Neutral Citation Number: [2019] EWHC 3441 (Ch)

Case No: HC-2015-002841

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 13/12/2019

Before :

MR MICHAEL GREEN QC

(sitting as Deputy Judge of the Chancery Division)

- -

ON APPEAL FROM THE BETH DIN OF THE FEDERATION OF SYNAGOGUES

IN THE MATTER OF AN ARBITRAL AWARD DATED 4 APRIL 2014

Between :

RABBI MOSHE AVRAM DADOUN	**Claimant**
- and –	
YITZCHOK BITON	**Defendant**

- -
- -

Mr Steven Woolf (by **direct access**) for the **Claimant**
Ms Giselle McGowan (instructed by **RIAA Barker Gillette**) for the **Defendant**

Hearing date: 27 November 2019

- -

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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MR MICHAEL GREEN QC

MR MICHAEL GREEN QC:

Introduction

1. This is an appeal pursuant to section 68 of the Arbitration Act 1996 (the **Act**) challenging an arbitral award dated 4 April 2014 (the **Award**) of the Beth Din of the Federation of Synagogues in London (the **Beth Din**) on the grounds that there was a serious irregularity affecting the tribunal, the proceedings or the Award. The Beth Din is a Jewish Rabbinical Court and it can be used by Orthodox Jews to arbitrate their commercial disputes, as happened in this case. The Beth Din consists of three Dayanim (or Judges) and they make their decisions by reference to Halacha, which is Jewish Law and Jurisprudence, rather than English civil law.

2. The sole basis for the appeal concerns alleged apparent bias on the part of the "*Rosh*" or Head of the Beth Din, Dayan Yisroel Lichtenstein. There is no dispute that Dayan Lichtenstein spoke to the brother of the Defendant, Rabbi Daniel Biton, in June 2013 (the **discussion**). The Claimant says that the discussion, which he only discovered had taken place in 2017, is highly suspicious and led to a serious irregularity affecting the Award. The Defendant says that the discussion that Dayan Lichtenstein and Rabbi Biton had was insignificant, very short and simply concerned the timing of the Award being issued, as by then it had been 5 years since the oral hearing had taken place before the Beth Din. I heard evidence from both Dayan Lichtenstein and Rabbi Biton as to the content of their discussion.

3. The Claimant also challenges the Award under s.69 of the Act on a point of law, although that part of the claim is presently stayed and is not before me.

Background to the Dispute

4. The underlying dispute determined in the Award relates to the shareholdings in a company called RSM Ltd Property Investments Limited (**RSM**) and the Defendant's entitlement to any profits from RSM. I heard no evidence in relation to the underlying dispute and I take these brief facts from the parties' skeleton arguments and the Award. The material events are now over 20 years old.

5. In December 1997, the Claimant and Mr Shlomo Friedman were the only shareholders in RSM and another company, Chaplin Walk Limited (**Chaplin**). Each company owned and managed one property: RSM owned a property in Golders Green, London; and Chaplin, a property in Southport, Merseyside.

6. On 14 December 1997, a Memorandum of Agreement was signed by the Claimant, Mr Friedman, the Defendant and the Defendant's brother, Rabbi Biton. The Memorandum of Agreement provided for a quasi-partnership between the four parties in which the principal terms were for the Defendant and his brother to invest a total of £275,000 for a 50% shareholding in each of RSM and Chaplin. This would leave the Claimant and Mr Friedman with the other 50% in each company.

7. On 18 December 1997, the Defendant transferred £275,000 to the Claimant's solicitor. The Defendant's evidence was that he understood that the £275,000 would be repaid by the companies as soon as a mortgage was obtained by them.

8. In August 1999, the Claimant acquired a loan of £250,000 by mortgaging his own home. Of this sum, the Claimant paid £120,000 to Mr Friedman to purchase his shareholdings in the companies. The remaining £130,000 was paid to the Defendant and the purpose of this payment forms the subject-matter of the dispute. The Claimant's case is that he paid the £130,000 to purchase the Defendant's 50% shareholding in RSM which the Claimant thereafter would wholly own. The Defendant however maintains that the loan was actually obtained on behalf of the partnership and was a part-repayment of the Defendant's investment of £275,000. The Defendant was therefore claiming that he was still owed £145,000 and that he retained his 50% shareholding in RSM.

9. Nothing seemed to have happened for five years until in November 2005, the Defendant engaged lawyers to commence legal proceedings against the Claimant. The Claimant then applied to the Beth Din for a restraining order to prevent the Defendant from proceeding in Court. The Beth Din issued the restraining order and Court proceedings were not commenced.

10. On 6 March 2008, the parties agreed that their dispute should be referred to arbitration by the Beth Din. On 2 June and 4 August 2008, the Beth Din, consisting of three Dayanim[1], including Dayan Lichtenstein, heard submissions and evidence. In his oral evidence, Dayan Lichtenstein said that they continued to receive documents and evidence, including hearing further evidence in Israel on one occasion, until around 2011. He also said in his written evidence that:

> "During the intervening period, there were numerous attempts made by intermediaries and "honest brokers" on the part of both parties to try to resolve the matter outside the formal Arbitration but ultimately no agreement could be reached and it was necessary for the Beth Din to give an Award."

11. Eventually the Award was issued on 4 April 2014 (it was apparently only formally "released" to the parties on or about 1 September 2014), nearly six years after the initial oral hearing. The Beth Din largely found in favour of the Defendant, concluding that the Defendant retained his 50% shareholding in RSM and was therefore entitled to 50% of the income from both properties owned by RSM and Chaplin. The Beth Din quantified the sums owed to the Defendant based on his entitlement at £213,150.

12. On 4 June 2015, the Claimant issued the Claim Form seeking to appeal the Award, at that stage only pursuant to s.69 of the Act. There then followed some procedural wrangling concerning service out of the jurisdiction (the Defendant is resident in Israel).

13. On 8 March 2017, the Claimant became aware of the meeting that had taken place between Dayan Lichtenstein and Rabbi Biton and sought to amend his Claim Form to

[1] In addition to Dayan Lichtenstein, there was also Dayan Elzas and Rabbi Pearlman, the latter acting as a Dayan.

include an appeal under s.68 of the Act. On 27 September 2017, Deputy Master Pickering granted the Claimant permission to challenge the Award under s.68 of the Act and to re-amend the Claim Form. At the same time, the Deputy Master stayed the appeal under s.69 of the Act.

The Discussion

14. In the Claimant's witness statements, there were two allegations of apparent bias by Dayan Lichtenstein: the primary allegation concerned the contents of the discussion in June 2013; and there was also an allegation that the provision of a witness statement of Dayan Lichtenstein on the s.69 appeal on behalf of the Defendant was further evidence of apparent bias. Mr Steven Woolf on behalf of the Claimant confirmed at the hearing that the Claimant does not rely on the witness statement allegation and the appeal is purely based on what was discussed between Dayan Lichtenstein and Rabbi Biton in June 2013 and the fact that the discussion was not disclosed.

(a) The 23 July 2013 letter

15. In January 2017, the Claimant was granted access to the documents retained by the Beth Din in relation to the Award. In amongst the files of documents, the Claimant discovered a letter from the Defendant to Dayan Lichtenstein dated 23 July 2013 (or 16 Av 5773 in the Jewish calendar). This long 17 paragraph letter, written in Hebrew, revealed that there had been a meeting between Dayan Lichtenstein and the Defendant's brother some four weeks earlier and that Rabbi Biton had written to Dayan Lichtenstein a week before this letter. It is not disputed that none of this had been disclosed to the Claimant either at the time or any time thereafter.

16. The letter of 23 July 2013 is the only contemporaneous document in relation to the discussion. The first two paragraphs are material as it is there that the discussion is mentioned. The letter is addressed to "*Your Honor, The Israel Court of Justice*" and it is headed "*Subject: Ruling on the claim Biton-Dadoun*". The first two paragraphs read as follows (in their English translation, with underlining added):

> "1. My brother, Rabbi Daniel, may he live a long and healthy life, brought to my attention the content of the discussion he held with the honorable President of the Court, Rabbi Ya'acov Lichtenstein, may he live a long and healthy life, on the 17th day of Tammuz, this year. Furthermore, [he also brought to my attention] the content of his letter that he dispatched to the honorable President of the Court on the 11th day of Av, this year.
>
> 2. According to that stated by Rabbi Daniel, I was informed that the honorable President of the Court promised him that this time it is a final promise (after in the past, there were promises that were not honoured) and that the verdict will be handed down even before the 9th Day of Av in the year 5773 (2013). Today, when I approached my brother with a request to contact you to speed up the materialization of the ""Promise"" (double inverted commas),

his response was: "My brother, I am unable to help you any further with respect to this matter, Go ahead and do what you deem fitting".

17. The letter continued in what was a somewhat aggressive diatribe to complain bitterly about the delay in the Beth Din providing its Award. The Defendant was clearly perturbed about the substantial delay, not only since the start of the arbitration proceedings but also since the material events in 1997-1999.

18. In relation to the discussion, the letter shows the following:

    (1) That the discussion took place on 17 Tammuz[2], which was 25 June 2013;

    (2) That in the discussion Dayan Lichtenstein gave a final promise that the Award would be issued by 9 Av[3], which was 16 July 2013, that is within 3 weeks of the discussion;

    (3) That Rabbi Biton wrote to Dayan Lichtenstein on 11 Av, which was 18 July 2013; this was just after the promised deadline for the delivery of the Award.

19. Rabbi Biton's letter of 18 July 2013 has not been found. Nor is there any evidence of a reply by Dayan Lichtenstein or the Beth Din's Registrar to either Rabbi Biton's letter of 18 July 2013 or the Defendant's letter of 23 July 2013. It is admitted by the Defendant that neither the discussion nor the letters were disclosed to the Claimant.

20. The Claimant says that it is implausible that the discussion was limited to the timing of delivery of the Award and that by reference to the circumstances of the meeting there must have been a discussion as to the merits of the underlying dispute.

21. Before looking at the evidence of Dayan Lichtenstein and Rabbi Biton, some context is required:

    (1) By June 2013, the parties had been waiting for five years since the first hearings by the Beth Din; this is an extraordinarily long time to be waiting for the Award, particularly as the material events had taken place 14-16 years previously;

    (2) Rabbi Biton is a senior Rabbi in Israel and a well-known publisher of Jewish religious works;

    (3) As is clear from paragraph [6] above and the Award, Rabbi Biton was himself a party to the Memorandum of Understanding, although ultimately the only parties to the dispute were the Claimant and the Defendant; Rabbi Biton did not give evidence to the Beth Din but he was clearly a person who featured in the case;

    (4) Jewish afternoon prayers (Mincha) are held daily between 1 and 2pm at the Federation of Synagogues' Offices (which includes the Beth Din) at 65 Watford Way, London NW4; any Jewish member of the public is able to attend this service together with those who are working on the premises.

[2] This is a fast day in the Jewish calendar
[3] 9 Av, or Tisha b'Av, is a very holy and solemn fast day in the Jewish Calendar

(b) Dayan Lichtenstein's evidence

22. In his witness statement dated 28 June 2017, Dayan Lichtenstein said the following about his meeting and discussion with Rabbi Biton:

> "4.5 On a date that I cannot recall but not on the 17th Tammuz (that date being an important fast day commemorating the destruction of the two Jewish Temples in Jerusalem) our daily afternoon prayers were attended by Rabbi Daniel Biton. His appearance at the afternoon prayers was not prearranged and I was not introduced to Rabbi Biton (who I had never met previously) prior to the prayers commencing.
>
> 4.6 However, following the conclusion of the prayers (which last approximately 15 minutes) a man came up to me who introduced himself as Rabbi Daniel Biton, being the brother of Mr Yitzchok Biton, the Defendant and/or Respondent in these proceedings. Although I had not previously met Rabbi Biton knew [sic] of him by reputation as he is a well-known publisher of religious books in Israel. Rabbi Biton simply asked me how much longer his brother was going to have to wait for the Courts decision in respect of the claim brought by Rabbi Dadoun. I advised Rabbi Biton that we intended to issue our decision by the end of the summer. Rabbi Biton thanked me for this information, our conversation concluded and Rabbi Biton left without any further discussion with me.
>
> 4.7 I cannot now recall the date of my conversation with Rabbi Biton and until I was shown Rabbi Dadoun's evidence I had forgotten about it. At the time, I did not regard the conversation of any consequence and so I made no record of it although now that my memory had been jogged I do have a clear recollection of the conversation.
>
> 4.8 I note what Rabbi Dadoun has said about Rabbi Biton but I cannot see that the status of Rabbi Biton is of any relevance whatsoever. We did not discuss any aspect of the proceedings ongoing in the Beth Din other than the timing of the Court's decision and the conversation lasted only a matter of several minutes.
>
> 4.9 …The impromptu conversation with Rabbi Biton has had no bearing whatsoever on the decision taken by the Court in this case…
>
> …
>
> 4.13 …Clearly there was no conversation with Rabbi Biton of substance. The conversation which as I said above could not have lasted more than a matter of minutes focused very simply on when the Court were going to issue the Award and in those circumstances, I do not see how that discussion (which in any event was not with Mr Biton himself) could have undermined the Court's impartiality or the sense of fairness attaching to its Award."

23. In a further witness statement dated 5 March 2018, Dayan Lichtenstein said as follows:

> "4.3 I must say I find recalling or reciting all what was said at this brief discussion which took place nearly 5 years ago to be an impossible task; in my capacity at the Beth Din I speak to a great many people each and every day, recollecting the events of these discussions is simply impossible.
>
> 4.4 As I have previously stated in my previous witness statement I recall Rabbi Daniel Biton approaching me at the end of the afternoon prayer meeting on 17th Tammuz (25th June 2013) to initiate a discussion; at the time of his approach he was of course a stranger to me as I had never met him before.
>
> 4.5 Rabbi Biton then asked about the timing of the handing down of its arbitration award and I believe I gave an explanation for the on-going delay; I also gave a projected date when the parties could finally expect the Beth Din's decision. But I have already said I am simply unable to recall much of what was said as it was over 5 years ago.
>
> 4.6 All in I would say the totality of the discussion lasted around 3 to 5 minutes but this only [sic] a hazy estimation given the significant passage of time.
>
> 4.7 I must however emphasise once again for the record, that I did not discuss the dispute or arbitration in any substantive way with Rabbi Biton and certainly this brief discussion did not have any influence on the contents of the Award.
>
> 4.8 As I have stated in my Second Witness Statement the discussion was short lived and insofar as any aspect of the discussion related to the arbitration, it only related to the timing of the Beth Din's decision. At the time I saw no compelling reason to create any memorandum for the office file for what was an [sic] essentially an administrative enquiry (albeit one made face to face.) For the same reason I did not think to inform Rabbi Dadoun about this discussion as nothing of any note whatsoever turned on it.
>
> 4.9 I understand that following the Beth Din's inability to comply with the Award's projected hand down date, Rabbi Biton then wrote to the Beth Din on 18th July 2003 chasing the Award. I do not actually recall seeing this letter and we have searched thoroughly the Beth Din's offices for a copy without any success. I note that the Claimant himself has not been able to locate a copy in the file of papers he received from the Beth Din.
>
> 4.10 I cannot say for sure whether the Beth Din actually received Rabbi Biton's letter or it has been unfortunately mislaid somewhere at our office; this may be a possible reason why it was not copied to Rabbi Dadoun."

24. There are a few inconsistencies within and between the two witness statements such as: (1) being sure in the first that the discussion had not taken place on 17 Tammuz whereas he appeared to accept it was on that date in the second; (2) claiming that it was "*impossible*" to recall the discussion after this length of time but then being sure that there was no discussion of the substantive dispute.

25. Dayan Lichtenstein was cross examined by Mr Woolf. The following pertinent points arose from his evidence:

(1) He has been the Rosh of the Beth Din since 1988; the Beth Din has roughly 60 commercial arbitration cases a year; these sometimes have three Dayanim hearing them, but more normally there will just be one.

(2) The Beth Din deals with a lot of other matters as well, including marriage, divorce and kashrut; it is therefore very busy and some of the explanation for the delay is down to this and also there being not enough full time Dayanim.

(3) Even though the evidence and oral hearing took place in 2008, the Beth Din continued to receive further documentary evidence until 2011 and heard oral evidence in Israel from Mr Friedman; (this receipt of further evidence is surprisingly not referred to in the Award).

(4) There were a number of difficult Halachic issues in relation to the Award and it required a lot of working out between the three Dayanim.

(5) In relation to the discussion, when Rabbi Biton introduced himself to Dayan Lichtenstein he immediately knew who he was and that he was the brother of the Defendant; furthermore, Dayan Lichtenstein immediately recalled the case and did not need any reminding from Rabbi Biton as to the facts and features of the case.

(6) The gist of the discussion was Rabbi Biton asking when they were going to receive the Award and Dayan Lichtenstein was able to tell him that it would be ready within the month;

(7) Dayan Lichtenstein was adamant that there was no discussion of the issues in the case; nor was it necessary for Rabbi Biton to remind him of the details of the case or explain what it was about.

(8) The further delay of nine months from the discussion to the issue of the Award was because of a very heavy workload, short-staffing, Dayan Lichtenstein taking a last minute summer holiday, and the very difficult Halachic questions involved.

(9) The discussion was so insignificant in Dayan Lichtenstein's mind that he did not make a note of it; nor did he disclose it to the Claimant.

(10) Dayan Lichtenstein did not remember receiving the 18 July 2013 letter from Rabbi Biton; he or the Registrar would normally reply to every letter and it would normally be disclosed to the other side.

(11) Dayan Lichstenstein also did not remember seeing the letter of 23 July 2013 from the Defendant which, given the timing, he would have expected the Registrar to have put on his desk so he could deal with it on his return from holidays; he also added that there had been a number of letters from the Defendant chasing the Award.

(c) Rabbi Biton's evidence

26. Rabbi Biton gave both his written and oral evidence in Hebrew and they were translated. After explaining why he was in London around the 25 June 2013 (which explanation was somewhat different in his oral evidence), Rabbi Biton's witness statement dated 25 May 2018 said this about the discussion:

> "6. On June 25, 2013, I attended a service in the Beth Din in the early afternoon, as I understood that Dayan Lichtenstein would supervise the afternoon prayers.
>
> 7. I remember that I spoke to with Dayan Lichtenstein, and asked that the Beth Din should just 'make a decision', since the matter had dragged on for so long. I told Dayan Lichtenstein that despite the hearings held between May and August 2008, the parties were still waiting for the Beth Din's decision.
>
> 8. I recall that Dayan Lichtenstein offered apologies for the long delay in the handing down of the decision. I remember that the delay apparently stemmed from the fact that the Beth Din had been short staffed for a long time and had hindered the 'signing off' of the decision.
>
> 9. Dayan Lichtenstein assured me that the decision should ultimately be with the parties by 16 July 2013; however, the Beth Din did not actually provide the Award until 4 April 2014.
>
> 10. Although I struggle to remember the details of my discussion with Dayan Lichtenstein, I can certainly confirm to this court that I did not discuss the dispute or the contents of the potential decision – my discussions only regarded when the parties could finally expect to see the decision.
>
> 11. I understand that Claimant believes that I would try to use my status as an Honorable Rabbi to influence the Beth Din in my brother's favour. I reject this claim as I have a sincere belief that rabbinical justice is a serious matter to be undertaken with the utmost transparency and fairness. Moreover, I do not believe for a moment that a well-regarded institution such as the Beth Din could be affected in such an easy and unlawful fashion."

27. Rabbi Biton was cross examined by video link to Miami and, as I have said, it was translated from Hebrew. The following emerged from the cross examination:

> (1) Rabbi Biton and his brother, the Defendant, were and are extremely angry with the Claimant as they believe that he has wrongfully kept them from their money and entitlements for over 20 years.
>
> (2) They were also both very frustrated with the long delay in the delivery of the Award; Rabbi Biton said that the Defendant had sent so many letters chasing the Award (I have not seen any of these letters).
>
> (3) Rabbi Biton explained that he had been in Argentina for work and he decided to change his travel plans to go back to Israel via London so that he could attend a wedding that he had been invited to; while in London he could also

go to try to see Dayan Lichstenstein to ask when the Award would be available.

(4) Rabbi Biton said that he was booked into the Melia Hotel which was near to the Beth Din offices; that he arrived early in the morning at the hotel having flown in from Argentina; and then he attended the afternoon prayers in the Beth Din and met Dayan Lichstenstein there; after the discussion, he went straight off to the wedding, which was outside London; in the end he did not even have time to see his business partner based in London and he admitted that he prioritised seeing Dayan Lichstenstein over his business partner.

(5) Rabbi Biton was also adamant that they simply discussed the timing of the Award and he was assured by Dayan Lichstenstein that they would have it by Tisha b'Av (16 July 2013).

(6) Rabbi Biton did not retain a copy of his letter of 18 July 2013 but that he thought it was likely to have been 2 or 3 lines sent by fax saying that the Beth Din had promised the Award by Tisha b'Av but it had not yet been received.

(7) He did not remember seeing his brother's letter of 23 July 2013.

(8) He did not speak to or see Dayan Lichstenstein again.

(9) He agreed that the discussion could not have taken place on 17 Tammuz (25 June 2013) as this was a fast day and he would not have been attending a wedding on that day.

28. There are some unsatisfactory aspects to Rabbi Biton's evidence. The wholly new explanation under cross examination as to why he came to be in London on or around 25 June 2013 is inconsistent with paragraphs 2 and 3 of his witness statement where he states that it was a "*planned*" trip to meet his business partner. There is no mention in his witness statement of Argentina, changing his plans to attend a wedding or the fact that he did not in the end meet up with his business partner. The explanation of the wedding also does not fit with the discussion taking place on 25 June 2013 which, as I have said above, is the Jewish fast day of the 17 Tammuz. Nevertheless, his account of the discussion is broadly similar to that of Dayan Lichtenstein.

(d) Conclusions on the evidence

29. Mr Woolf submitted that this was not a chance meeting between Dayan Lichtenstein and Rabbi Biton as the latter deliberately attended the service at the Beth Din's offices in order to discuss his brother's case. Having done so, Mr Woolf said that it is implausible and inconceivable that there would not have been a discussion as to the merits of the case and that, given Rabbi Biton's status as a respected and distinguished Jewish scholar and publisher, whatever he said would have been likely to carry weight with Dayan Lichtenstein. Mr Woolf even went so far as to suggest something which the Claimant had put forward in his evidence that the further delay to the delivery of the Award from the discussion to 4 April 2014 was suspicious particularly as the Award then found heavily in favour of the Defendant.

30. I reject those submissions and accept the material parts of the evidence of Dayan Lichtenstein and Rabbi Biton as to the contents of their discussion. I find that the discussion was purely about the timing of the delivery of the Award. I do so for the following reasons:

(1) By the time of the discussion, the Award had been very considerably delayed; the Defendant had been pressing the Beth Din for the Award; and it was clearly a matter of great concern on the Defendant's side.

(2) So far as Dayan Lichtenstein was concerned, the appearance of Rabbi Biton at the afternoon prayers was a complete surprise and he did not know who he was until he introduced himself; given the circumstances of the meeting, it is likely that any conversation between the two of them would have been short.

(3) Dayan Lichtenstein knew of Rabbi Biton and his reputation; he also knew that Rabbi Biton featured in the case as a party to the Memorandum of Agreement; his evidence was that he immediately recalled the case and did not need reminding of the details; I accept that evidence because the Beth Din must then have begun to draft their Award if it was going to be ready quite soon.

(4) The most important contemporaneous evidence which corroborates Dayan Lichtenstein's and Rabbi Biton's evidence is the Defendant's letter of 23 July 2013; this indicates clearly that the discussion was limited to the question of delay and Dayan Lichtenstein promised that the Award would be with the parties within about three weeks; the letter does not hold back from criticising both the Claimant and the Beth Din in trenchant terms but this only serves to emphasise the fact that delay was uppermost in the Defendant's and his brother's minds.

(5) Rabbi Biton must have believed that he had done his bit by approaching Dayan Lichtenstein and extracting a "*promise*" that the Award would be delivered shortly and then sending his letter of 18 July 2013; the second paragraph of the Defendant's letter of 23 July 2013 suggests that Rabbi Biton did not want any further involvement.

(6) The shortness and insignificant nature of the discussion is given more credence by the fact that Dayan Lichtenstein did not make a note of the discussion nor inform the Claimant; while that has to be put in the context of the apparent failure to disclose the letters to the Claimant, I accept Dayan Lichtenstein's evidence on this and consider that he would have made a note if something of substance had been discussed.

(7) I do consider that it is regrettable that the letters of 18 and 23 July 2013 were not disclosed to the Claimant; however I do not think that this was deliberate or an attempt to conceal the discussion; there would have been no problem with disclosing the letter of 23 July 2013 and it would no doubt have been regarded by the Claimant as merely another aggressive attack by the Defendant on him personally as well as the Beth Din.

(8) The delay from the discussion until the issue of the Award nine months later is not suspicious; rather it is consistent with the very considerable five year delay that the parties had suffered up to that point; I do not fully understand why the Award took so long to write but the Beth Din was very busy and short-staffed.

(9) In short, there is no evidence at all to contradict the evidence of Dayan Lichtenstein and Rabbi Biton which is corroborated particularly by the letter of 23 July 2013 and, while there are some inconsistencies, they do not detract from the overall credibility of their evidence as to the content of a very short discussion that took place over six years ago.

(10) Accordingly, I accept the evidence of Dayan Lichtenstein and Rabbi Biton that the discussion they had on or around 25 June 2013 was limited to the timing of the delivery of the Beth Din's Award.

Relevant Legal Principles on Apparent Bias

31. Even though the Claimant's primary case was that the discussion was more extensive than I have found, Mr Woolf did still submit that the limited discussion as to timing would give rise to apparent bias and serious irregularity. He based this submission on the failure to disclose both the discussion and the letters of 18 and 23 July 2013 rather than the limited discussion itself. Ms McGowan submitted that this alternative case of non-disclosure has not been pleaded and it would be unfair for the Claimant to be allowed to run it.

32. It is necessary therefore to look briefly at some of the relevant legal principles.

(a) Serious Irregularity within s.68 of the Act

33. The relevant parts of s.68 of the Act provide as follows:

> "68.- **Challenging the award: serious irregularity**
>
> (1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award…
>
> (2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant -
>
> (a) Failure by the tribunal to comply with section 33 (general duty of tribunal);"

34. Section 33 of the Act is headed "**General duty of the tribunal**" and it provides as follows:

> "(1) The tribunal shall –
>
> (a) 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
>
> (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling 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 the exercise of all other powers conferred on it."

35. It is also relevant to refer to s.24 of the Act which enables a party to apply to the court to remove an arbitrator. One of the grounds for removal under subsection (1) is:

> "(a) that circumstances exist that give rise to justifiable doubts as to his impartiality"

36. It is common ground that apparent bias on the part of the Beth Din would amount to a breach of the general duty in s.33 of the Act and would constitute a serious irregularity under s.68(2)(a) of the Act. As was said in paragraph 8-100 of *Russell on Arbitration* (24th Ed):

> "As to a failure to observe principles of natural justice, actual or apparent bias on the part of the tribunal would, if established, amount to a breach of the general duty and a serious irregularity under s.68(2)(a). There is considerable overlap between a challenge to an award on this ground as a result of actual or apparent bias and an application under s.24 to remove the arbitrator."

Furthermore, a finding of apparent bias will almost inevitably lead to there being a "*substantial injustice*" within s.68(2). Paragraph 7-129 of *Russell* states:

> "Once the court has found a real possibility of bias…then substantial injustice will normally be imputed as a matter of course. In other words in cases of actual or apparent bias there is no second hurdle to overcome, or if there is it is a very low one. As Morison J said in *ASM Shipping Ltd v TTMI Ltd,*[4]
>
> > "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.""

[4] [2006] 1 Lloyd's Rep.375 at para. [39]. See also *Norbrook Laboratories Ltd v Tank* [2006] 2 Lloyd's Rep. 485 at paras. [144] and [145].

(b) The test for apparent bias

37. The same common law test for impartiality and apparent bias applies to arbitrations. That well-known test as encapsulated in Lord Hope's speech in *Porter v Magill* [2002] 2 AC 357 at [102] to [103] 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*." Ms McGowan submitted that the fair minded and informed observer is not unduly sensitive or suspicious but neither are they complacent – see *Bubbles & Wine Ltd v Lusha* [2018] EWCA Civ 468 at para. [18].

38. In the *Bubbles* case a private conversation had taken place during the trial between the judge and one-party's counsel. Amongst other things, they had discussed the case. Although the Court of Appeal was critical of the Judge's behaviour, nevertheless it found that there was no apparent bias. That case was materially different to this because very soon after the conversation, the Judge emailed the opposing counsel informing him of the discussion that he had had. There was also no real doubt about what was said as it was confirmed by counsel's evidence, contemporaneous emails and the judge's comments in the judgment.

39. The significance of the non-disclosure of facts relevant to the impartiality of an arbitrator has recently been examined by the Court of Appeal in *Halliburton Company v Chubb Bermuda Insurance Ltd and ors* [2018] 1 WLR 3361[5]. In the judgment of the Court, the following statements of general principle were said (underlining added):

> "71. In summary, we consider the present position under English law to be that disclosure should be given of facts and circumstances known to the arbitrator which, in the language of section 24 of the Act, would or might give rise to justifiable doubts as to his impartiality. Under English law this means facts or circumstances which would or might lead the fair-minded and informed observer, having considered the facts, to conclude that there was a real possibility that the arbitrator was biased.
>
> …
>
> **What are the consequences of failing to make disclosure of circumstances which should have been disclosed?**
>
> 73 There are, as it seems to us, two distinct questions for the court considering an allegation of non-disclosure after the event. First, the court needs to consider whether disclosure ought to have been made in accordance with the principles we have just enunciated. Secondly, the court needs to consider the significance of that non-disclosure in the context of the application with which the court is dealing. In the case of an application for removal of the arbitrator in question, the court will consider on the basis of all the factual information available when that application is heard (including the fact that there has been non-disclosure), whether the fair-minded and informed

[5] An appeal from this judgment has been heard by the Supreme Court on 12 and 13 November 2019 and judgment is awaited.

observer would conclude that there was a real possibility that the arbitrator was biased.

74 If a disclosure that ought to have been made has not been made, that will mean that the arbitrator will not have displayed the "badge of impartiality" which he should have done. As Lord Bingham observed in the *Davidson* case: the fact of non-disclosure "must inevitably colour the thinking of the observer".

75 Non-disclosure is therefore a factor to be taken into account in considering the issue of apparent bias. An inappropriate response to the suggestion that there should be or should have been disclosure may further colour the thinking of the observer and may fortify or even lead to an overall conclusion of apparent bias – see, for example, *Paice v Harding* [2015] EWHC 661, and *Cofely Ltd v Bingham* [2016] EWHC 240.

76 Non-disclosure of a fact or circumstance which should have been disclosed, but does not in fact, on examination, give rise to justifiable doubts as to the arbitrator's impartiality, cannot, however, in and of itself justify an inference of apparent bias. Something more is required – see, for example, the comments of Lord Mance in *Helow v Home Secretary* at [58]."

40. It is clear from *Halliburton* that non-disclosure is not in itself enough to found apparent bias and "*something more is required*". The fact of non-disclosure will contribute to the fair minded and informed observer's assessment of the impartiality of the arbitrator but it is only a factor and there needs to be some other factor(s) before the Court can conclude that there was apparent bias.

Conclusion

41. As I said above, the Claimant's allegation of apparent bias now rests wholly on the non-disclosure of the discussion and the 18 and 23 July 2013 letters. By putting his case in that way, Mr Woolf accepted that, if the content of the discussion was limited to the timing of the Award, such a discussion was not itself evidence of any apparent bias. That must be right. An enquiry by one party to an arbitrator or a Judge as to when an award or judgment might become available cannot possibly be improper or constitute evidence of apparent bias.

42. The next question therefore is whether the non-disclosure to the Claimant of that discussion can constitute apparent bias. It is difficult to see how the non-disclosure of something that was not evidence of apparent bias could itself be evidence of apparent bias. This is not even within the *Halliburton* test of being something that "*should have been disclosed*". Accordingly the non-disclosure of an insignificant conversation about timing is not something that a fair minded and informed observer would consider gives rise to any doubts about the impartiality of Dayan Lichtenstein and the Beth Din.

43. Mr Woolf also relied upon the non-disclosure of the 18 and 23 July 2013 letters and this is what I think Ms McGowan was referring to in her submission that this point was not pleaded. It is certainly correct to say that the non-disclosure of those letters is not referred to in the Re-Amended Claim Form and the Amended Grounds of Appeal. Nor did Mr Woolf refer to this point in his skeleton argument.

44. Whether it is pleaded or not, I do not regard it as a good point. While I certainly think that it is unfortunate and regrettable that the Defendant's letter of 23 July 2013 was not disclosed to the Claimant at the time (I have not seen the 18 July 2013 letter from Rabbi Biton, so cannot comment on whether it ought to have been disclosed), that was because of a failure of administration at the Beth Din rather than anything sinister. If it had been disclosed to the Claimant at the time, he would have seen that there had been a discussion between Dayan Lichtenstein and Rabbi Biton about when the Award would be issued and he probably would have been totally unconcerned about that. I do not consider that the failure to disclose this letter provides any evidence that could support a case for apparent bias against the Beth Din.

45. In all the circumstances, I dismiss the Claimant's challenge to the Award under s.68 of the Act.

46. In her skeleton argument, Ms McGowan invited me to lift the stay on the s.69 appeal and to give further directions in relation to progressing that appeal. I do not know what Mr Woolf says about that and unless the parties can agree those directions and any other consequential matters, it may be that a further hearing will be necessary. I would invite the parties to attempt to agree all outstanding matters but of course if that is not possible a hearing can be held at a time convenient to all.