy yourself that there is no information that you should disclose to Cofely which could reasonably be interpreted (on an objective basis) as undermining your apparent impartiality?"

On 12 March 2015, Mr Bingham emailed Knowles and SH acknowledging SH's letter and making observations on the Eurocom case but failing to answer any of the questions or to indicate whether or not he would do so in due course.

On 17 March 2015, Mr Thwaite of SH sent an email commenting on Mr Bingham's observations on the Eurocom case, explaining why it appeared significant in the current case and asking Mr Bingham to answer the questions previously asked of him "so that Cofely may be reassured about the position".

In an email dated 19 March 2015, Mr Bingham replied to Mr Thwaite stating that in the last three years he had been appointed as adjudicator/arbitrator a total of 137 times and asking what "you say is wrong" in light of this and Knowles' answers in its 27 February 2015 letter.

On 23 March 2015, Mr Thwaite emailed Mr Bingham asking him to confirm that (i) the number of Knowles-related appointments suggested by Knowles in the past three years (25) was correct, and (ii) he was prepared to answer the question as to what proportion of his income had come from these appointments.

Mr Bingham did not respond directly to these specific queries or the original 6 questions.

On 30 March 2015, Mr Bingham sent the parties an email dated 30 March 2015 stating that "the clip of correspondence beginning 18th February between Cofely-Knowles raises an issue of whether the tribunal is properly constituted" and directing that there be a meeting in relation to this matter.

Mr Bingham then sent an email dated 31 March 2015 to Mr Thwaite asking "I ponder what are you driving at. Is it anything in particular" in relation to question 6 from the 11 March 2015 letter (regarding what Mr Bingham had done to satisfy himself that there was no relevant information to be disclosed).

Mr Bingham chased an answer to the above question in a further email dated 2 April 2015 stating, "what are you driving at please; or (forgive the vernacular) so what?"

In an email dated 2 April 2015, Mr Thwaite sought to explain the purpose of the question posed in the letter dated 11 March 2015 and, in particular, the relevance of the question regarding the proportion of Mr Bingham's income derived from the 25 apparent Knowles appointments in the past three years. The email stated as follows:

"The purpose of the questions raised in our letter of 11 March was to reassure Cofely that there are no previously undisclosed circumstances that might give rise to justifiable doubts as to your independence and impartiality. As a matter of general law an arbitrator has a duty prior to appointment and throughout the duration of the appointment to consider whether there are any relevant circumstances about the arbitrator's relationship with the parties that should be disclosed...

We are told that you have been appointed 25 times in 3 years in matters involving Knowles either as referring party or acting for the referring party. Based on the information you have given us, this amounts to almost one fifth of your total appointments during the same period. We have asked what proportion of your income as barrister/adjudicator/arbitrator relates to these appointments. The relevance of this information is that were a significant proportion of your income to derive from appointments by (or at the request of) Knowles, it could raise justifiable doubts about your independence and impartiality in a matter where Knowles is itself the claimant party. Certainly,

given the number of appointments, it is information which we believe you should have considered whether to disclose prior to, or during, your appointment in this arbitration."

On 17 April 2015, the hearing called for by Mr Bingham took place at the offices of Knowles.

After the meeting SH wrote to Knowles on 21 April 2015 requesting that answers be provided to the outstanding questions canvassed at the hearing.

In response, on 24 April 2015 Knowles provided SH with answers to the outstanding questions raised in the letter dated 11 March 2015.

On 30 April 2015, Mr Bingham issued his "Arbitrator's Ruling" as to whether the tribunal was 'properly constituted' – concluding that it was and that he had no conflict of interest.

Cofely stresses that (i) neither of the parties had requested a ruling on either of these issues, and (ii) as part of his reasoning Mr Bingham appeared to adopt Knowles's figure for the number of relevant appointments (25) (and all of the other relevant information provided by Knowles) without undertaking his own independent investigation.

In a letter dated 15 March 2015, SH wrote to Knowles seeking an answer to question 5 of its earlier letter dated 18 February 2015. It was explained that without it being answered Cofely would not know the extent to which 'the Eurocom case practice' of deliberately excluding certain potential individuals as tribunal had been deployed so as to make the chance of Mr Bingham's appointment increase.

By email dated 26 May 2015, Knowles copied in Mr Bingham to the requests for further information. On 28 May 2015, Knowles emailed Mr Bingham to ask him to answer certain parts of the questions put to Knowles in the SH letter dated 15 May 2015.

In an email on 5 June 2015 to Mr Bingham, Knowles then revised the questions put to Mr Bingham regarding his income from the 25 'Knowles' appointments and the total 137 appointments in the previous three years. Knowles asked Mr Bingham to provide specific total figures as to his income over the past three years and the amount of fees he had earned from appointments involving



Knowles. This request went beyond the level of information requested by Cofely. On the same day, Mr Bingham responded by email to both parties providing the information sought, namely £1,146,939 and £284,593.75 respectively.

On 3 July 2015, Knowles wrote to SH to provide some further outstanding information relating to when they had excluded other candidates in requests for appointments where Mr Bingham had ended up being appointed. Knowles stated that this had occurred 16 out of the 25 times he had been appointed without being named specifically.

On 8 July 2015, SH wrote to Mr Bingham asking him to recuse himself – to which there had been no response from Mr Bingham.

On 22 July 2015, the application was issued.

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#### Reasoning (role of the Charter or other EU, ECHR related legal basis)

The Court reasoned that in cases where the arbitrators have been repeatedly appointed by one of the parties to the dispute so that a considerable part of their professional income effectively results from those appointments, impartiality cannot be guaranteed.

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#### Relation of the case to the EU Charter

The case relates to the impartiality standards applicable in the EU to judicial organs as resulting from the Charter and the ECJ's case law.

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#### Relation between the EU Charter and ECHR

Not applicable

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#### Use of Judicial Interaction technique(s)

The High Court relies heavily on domestic law and domestic case law. It does not make reference to supranational case law. Reference to the IBA Guidelines on Conflicts of Interest in International Arbitration is also made.

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#### Horizontal Judicial Interaction patterns (Internal – with other national courts, and external – with foreign courts)

In line with the common law tradition, the High Court borrows heavily from previous domestic cases.

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Vertical Judicial Interaction patterns (Internal – with other superior national courts, and external – with European supranational courts)

Not applicable

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Strategic use of judicial interaction technique (purpose aimed by the national court)

The main purpose of the national court is to maintain systemic coherence with similar precedents.

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Impact on Legislation / Policy

This case, as other cases analysed above, have certainly played a role in the shaping of those provisions of EU investment agreements relating to the issue of double hatting, which can take many different forms (as the variety of situations commented in this casebook clearly demonstrates).

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Notes on the national implementation of the preliminary ruling by the referring court

Not applicable

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Impact on national case law from the same Member State or other Member States

Not applicable

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(Link to) full text

[https://www.trans-lex.org/312060/\\_/cofely-limited-v-anthony-bingham-et-al-%5B2016%5D-ewhc-240-/](https://www.trans-lex.org/312060/_/cofely-limited-v-anthony-bingham-et-al-%5B2016%5D-ewhc-240-/)

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Author

**Barbara Warwas and Luca Pantaleo, Lectoraat Multilevel Regulation, The Hague University of Applied Sciences.**

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