English Court applies the principles of Halliburton on arbitration bias and the confidentiality of arbitration claims

By Chris Parker and Vanessa Naish

Introduction

In *Newcastle United Football Company Limited v The Football Association Premier League Limited* [2021] EWHC 349 (Comm), the English Commercial Court dismissed an application to remove an arbitrator under s24 of the Arbitration Act 1996 (the **Act**). In doing so, it provided valuable insight into how the principles on arbitrator bias set out in *Halliburton Co v Chubb Bermuda Insurance Ltd* [2020] UKSC 48 are to be applied in practice, including the relevance of the IBA Guidelines in objectively assessing potential bias. The court also considered the circumstances when it may be appropriate to deviate from the default position under CPR62.10(3) that arbitration claims should be heard in private, ultimately directing that the hearing should be in private, but later ordering that the judgment should be published in an un-anonymised and un-redacted form. The decision to publish the judgment was handed down in a separate judgment, *Newcastle United Football Company Limited v The Football Association Premier League Limited* [2021] EWHC 450 (Comm).

Background

The dispute between Newcastle United Football Company Limited (**NUFC**) and The Football Association Premier League Limited (**PLL**) arose in relation to the proposed sale of NUFC shares to a company which was allegedly ultimately controlled by the Kingdom of Saudi Arabia (**KSA**).

As a shareholder of PLL, NUFC is bound by the Rules of the PLL. Section F of the Rules requires PLL to disqualify individuals and entities from acting as directors, or propose the appointment of particular directors of member clubs in certain defined circumstances. In June 2020 PLL informed NUFC that as a result of the share sale KSA would become a Director of NUFC because of its ultimate control over the purchasing company. NUFC disagreed with PLL on this point (specifically with reference to the definitions contained within Section A of the Rules) and commenced arbitral proceedings against PLL in September 2020 under the arbitration code contained within the Rules.

In October 2020 NUFC and PLL nominated their party-appointed arbitrators who then appointed the Chair (the second defendant), known as "MB". On 9 October MB confirmed that no circumstances existed that gave rise to justifiable doubts as to his impartiality.

On 23 October PLL's lawyers informed NUFC's lawyers of a number of matters that had not been disclosed by MB. These included that:

- MB had advised PLL four times in the past (although all more than two years before his appointment in the arbitration). This included giving advice to PLL in March 2017 (more than three years before the appointment) on potential changes to section F of the Rules.
- In the last three years PLL's lawyers had been involved in 12 arbitrations in which MB was an arbitrator. MB had been appointed by that law firm in three of those arbitrations (of which two were after the appointment in question).

NUFC argued that this information should have been disclosed by MB upon appointment, and invited MB to recuse himself. MB declined to do so, giving reasons.

On 28 October, MB then emailed PLL's lawyers (not copying NUFC's lawyers) asking for permission to disclose that the earlier advice he had given on the Rules was not on Section A, which was the focus of this arbitration. MB also asked PLL and their lawyers whether they were happy for him to continue acting as Arbitrator and asked whether a directions hearing that was scheduled should proceed. When PLL's lawyers responded, they informed MB that they intended to send NUFC's lawyers a copy of the email correspondence. MB then said that he would inform them of the emails himself (and that PLL's lawyers could disclose them

if requested). MB did so, confirming that the earlier advice related to Section A and that he would not recuse himself. PLL's lawyers then wrote to NUFC's lawyers, providing copies of the emails and indicating that the PLL would not disclose the privileged earlier advice.

NUFC made an application to the Court under section 24(1)(a) of the Act to remove MB from the arbitral tribunal on the grounds that a fair-minded and informed observer would conclude that there was a real possibility MB was biased, based on (i) his earlier advice on the Section F of the Rules, which may be relevant to the case and, if not, would still mean he had formed a view of Section A; (ii) his other arbitrator appointments by PLL's lawyers; (iii) MB's failure to disclose this information; and (iv) the *ex parte* communications between MB and PLL's lawyers.

Additionally, NUFC requested under CPR 62.10(1) that the hearing of the application take place in public, on the grounds that the existence of the dispute and its subject matter was already in the public domain.

Decision

(i) Confidentiality

The Court rejected the application that the court proceedings be heard in public.

As confirmed in *Halliburton*, the default position under CPR 62.10(3)(b) is that arbitration claims will be heard by the court in private. The fact that the existence of the dispute and its subject matter had already entered the public domain was not a sufficient reason to deviate from this position. This was because "*the detail of the dispute*" which might be raised in the hearing in this application had not entered the public domain.

HHJ Pelling QC stated that public interest in the arbitral proceedings was not a factor in favour of holding the hearing in public. He disagreed with NUFC's argument that PLL had a regulatory role, finding this to be "*from beginning to end*" a private dispute. Concern about public scrutiny may have been one of the reasons for referring the dispute to arbitration in the first place. NUFC's argument that there was a public interest in the legal arguments was also rejected given that no new point of law arose in the case.

HHJ Pelling QC noted that *Halliburton* did not preclude the protection of the identity of the arbitrators from being a relevant consideration as to whether to hold the hearing in private. However, this issue would be material only in exceptional cases. It could be justified "*only in circumstances where identifying the arbitrators would defeat the purpose of maintaining the confidentiality of an arbitration*" or "*for exceptional reasons relating to the arbitrators' right to privacy or their safety*."

While it decided to hold the hearing in private, the Court later allowed publication of the judgment. Applying *Moscow v Bankers Trust* the Court held that there was public interest in maintaining standards in the conduct of arbitration and there was no evidence that any detriment would result from the publication of the judgment.

(ii) Impartiality and duty of disclosure

The Court dismissed the s24 application, concluding that none of the grounds pleaded, whether considered individually or cumulatively, would lead a fair-minded and informed observer, having considered the facts, to conclude that there was a real possibility that MB was biased. In reaching this conclusion, HHJ Pelling QC considered the established test for judging arbitrator bias, recently re-stated by the Supreme Court in *Halliburton* (discussed in our blog post here). In considering whether MB should have made disclosures, he referred to the International Bar Association Guidelines on Conflicts of Interest (the IBA Guidelines), reiterating the position in *Halliburton* that, while not binding, they are a "practical benchmark" against which potential bias can be assessed.

On ground (i), HHJ Pelling QC considered that the dispute submitted to arbitration related to the definitions in Section A of the Rules. There was no suggestion that the tribunal would need to consider Section F (the subject of the earlier advice) in the arbitration. While PLL had claimed privilege over the prior advice, both MB and PLL's lawyers, with considerable professional status, had confirmed in evidence that it did not address Section A. As a consequence, the Court considered that MB's past advice to PLL on the Rules did not create a risk of prejudgment of the issues in the present dispute.

In terms of grounds (ii) and (iii), HHJ Pelling QC observed that the IBA Rules did not mandate the disclosure of this advice, given that it was provided over three years earlier on a different issue. While the two instructions in 2018 should have been disclosed, the instructions did not relate to the issues in the arbitration and did not show an ongoing relationship. In terms of the arbitrator appointments, the Court considered the fact that this was a sports arbitration and that the pool of experienced and qualified arbitrators was smaller. Further, the IBA Guidelines did not require disclosure of the prior appointments of MB by PLL's lawyers because MB had not been appointed by them more than three times in the three years prior

to this arbitration. The Court also noted that MB's appointment in this arbitration was also as chair, rather than as a party appointed arbitrator.

Considering ground (iv) HHJ Pelling QC considered that MB had needed to seek PLL's consent to disclose the earlier advice and, as a consequence, could not be criticised for doing so without copying NUFC's lawyers. However, he observed that MB may have made certain errors of judgment in communicating privately with PLL on the question of his recusal or about the directions hearing. However, given MB's reputation and his willingness for the content of the emails to be shared with NUFC's lawyers, the Court found that, on balance, a fair-mind observer would not conclude there was evidence of a real risk of bias.

Comment

While HHJ Pelling QC considered that the case does not break new ground on either issue, this judgment is the first to apply the principles set out in Halliburton on both confidentiality and arbitrator bias. The case demonstrates the difficulty in demonstrating apparent bias to the satisfaction of the English court and the highly fact-specific approach that will be taken. The decision is a helpful reminder that the court will not allow arbitration claims to be heard in public on the basis of public interest in the dispute.

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