LITTLETON

RARE PUBLIC JUDGMENT ON S.24 APPLICATION FOR REMOVAL OF ARBITRATOR

by Charlotte Davies

The Commercial Court (HHJ Pelling QC) recently handed down judgment in the case of *Newcastle United Football Company Limited v (1) The Football Association Premier League Limited (2) Michael Beloff QC (3) Lord Neuberger (4) Lord Dyson* [2021] EWHC 349 (Comm).

In rejecting Newcastle United's attempt to remove an arbitrator on grounds of apparent bias under s.24 Arbitration Act 1996, this rare public judgment provides helpful guidance on the legal principles and approach to be applied in such cases.

The background

The underlying arbitration arose in relation to Newcastle's plan to sell their shares in The Football Association Premier League Limited (the **"PLL"**) to a company ultimately owned by a Saudi Arabian sovereign wealth fund. There was a dispute between Newcastle and the PLL as to whether that fund is controlled by the government of the Kingdom of Saudi Arabia. If so, there may be an issue as to whether the PLL was required to refuse to agree a change of control or appointment of a director under the relevant section of PLL's Rules.

On 12 June 2020 PLL issued a decision letter concluding that the Kingdom of Saudi Arabia would become a director of Newcastle pursuant to the PLL Rules because of the control it would exercise over the company owned by the sovereign wealth fund. No decision was made on whether the Kingdom would be disqualified from being a director or whether PLL would refuse to agree the proposed change of control.

Newcastle disputed PLL's conclusion, and the lawfulness of the process by which it was arrived at by PLL, and referred the matter for arbitration as a 'Board Dispute' in accordance with PLL's Rules.

Following the appointment by each party of their nominated arbitrators, they each agreed to the appointment of Mr Beloff QC as the chair of the tribunal. Mr Beloff QC certified that there were no circumstances which existed to give rise to justifiable doubts as to his impartiality in the role of chair.

Newcastle was subsequently informed by PLL's solicitors that in the past three years it had been involved in 12 arbitral proceedings in which Mr Beloff QC had been an arbitrator, although he had only been appointed by PLL's solicitors in three of those, two of which appointments were made after Mr Beloff QC had been appointed in the present arbitration between Newcastle and the PLL. PLL's solicitors also informed Newcastle that Mr Beloff QC had advised PLL on four separate occasions all in excess of two years before his appointment in the present arbitration, including in March 2017 when he provide advice in respect of a particular section of PLL's Rules.

Newcastle said it would not have agreed to Mr Beloff's appointment had it known of these matters and asked him to recuse himself, which he declined to do. It stated it would make an application for his removal under s.24 AA 1996. Mr Beloff QC then entered an exchange of emails with PLL's solicitors, in which Newcastle was not copied, regarding the request for his recusal and issues of privilege in respect of the March 2017 advice he had provided to PLL. This email exchange was disclosed to Newcastle the following day, and Newcastle relied on it as another ground in its s.24 application.

Legal principles and approach

HHJ Pelling QC starts his judgment by confirming that the test applicable to an allegation of apparent bias under s.24 AA 1996 is the same as that which applies at common law to judges sitting in courts and tribunals: see *Halliburton Co v Chubb Bermuda Insurance Ltd* [2020] UKSC 48. The applicable test is the familiar one identified in *Porter v Magill [2002] 2 AC 357* of whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. This is an objective test.

In terms of an arbitrator's duty to disclose matters to a party, he held this applied to anything that could arguably lead a fair minded and informed observer to conclude there was a real possibility of bias. This applies to a potentially wider group of circumstances that might ultimately justify recusal, because parties need such disclosure to decide whether or not to challenge an appointment.

He agreed with Newcastle that, in deciding the s.24 application, he should consider the cumulative effect of the four separate factors relied upon, those being: (1) Mr Beloff QC had given PLL advice in 2017 in respect of PLL's Rules; (2) Mr Beloff QC's other appointments as an arbitrator by PLL's solicitors; (3) his failure to disclose these matters to Newcastle; and (4) the private email exchange between him and PLL's solicitors.

Decision

HHJ Pelling QC comprehensively rejected Newcastle's arguments for removal of Mr Beloff QC. In respect of the points relied upon by Newcastle he held that:

(1) The March 2017 advice Mr Beloff QC had provided to PLL did not relate to the issue

in dispute in the current proceedings, and it was fanciful to suggest there would be overlap. Both Mr Beloff QC and PLL's solicitor had confirmed that he had not, when providing that advice, considered the particular rules relevant to the current proceedings. Unless it was found they were lying, this was an end to any suggestion of apparent bias arising due to the March 2017 advice.

(2) Mr Beloff QC's other appointments as an arbitrator in proceedings involving PLL's solicitors would not lead a fair-minded and informed observer to conclude there was a real possibility of bias either due to the appointments or his failure to disclose them. None of those appointments had been by PLL, nor did they concern matters related to the current proceedings. The non-disclosure was consistent with the International Bar Association Guidelines on Conflicts of Interest in International Arbitration. There was no dispute that Mr Beloff QC was not financially dependent on work from PLL or its solicitors.

(3) With regard to disclosure of these matters, it was important that Mr Beloff QC had not been appointed by PLL but by the parties' chosen arbitrators. This appointment was more than three years after the March 2017 advice, and there was no continuing relationship between Mr Beloff QC and PLL (with his last instruction by PLL being on an unrelated issue and completed in July 2018). In the circumstances of this case the non-disclosure did not give rise to an inference of that there was a real possibility of bias.

(4) The majority of the private email exchange between Mr Beloff QC and PLL's solicitors was uncontroversial and concerned with permission for Mr Beloff QC to explain what was covered in the March 2017 advice. These did not need to be copied to Newcastle and doing so might have resulted in a breach of confidence. However, HHJ Pelling QC described the private email from Mr Beloff QC asking PLL's solicitors about their client's position on whether he should recuse himself as *"an error of judgment [which] ought not have occurred"*. He should not have been communicating with one party alone in relation to this issue and there was a risk it would appear as though Mr Beloff QC was willing to be guided on the recusal question by PLL. However, ultimately HHJ Pelling QC decided that, despite the error of judgment, the *Porter v Magill* test was not met because, bearing in mind Mr Beloff QC's reputation (which was a relevant factor), there was no evidence of a real risk of bias.

Considering the cumulative effect, HHJ Pelling QC concluded that in this case *"the weight of the whole does not exceed the sum of its parts"* and even viewed cumulatively there would be no real risk of bias in the eyes of a fair minded and informed observer.

As a result, Newcastle's s.24 application was dismissed.

Private hearing?

HHJ Pelling QC also considered whether the s.24 application should be heard in public or private. He held that although CPR r.62.10 confers a discretion to hear an arbitration claim in public, the default position is that such hearings will be in private. If necessary, the judgment can be published in an anonymised or redacted form (see his separate judgment on this at *[2021] EWHC 450 (Comm)*).

Conclusion

This judgment serves as a reminder of the legal principles that apply, and of the fact it can be a difficult task to show apparent bias on a s.24 application under the relevant *Porter v Magill* test.