

All's fair in football and arbitration: Court of Appeal orders publication of High Court judgments relating to an arbitration

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The recent judgment handed down by the Court of Appeal (the **CoA**) in [Manchester City Football Club Ltd v The Football Association Premier League Ltd & Others \[2021\] EWCA Civ 1110](#) saw the CoA consider a decision of the Commercial Court concerning publication of a judgment that had rejected applications made under sections 67 and 68 of the Arbitration Act 1996 (the **Act**) following an arbitration between the parties. Manchester City Football Club (**Manchester City**), with the support of the Premier League, appealed the Commercial Court's decision. The appeal concerned the circumstances in which judgments of the Courts on applications under sections 67 and 68 should be published or remain private. The CoA held that there was a legitimate public interest in publishing the judgment and, crucially, that this would not result in significant confidential information being disclosed.

Background

In 2018 a hack of Manchester City's email servers resulted in the publication by the media of confidential emails and financial documents alongside allegations that Manchester City had breached the Union of European Football Association's (**UEFA**) financial fair play (**FFP**) rules, as well as the Premier League's own rules (the **PL Rules**). The Premier League began a disciplinary investigation into Manchester City and, aside from a statement made by the

Premier League where it announced its investigation, both parties had agreed that the investigation process was confidential.

The Premier League requested to be provided with certain information and documents from Manchester City under information gathering powers in the PL Rules which the club objected to. This led to the Premier League commencing arbitral proceedings under the PL Rules in October 2019 to enforce the demand in which the Premier League sought (a) a declaration and/or determination that Manchester City was obliged to provide the Premier League with the requested information and documents; and (b) an order for specific performance. Manchester City challenged the jurisdiction of the Tribunal appointed to determine the proceedings, which rejected that challenge. In June 2020, Manchester City issued arbitration claims in the Commercial Court under sections 67 and 68 of the Act in which it challenged the jurisdiction of the tribunal under the PL Rules (the **Section 67 Challenge**) and also alleged that the tribunal was tainted with apparent bias due to the process for appointment and reappointment to the Premier League's arbitral panel (the **Section 68 Challenge**). The arbitration continued pending the determination of the Section 67 and Section 68 Challenges and the Tribunal rejected Manchester City's arguments and ordered it to produce information and documents. That order

was then stayed pending the Commercial Court's consideration.

Manchester City's application was heard in private in March 2021 where Mrs Justice Moulder dismissed the application in full, finding that the PL Rules permitted "all disputes" to be referred to arbitration and that the allegation of bias 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 (the **Merits Judgment**).

Publication of the Merits Judgment

Upon the Merits Judgment being communicated to the parties, the Judge indicated that she was minded to publish it. This was opposed by both parties (although the opposition from the Premier League was subject to an important caveat, as explained below). The Judge considered the parties' submissions on the matter of publication and held that both the Merits Judgment and that the present judgment should be published (the Publication Judgment). In reaching this decision, the Judge applied the principles set out in *City of Moscow v Bankers Trust* [2004] EWCA Civ 314. She summarised these as:

- 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";*
- 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..." [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";*
- 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.

In considering these, Mrs Justice Moulder concluded that publication of the Merits Judgment would not lead to disclosure of "significant confidential information". Mrs Justice Moulder opined that the only confidential information that would be disclosed was the existence of the dispute and the arbitration. Given that it was already in the public domain that the underlying investigation was taking place, Mrs Justice Moulder did not regard that confidential information to be significant. Furthermore, it was noted that there was no information regarding the underlying dispute contained in the Merits Judgment. The Judge also noted that publication of the Merits Judgment was unlikely to cause prejudice or detriment to Manchester City, even in the face of the likely public comment and press speculation. Mrs Justice Moulder also held that it was desirable for any judgment to be made public in order to ensure public scrutiny and the transparent administration of justice.

The Appeal

Permission to appeal the Publication Judgment was granted by Lord Justice Males on two grounds. The first was that the Judge erred by ordering publication of the Judgments and the second was that the publication of the Judgments should have been stayed pending the conclusion of the underlying investigation. The CoA dismissed the appeal, finding that Mrs Justice

Moulder had made the correct assessment in deciding that both the Merits Judgment and the Publication Judgment should be published. The Chancellor of the High Court, Sir Julian Flaux, in giving the lead judgment, with which both the Master of the Rolls and Lord Justice Males agreed, gave a series of “*inter-related reasons*” for the appeal’s dismissal:

- **Confidential information:** The CoA agreed that publication would not lead to disclosure of significant information. Only the dispute’s existence and the arbitration would be disclosed; the substance of the underlying disclosure dispute would not be disclosed.
- **Public interest:** The Chancellor explained that there was “*a public interest in maintaining appropriate standards of fairness in the conduct of arbitrations*”. The CoA also held that the Premier League’s support of Manchester City’s appeal being contingent on being able to rely on the Merits Judgment in proceedings against other clubs demonstrated the fact that the parties’ interest in confidentiality was far outweighed by public interest in the publication of an important judgment. Where a judgment will be available as a potentially important precedent then it must be available to all. There was also a public interest in the resolution of disputes between the Premier League and member clubs and the reason for the delay in the Premier League’s investigation.
- **Both parties’ objections to publication:** The fact both parties opposed publication was “of some weight” in mitigating against publication but the CoA should also scrutinise the parties’ wishes.
- **Prejudice:** Finally, the CoA held that Manchester City’s argument that any such publication of the judgments would cause it prejudice or detriment should be treated with “*considerable scepticism*”. The suggestion that press interest and speculation might disrupt the investigation or arbitration, both of which were being conducted by experience professionals, was “*fanciful*” and the suggestion that they might damage Manchester City’s relations with commercial partners was “*unconvincing*”

given the fact that any commercial partner would conduct due diligence and learn of the investigation and despite.

Comment

One key advantage often identified in relation to arbitration proceedings is the possibility of keeping the subject matter entirely confidential. However, this case shows the limits of that principle, since if an application to the courts is made in respect of such arbitration proceedings, there is always the possibility of some information becoming publicly available in the form of a published judgment.

Whilst this case specifically concerned a sporting body and a Premier League football club, and a certain degree of the public interest in the case was attributed to the manner in which disputes involving sporting bodies are resolved, this judgment is of broader application and is helpful guidance as to when the Courts will be prepared to publish judgments relating to arbitral applications made in the Courts.

The facts suggest that where the matters in dispute are already public knowledge and, crucially, where publication of significant confidential information can be avoided, then the confidentiality of the arbitration itself should not be presumed.

Finally, it is worth noting that the caveat to the support on the part of the Premier League to the position of Manchester City was that it said that it should remain entitled to rely upon the Merits Judgment in other relevant proceedings between it and other member clubs. In his judgment, Lord Justice Males thought it highly problematic that a judgment to be used for precedent value in future proceedings may be available only to one side in those proceedings which could be said to be highly unfair, stating: “*If the judgment is to be available as a potentially important precedent, it must be available to all.*” This highlights a major difficulty in declining to make public judgments of this type.

[Link to original article here.](#)