

# CONFLICTS OF INTEREST

*A training paper for RICS Scotland<sup>1</sup>*

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## Introduction

1. Rent review clauses in leases routinely provide for disputes as to the rent upon review to be decided in default of agreement by a third party agreed by the parties or appointed by the President of the RICS (in Scotland by the Chairman of the Scottish Branch of the RICS).
2. Some rent review clauses stipulate that the third party should be qualified in a particular way (e.g. “minimum 15 years retail experience in Edinburgh”). All implicitly if not expressly require that the third party should be sufficiently experienced in the field in which the dispute arises as to be able properly to evaluate the matters in dispute.
3. This requirement causes difficulty where the pool of third parties is small, and the third parties are all actively involved in the market in one way or another. It will often be the case that an arbitrator will have been the arbitrator or expert witness in a previous relevant dispute.
4. The issue that arises in such circumstances is – What level of involvement in previous disputes is such that the third party should either disclose it to the parties, or refuse to accept, or continue with, an appointment?
5. The same issue also arises in other arenas where third party surveyors are appointed to resolve disputes – typically adjudicators in construction disputes.
6. This paper summarises the relevant legal principles before setting out a number of hypothetical scenarios for consideration, [together with suggested responses](#).

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<sup>1</sup> Although this paper is directed towards third parties in Scotland, it is assumed that the substantive law concerning bias and conflicts of interest is the same in Scotland as it is in England and Wales.

## Background

7. Before tackling the legal principles and some individual scenarios, it is worth noting the esteem in which RICS third parties are held.

8. In AMEC Capital Projects Ltd v Whitefriars City Estates Ltd [2004] EWCA Civ 1418, Dyson LJ said:

“Judges are assumed to be trustworthy and to understand that they should approach every case with an open mind. The same applies to adjudicators, who are almost always professional persons.”

9. The same applies to RICS arbitrators/independent experts: they are all professionally trained, and can ordinarily be trusted to approach matters with an open mind, provided that they adhere to the advice summarised in this paper.

10. Further, bearing in mind the point that surveyor arbitrators, independent experts and adjudicators are selected for their expertise in evaluating the evidence before them, it will commonly be the case, if not a positive requirement, that they should be experienced in the context in which the dispute arises. In this context, as the Judge said in Moore Stephens & Co v Local Authorities’ Mutual Investment Trust [1992] 1 EGLR 33:

“... arbitrators in these sort of circumstances inevitably are men or women who not only have great experience of commercial rents, they inevitably must have come down firmly in comparable situations. If they had no experience of comparable situations, they would hardly be in a position to do justice as arbitrators.”

11. Having made those points, caution should be applied in seeking to derive principles from other cases – and particularly older cases, when social attitudes may have been greatly different. For example, in Haigh and London North Western and Great Western Railway Co [1896] 1 QB 649, the Divisional Court held that it was not necessarily an objection on the ground of bias to the award of an umpire in an arbitration under the Lands Clauses Consolidation Acts to determining the value of land compulsorily taken that, during the course of the arbitration and before making his award, the arbitrator had given evidence as a witness on behalf of one of the parties in another inquiry as to the value of other land taken for the same purposes and under the same parliamentary powers. It is unlikely that a modern court would now arrive at the same decision.

## Conflicts and Bias - the law

12. The relevant principles concerning removal for arbitral bias were reviewed last month by Popplewell J in H v L [2017] EWHC 137 (Comm), and may be summarised as follows:

- (1) Section 33 of the 1996 Act requires the tribunal to act fairly and impartially between the parties. The same applies in Scotland under s.1 of the Arbitration (Scotland) Act 2010<sup>2</sup>.
- (2) Not merely must an arbitral tribunal act fairly and impartially: it must *appear* to do so. Cases of actual bias are rare; cases of apparent bias are numerous.
- (3) Under s.24 of the Arbitration Act 1996 (compare rule 12 of the Scottish Arbitration Rules<sup>3</sup>), a party to arbitral proceedings may apply to the court to remove an arbitrator on the ground that circumstances exist that give rise to “*justifiable doubts as to his impartiality*”.
- (4) The question whether circumstances exist which give rise to justifiable doubts as to an arbitrator’s impartiality is to be determined by applying the common law test for apparent bias<sup>4</sup>.
- (5) That test is whether the ‘fair-minded and informed observer’, having considered the facts, would conclude that there was a ‘real possibility’ that the tribunal was biased<sup>5</sup>.
- (6) The ‘fair-minded’ observer is not unduly sensitive or suspicious, reserves judgment on every point until he or she has fully understood both sides of the argument, is not complacent and is aware that judges and other tribunals have their weaknesses. The ‘informed’ observer is informed on all matters

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<sup>2</sup> “The founding principles of this Act are —

(a) that the object of arbitration is to resolve disputes fairly, impartially and without unnecessary delay or expense ...”.

<sup>3</sup> Rule 12 is more explicit: “The Outer House may remove an arbitrator if satisfied on the application by any party—

(a) that the arbitrator is not impartial and independent,

(b) that the arbitrator has not treated the parties fairly,

(c) that the arbitrator is incapable of acting as an arbitrator in the arbitration (or that there are justifiable doubts about the arbitrator’s ability to so act) ...”.

<sup>4</sup> As explained in numerous cases: see for example Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451; A v B [2011] 2 Lloyd’s Rep 591; Sierra Fishing Co v Farran [2015] EWHC 140.

<sup>5</sup> See Porter v Magill [2002] AC 357.

which are relevant to put the matter into its overall social, political or geographical context. These include the local legal framework, including the law and practice governing the arbitral process and the practices of those involved as parties, lawyers and arbitrators<sup>6</sup>.

- (7) The test is an objective one. The fair-minded observer is not to be confused with the person who has brought the complaint, and the test ensures that there is a measure of detachment. The litigant lacks the objectivity which is the hallmark of the fair-minded observer. He is far from dispassionate. Litigation is a stressful and expensive business and most litigants are likely to oppose anything which they perceive might imperil their prospects of success, even if, when viewed objectively, their perception is not well-founded<sup>7</sup>.
- (8) All factors which are said to give rise to the possibility of apparent bias must be considered not merely individually but cumulatively<sup>8</sup>.
- (9) The International Bar Association Guidelines on Conflicts of Interest in International Arbitration 2014 edition may provide some assistance to the Court on what may constitute an unacceptable conflict of interest and what matters may require disclosure. However they are not legal provisions and do not override the applicable legal principles; if there is no apparent bias in accordance with the legal test, it is irrelevant whether there has been compliance with the IBA Guidelines<sup>9</sup>.

13. In Scotland, the mandatory Rule 8 of the Scottish Arbitration Rules, “Duty to disclose any conflict of interests”, adds to this by providing:

- “(1) This rule applies to—
  - (a) arbitrators, and
  - (b) individuals who have been asked to be an arbitrator but who have not yet been appointed.
- (2) An individual to whom this rule applies must, without delay disclose —

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<sup>6</sup> See Helow v Secretary of State for the Home Department [2008] 1 WLR 2416; A v B.

<sup>7</sup> See Helow; Harb v Aziz [2016] EWCA Civ 556.

<sup>8</sup> See e.g. Cofely Ltd v Bingham [2016] EWHC 240 (Comm) at [115].

<sup>9</sup> See Cofely Ltd v Bingham; A v B; Sierra v Farran.

- (a) to the parties, and
- (b) in the case of an individual not yet appointed as an arbitrator, to any arbitral appointments referee, other third party or court considering whether to appoint the individual as an arbitrator,  
any circumstances known to the individual (or which become known to the individual before the arbitration ends) which might reasonably be considered relevant when considering whether the individual is impartial and independent.”

14. Rule 77 adds:

“For the purposes of these rules, an arbitrator is not independent in relation to an arbitration if—

- (a) the arbitrator's relationship with any party,
- (b) the arbitrator’s financial or other commercial interests, or
- (c) anything else,

gives rise to justifiable doubts as to the arbitrator’s impartiality<sup>10</sup>”

15. These rules do not identify what might be said to be relevant for the purposes of such disclosure, and what constitutes justifiable doubts. For that, recourse should be had to the relevant cases.

16. The RICS has also issued guidance on this topic. In 2012, it issued the first edition of a guidance note “Conflicts of interest for members acting as dispute resolvers”, incorporating a Scottish addendum.

17. As with the IBA guidelines (see para 10(9) above), this guidance note does not override the applicable legal principles. Nevertheless, it does contain useful guidance which may be treated as a starting point for any analysis. It also appends an information paper setting out an adapted version of the IBA traffic light scheme, which prescribes the following treatment for involvements:

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<sup>10</sup> In the remainder of the UK, the importance of independence as a separate ingredient is not stressed. This is probably a distinction without a difference: as rule 77 makes clear, independence is defined by reference to impartiality.

- (a) *red* - situations in which a conflict of interest may be said to exist, and where the third party must decline the appointment save where the parties expressly agree otherwise;
- (b) *orange* - those where a conflict may exist, and where the third party's involvement should be disclosed;
- (c) *green* - those where there is no conflict, and the involvement need not be disclosed.

18. While it is difficult to draw any general lessons from this guidance, since the situations that may be encountered are so fact-specific, three points are worth emphasising.

19. First, it may safely be said that third parties must disclose their relevant knowledge to the parties – see the decision of HHJ Wilcox in London and Amsterdam Properties Ltd v Waterman Partnership Ltd [2003] EWHC 3059 (TCC):

“It is a fundamental requirement that any reliance upon previously acquired relevant knowledge by an adjudicator is made known to the parties to the adjudication, so that both have an opportunity to deal with it, should it be likely to or if it does in fact affect his decision materially. A professionally qualified person who is an adjudicator appointed by a body such as the RICS must be presumed to be aware of such a basic ingredient of any fair hearing which accords with the requirement of natural justice”.

20. This requirement is obviously not aimed at the general knowledge of the third party, but rather at specific knowledge of which the third party has become aware, which may not be known to the parties, and which may make a difference to the decision.

21. Secondly, the cases on the subject show that third parties who fail to disclose involvements which should have been disclosed usually make their predicament worse by arguing that disclosure was unnecessary – thereby worsening the perception of bias. Cofely Ltd v Bingham is a good (bad) example of this.

22. Thirdly, the obligation concerning conflicts of interest is one that continues throughout the dispute resolution process, as the RICS guidance note emphasises – and see paragraph 77 of the judgment of Hamblen J in Cofely Ltd v Bingham.

## SAMPLE SCENARIOS:

In each of the scenarios that follow, as appropriate:

- a property valuation dispute has been referred to arbitration;
- Alf is a surveyor who has been invited by DRS to take up an appointment as arbitrator.

The analysis that is required applies equally to situations where the third party is instead an independent expert<sup>11</sup> or an adjudicator.

In each scenario, the question to be answered is whether Alf should:

- (a) refuse the appointment without further ado; or
- (b) disclose his involvement to the parties and decline the appointment if objection is made; or
- (c) disclose his involvement to the parties and accept the appointment even if objection is made; or
- (d) not disclose his involvement.

### *Scenario (1): Alf regularly acts for one of the parties to the dispute*

23. The scenario suggests that Alf derives a non-trivial part of his income from one of the parties. This not merely gives the appearance of bias – it is quite possibly an actual conflict of interest, since Alf may be said to be financially interested in the outcome of the dispute.

24. ***Suggested answer:*** This is a waivable red situation (see para A2.2.1 in the information paper appended to the RICS guidance note on Conflicts of interest): disclosure is required, and Alf should not accept the appointment unless the situation is explained fully to both parties, and they give their informed consent to Alf acting as arbitrator. Even then, Alf may feel that the appointment would best be declined, in order to avoid any recriminations that might follow.

25. An extreme recent example of this is provided by the decision in Cofely, in which an arbitrator was removed from an arbitration between Cofely Ltd and Knowles Ltd. The arbitrator had conducted 137 arbitrations in the previous 3 years, in 25 of which he had been appointed by Knowles (or a party for Knowles was acting). The arbitrator's income for those 3 years was £1,146,939, of which the Knowles' appointments were responsible for

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<sup>11</sup> An independent expert is as liable to avoid conflicts of interest as an arbitrator.

£284,593.75 – roughly 25%. The submission was therefore that Bingham had derived a substantial part of this income from the appointments, and that circumstances existed that gave rise to “*justifiable doubts as to his impartiality*”.

***Scenario (2): Alf was independent expert involving other parties in a previous relevant dispute***

26. ***Suggested answer:*** this is an orange situation (although there is no particular paragraph that deals expressly with it). Disclosure should be made, and it is then up to the discretion of the arbitrator whether to proceed.

27. A similar situation arose in Moore Stephens & Co v Local Authorities’ Mutual Investment Trust [1992] 1 EGLR 33. In that case, an application was made to remove an arbitrator, on the ground that he proposed to entertain a piece of evidence consisting of an independent expert determination of a comparable property which he had himself made. The principal ground upon which the application was made was that the previous figure was too high, and that that figure would inevitably be lurking in the back of the arbitrator’s mind, and would influence him in any decision to which he came.

28. The judge robustly rejected that that submission:

“I am quite certain that somebody of [the arbitrator]’s standing and expertise would have absolutely no difficulty in being entirely unbiased about the whole matter.”

29. The judge also rejected the cognate submission that the applicant could reasonably fear that justice would not seem to be done:

“I find that argument as unattractive as I find the first argument put forward by the applicant. I do not think it does credit to [the arbitrator] and all other people who act in this capacity as arbitrators. I see absolutely no reason why they should have any fears.”

30. Disclosure did not arise for decision in Moore Stephens, since both parties were generally aware of the determination. Had they not been, then given the nature of the arbitrator’s previous involvement, disclosure should have been made. The decision itself supports the proposition that, absent other considerations, there was no need for the arbitrator to step down.

***Scenario (3): Alf was independent expert in a previous relevant dispute on a related issue involving one of the parties***

31. ***Suggested answer:*** This is an orange situation (para A2.3.12): disclosure is required, and Alf has a discretion whether to accept the appointment, depending upon the exact circumstances.

***Scenario (4): Alf's firm is acting on a comparable transaction that may become evidence in the arbitration***

32. ***Suggested answer:*** This is a waivable red situation (para A2.2.4): disclosure is required, and Alf should not accept the appointment unless the situation is explained fully to both parties, and they give their informed consent to Alf acting as arbitrator.

***Scenario (5): Alf is already appointed as an independent expert on another linked case***

33. ***Suggested answer:*** This too is a waivable red situation (para A2.2.7): disclosure is required, and Alf should not accept the appointment unless the situation is explained fully to both parties, and they give their informed consent to Alf acting as arbitrator.

34. A recent example arising in the case of an adjudication is instructive. In Beumer Group UK Ltd v Vinci Construction UK Ltd [2016] EWHC 2283 (TCC), an adjudicator was appointed in disputes arising under both a contract and sub-contract between Vinci, Beumer and a sub-contractor. Adjudications were made in both matters. The same adjudicator was again appointed adjudicator in further disputes between the same parties. However, Vinci in the main contract adjudication was not aware either that there was an adjudication in the sub-contract, or that the same adjudicator had been appointed. It was not therefore aware of the submissions made to the adjudicator in the sub-contract. The judge held that the adjudicator should have disclosed to Vinci that he was acting as adjudicator in another dispute involving the same counter-party, and that his failure to do was a breach of natural justice that meant that his decision could not be enforced.

***Scenario (6): Two years ago, Alf advised the landlord in an unrelated matter, but has no ongoing relationship.***

35. ***Suggested answer:*** This is an orange situation (para A2.3.1): disclosure is required, and Alf has a discretion whether to accept the appointment, depending upon the exact circumstances.

***Scenario (7): Alf's firm has acted against one of the parties in an unrelated matter***

36. ***Suggested answer:*** This is a green situation (para A2.4.2): Alf has no need to disclose the involvement, and no reason not to accept the appointment.

***Scenario (8): A colleague in Alf's firm is an arbitrator in another dispute involving the same party or parties***

37. ***Suggested answer:*** This too is a green situation (para A2.4.8): Alf has no need to disclose the involvement, and no reason not to accept the appointment.

***Scenario (9): One of the parties before Alf is represented by a surveyor that is the independent expert in an unconnected dispute, in which Alf also represents one of the parties.***

38. ***Suggested answer:*** This has no direct comparator in the information paper, although it would appear to be an orange situation. The suggested analysis is that there is a perception of “scratch my back; I’ll scratch yours”. It would be sensible for Alf to disclose the involvement, and to weigh up the response before deciding whether to accept the appointment.

***Scenario (10): Alf works in the Glasgow office of a large multi-national firm. A department in the London office of the same firm has a continuing current fee earning relationship with one of the parties in respect of the management of a small multi-let property on the South Coast of England.***

39. ***Suggested answer:*** This is analogous to an orange situation (para A2.3.3), on the assumption that the fee income does not amount to a “significant commercial relationship”, in which case it would be a waivable red situation (para) 2.2.3. Disclosure is required, and Alf has a discretion whether to accept the appointment, depending upon the exact circumstances.

***Scenario (11): A colleague of Alf's working from their London office completed an investment purchase for one of the parties to the dispute within the last six months and received a considerable fee. It was a one-off transaction and there is no continuing fee earning relationship between Alf's firm and the party.***

40. ***Suggested answer:*** This too is an orange situation (para A2.3.2): Alf has a discretion whether to accept the appointment, depending upon the exact circumstances.

***Scenario (12): One of the parties to the dispute is a former work colleague of Alf. They do not socialise together and contact between them is limited to normal professional contact between two professionals working in the same field in the same geographic location.***

41. ***Suggested answer:*** This is on the cusp between green and orange situations (compare paras A2.4.4, A2.3.8 and A2.3.11). None of the comparisons is exact. Alf would be prudent to treat the situation as an orange, disclose his involvement, and then exercise his discretion whether to accept the appointment, depending upon the exact circumstances.

### **Conclusions**

42. **Disclosure:** it is tempting to conclude that the third party should always disclose every involvement, no matter how trivial, because that at least is a safe course. Third parties should not take that course. As the Court of Appeal said in Taylor v Lawrence [2003] QB 528:

“judges should be circumspect about declaring the existence of a relationship where there is no real possibility of it being regarded by a fair-minded and informed observer as raising a possibility of bias. If such a relationship is disclosed, it unnecessarily raises an implication that it could affect the judgment and approach of the judge. If this is not the position no purpose is served by mentioning the relationship. On the other hand, if the situation is one where a fair-minded and informed person might regard the judge as biased, it is important that disclosure should be made. If the position is borderline, disclosure should be made because then the judge can consider, having heard the submissions of the parties, whether or not he should withdraw. In other situations disclosure can unnecessarily undermine the litigant’s confidence in the judge.”

43. I suggest that the right approach in any case is to disclose to the parties all but those involvements where there can be no doubts about partiality. I consider that disclosure of the remaining involvements will reveal the third party to be frank, competent – and involved in the market, which is what a good third party should be.

44. **Use of the traffic lights:** the answer to a specific issue in many areas of dispute resolution is often not black or white but depends on the specific facts including the expertise/experience of the parties and any imbalance between them. The traffic light examples should not be used as a series of

compartments into which to fit given situations, because that approach will reduce the ability of the parties and of DRS to use their own judgement.

45. Finally, I acknowledge with grateful thanks the considerable assistance I received in preparing this paper from Andrew Guest FRICS FCI Arb.

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