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Transparency 1 - 0 Confidentiality?

Manchester City v The Premier League in the Court of Appeal

by Ashley Cukier

The Court of Appeal this week handed down its decision in Manchester City Football Club Ltd v The Football Association Premier League & Ors [2021] EWCA Civ 1110, the latest judgment to consider the difficult tension that exists between the generally confidential nature of sports arbitration and the desirability of transparency where matters of public interest arise.

Background

In December 2018, the Premier League (the "PL") commenced a disciplinary investigation into Manchester City FC ("City"), following widely-publicised reports of confidential documents having been obtained from a hack of City's email servers relating to alleged breaches of UEFA's financial fair play ("FFP") regulations. The PL contended that the media reports suggested breaches of the PL Rules. During the course of its investigation, the PL requested documents and information from City, under Rule W1 of the PL Rules (a wide power entitling the PL Board to *"inquire into any suspected or alleged breach of these Rules"*). City objected to the disclosure request.

In October 2019, the PL commenced an arbitration against City, pursuant to Section X of the PL Rules, for a declaration and/or a determination that City was obliged to provide the PL with the sought documents, and an order for specific performance of City's contractual obligation to deliver up the documents in question. City disputed the jurisdiction of the arbitrators appointed, submitting to the tribunal that, on a proper construction of the PL Rules, the PL had no power to institute a Section X arbitration in respect of its claim for the documents and information. By an award dated 2 June 2020, the arbitral tribunal rejected City's challenge to its jurisdiction (and to City's submission that the tribunal did not have the appearance of impartiality), holding *inter alia* that it had substantive jurisdiction to hear the PL's claim.

Shortly thereafter, City issued an application in the Commercial Court, challenging the tribunal's jurisdiction under s.67 Arbitration Act 1996 ("the s.67 Challenge"), and, alternatively, contending that the tribunal was tainted with apparent bias ("the s.68 Challenge") such that

the appointed members should be removed under s.24 of the 1996 Act. Meanwhile, against this background, the Section X arbitration continued. In July 2020, the tribunal rejected City's arguments resisting disclosure, and – in November of last year – ordered City to provide certain documents and information to the PL and to make certain enquiries of third parties. The tribunal's order was stayed pending the determination of City's application in the Commercial Court.

The Commercial Court (Moulder J) handed down judgment on 17 March 2021, dismissing City's application ("the Merits Judgment"). In respect of the s.67 Challenge, the judge concluded that the language of Rule X2 of the PL Rules (permitting *'all disputes'* to be determined by arbitration) was not limited by Section W of the PL Rules. In respect of the s.68 Challenge, which was also dismissed, the judge – applying the decision of the Supreme Court in *Halliburton Company v Chubb Bermuda Insurance Ltd* [2020] UKSC 48 – held that City's challenge did not satisfy the test that a fair minded and informed observer would conclude that there was a real possibility that the arbitrators were biased. Permission to appeal to the Court of Appeal was refused.

The Publication Judgment

On handing down judgment, Moulder J indicated that she was minded to publish the Merits Judgment (the substantive hearing of the application having been heard in private, pursuant to CPR r.62.10). Both parties filed written submissions opposing publication. On 24 March 2021, Moulder J handed down judgment on the issue of publication ("the Publication

Judgment"), rejecting the submissions opposing publication and determining that the Merits Judgment should be published. In doing so, she summarised the key principles relevant to the case before her, derived from the judgment of Mance LJ (as he then was) in *City of Moscow v Bankers Trust* [2004] EWCA Civ 314, as follows:

i. *"Whatever the starting point or actual position during a hearing [in other words even if the hearing is in private under CPR 62.10], it is, although clearly relevant, not determinative of the correct approach to publication of the resulting judgment" (per Mance LJ, at [37]).*

ii. *"Further, even though the hearing may have been in private, the court should, when preparing and giving judgment, bear in mind that any judgment should be given in public, where this can be done without disclosing significant confidential information. The public interest in ensuring appropriate standards of fairness in the conduct of arbitrations militates in favour of a public judgment in respect of judgments given on applications under s.68. The desirability of public scrutiny as a means by which confidence in the courts can be maintained and the administration of justice made transparent applies here as in other areas of court activity under the principles of Scott v. Scott and article 6. Arbitration is an important feature of international, commercial and financial life, and there is legitimate interest in its operation and practice..." (at [39] emphasis added [by the judge]).*

iii. *"The factors militating in favour of publicity have to be weighed together with the desirability of preserving the confidentiality of the original arbitration and its subject-matter" (at [40]).*

iv. *A party inviting the court to protect evidently confidential information about a dispute must not necessarily prove positive detriment, beyond the undermining of its expectation that the subject-matter would be confidential (at [46]).*

Moulder J determined that publication of the Merits Judgment would not lead to the disclosure of *"significant confidential information"*, noting (at [14]) that the only confidential information that would be disclosed was the existence of the dispute and the arbitration. In circumstances where it was already public knowledge that the underlying investigation (into alleged breaches of the PL Rules) was taking place, and where there was nothing about the details of the underlying dispute in the Merits Judgment, the expectation of the parties of confidentiality in arbitration was a factor to be taken into account, but not determinative – even where both parties were opposed to publication. As to whether publication would result in real prejudice or significant detriment to City, the Judge's conclusion was that where such investigation into an alleged breach of the PL Rules was already public knowledge, even if it attracted media interest, it was difficult to see any real prejudice from disclosure of the existence of the dispute itself, particularly where the substantive details of the underlying dispute are absent from the Merits Judgment.

Concluding her judgment, Moulder J stated that it was desirable for any judgment to be made public in order to ensure public scrutiny and the transparent administration of justice, provided this could be done *"without disclosing significant confidential information"*. In this regard, the judge explained that the confidential nature of arbitration had to be weighed

against the public interest in ensuring appropriate standards of fairness in the conduct of arbitrations, and that – in this instance – the desirability of public scrutiny and the transparent administration of justice outweighed any competing considerations against publication, so that the Merits Judgment (and the Publication Judgment, by corollary) ought to be published.

The Appeal

Having been refused permission to appeal by Moulder J, City sought and obtained permission to appeal from Males LJ in April 2021, on two grounds. First, that the Judge erred by ordering publication of the Judgments; and Second, in the alternative, that the Judge erred by failing to stay publication of the Judgments pending the conclusion of the PL's investigation. The PL offered conditional support for City's position, stating that any order as to privacy should be subject to an exception, that the PL should be entitled to rely upon the Merits Judgment in other relevant proceedings between it and other member clubs, and to disclose it to such other member clubs as a clear confirmation by the Commercial Court that the PL is entitled to bring specific performance proccedings against member clubs under Section X of the PL Rules.

A Senior Court of Appeal (Sir Geoffrey Vos MR, Sir Julian Flaux C, Males LJ) dismissed the appeal, adjudging that Moulder J had made *"the correct evaluative assessment in ordering that the Merits Judgment and the Publication Judgment should be published"*. The Chancellor (giving the lead judgment with which both the Master of the Rolls and Males LJ agreed) explained the Court's *"series of inter-related reasons"* for dismissing the appeal as follows:

- First, publication of the Judgments would not lead to disclosure of significant confidential information. What was to be disclosed consisted of little more than the existence of the dispute and the arbitration *"in circumstances where it is already public knowledge that the underlying investigation by the PL is taking place"* and where the Merits Judgment itself did not disclose *"any details of the substance of the underlying disclosure dispute"*.

- Second, the Court declared itself *"unimpressed"* with City's argument that publication was not in the public interest because the club's complaint was specific to City's case. As the Chancellor explained: *"there is a legitimate public interest in how disputes between the PL and member clubs are resolved"*, citing, also, the recent judgment of HHJ Pelling QC in *Newcastle United FC v The FA* [2021] EWHC 450 (Comm), where the judge noted the public interest in an application under s.24 AA 1996 (dealing with an allegation of apparent bias) because *"there is a public interest in maintaining appropriate standards of fairness in the conduct of arbitrations"*.

- Third, the fact that both sides opposed publication was *"of some weight"*, but actually required the Court to be careful *"not simply to accept the parties' wishes without scrutiny"*.

- Fourth, insofar as the Merits Judgment confirmed the entitlement of the PL to claim specific performance against member clubs, this was *"of public interest and significance"*, a point indeed underlined by the 'condition' that the PL had attached to its support for the appeal (that it should be entitled to rely on the Merits Judgment in other arbitration proceedings against other member clubs). Insofar as the parties had an interest in confidentiality, this was *"far outweighed by the public interest in the publication of an important judgment on the scope of Section X of the [PL] Rules"*. Whereas the PL's desire to have *"the best of both worlds"* was commercially understandable, such desire was an *"eloquent demonstration as to why publication of the Merits Judgment is in the public interest"*.

- Finally, City's contention that publication would cause it prejudice or detriment was to be treated with *"considerable scepticism"*. The suggestion that press interest or speculation might disrupt the investigation or arbitration – both of which were being conducted by *"experienced professionals"* – was *"entirely fanciful"*. The similar suggestion that speculation and press comment might damage the club's relations with commercial partners was deemed *"unconvincing"*, given that any commercial partner would conduct its own due diligence, which would reveal the existence of the investigation and the dispute.

Adding a short additional judgment of his own, Males LJ underscored the particular public interest in judgments where the court exercises its jurisdiction to set aside or remit awards for substantial irregularity under s.68 of the 1996 Act:

> *65. More generally, it seems to me that public scrutiny of the way in which the court exercises its jurisdiction to set aside or remit awards for substantial irregularity under section 68 of the 1996 Act is itself in the public interest. In City of Moscow Mance LJ addressed a concern that publication of judgments would upset the confidence of the*

> *business community in English arbitration. He was sceptical about the extent to which, if at all, this would be so. I share his scepticism, for two reasons. First, the business community will see that, just as in this case, Commercial Court judges can be trusted to ensure that genuinely confidential information is not published. Second, publication of such judgments will confirm the pro-arbitration stance consistently taken by the English courts and thus will enhance the confidence of the business community in English arbitration. It will demonstrate that the section 68 gateway is a very narrow one, not only in theory but in practice, and that it is only in cases of real injustice that arbitral awards can be successfully challenged in the English courts.*

Males LJ concluded his judgment with the following pointed observation – in relation to the delays in the investigation itself – as a further support for publication:

> *66. Finally, the Club has been anxious to emphasise before us that "the arbitral proceedings relate to an ongoing and confidential investigatory and disciplinary process which is still in its early stages", and that it may be that no charges will ever be brought against it. While that may be true, it seems to me that this is, if anything, a factor which tells in favour of publication. This is an investigation which commenced in December 2018. It is surprising, and a matter of legitimate public concern, that so little progress has been made after two and a half years -- during which, it may be noted, the Club has twice been crowned as Premier League champions.*

Analysis

Whilst the Court of Appeal's judgment must to a large extent be confined to the particular facts of the case – and the rather unusual way in which the issues therein reached the Court of Appeal – it nevertheless contains important guidance for sports law practitioners as to when the courts will be prepared to intervene to remove the cloak of confidentiality from sports arbitrations.

First, where the matters in issue are already – to a greater or lesser extent – public knowledge, and where publication of significant confidential information can be avoided, the confidentiality of the arbitral proceedings themselves is not to be presumed. This is particularly the case where the matters in issue relate directly to the manner in which disputes involving sporting bodies (such as the PL) are resolved. Indeed, conceptually, it is difficult to see why such principle should only be confined to the largest and best-known sporting bodies such as the PL, and might not – also – apply in respect of smaller, or lesser-known, bodies whose decisions and decision-making processes might be of public interest (and indeed could conceivably 'affect' more participants than the rarefied populace of PL clubs).

Second, and more generally, the Court of Appeal's judgment underlines the particular public interest that is likely to be found in relation to s.68 challenges. Given the proliferation of such challenges in sports arbitration, this judgment constitutes a warning to parties in sporting disputes and sports law practitioners alike: challenges for bias or apparent bias under s.68 open the door to publication in a way which might never have been envisaged – or intended – by the parties at the commencement of the arbitral proceedings.

The judgment of the Court of Appeal constitutes the latest in a series of recent decisions in a sporting context where publication has been ordered, despite the ostensible confidentiality of proceedings.

In *Premier Rugby Limited v Saracens Limited* [SR/201/2019], the decision of the tribunal, chaired by Lord Dyson, was published despite regulation 16.1 of the Premiership Rugby Salary Cap Regulations providing for confidentiality (the parties eventually agreeing to publication of the decision in light of the pronounced media interest in the case). More recently still, in *Barnsley Football Club Limited v Hull City Tigers Limited*, the arbitral tribunal assented to Hull's request that the award (in relation to a transfer agreement) be made public, despite there being no obligation to publish under the relevant EFL Rules, and notwithstanding a series of objections by Barnsley to publication.

Whereas the Court of Appeal's decision in *Manchester City v The Premier League* cannot properly be deemed to signify a 'trend' in sports arbitration in favour of publication, the ever-growing public interest in off-the-field developments and decision-making *within* sport is, perhaps, an indicator of a direction of travel, towards publication where appropriate. What is undoubtedly clear – as reiterated by the Court of Appeal – is that parties in sporting arbitrations presume confidentiality at their peril:– even where both parties might wish to preserve it.

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