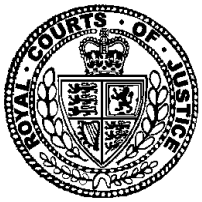

Neutral Citation Number: [2021] EWHC 450 (Comm)

Case No: LM-2020-000206

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (QBD)
IN PRIVATE

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 05/03/2021

Before:

HIS HONOUR JUDGE PELLING QC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between:

NEWCASTLE UNITED FOOTBALL COMPANY LIMITED **Claimant**

- and -

(1) THE FOOTBALL ASSOCIATION PREMIER LEAGUE LIMITED
(2) MICHAEL BELOFF QC
(3) LORD NEUBERGER
(4) LORD DYSON **Defendants**

- -

Ms Shaheed Fatima QC, Mr Nick de Marco QC and Mr Tom Richards (instructed by **Dentons UK and Middle East LLP** for the **Claimant**
Mr Adam Lewis QC and Mr Jason Pobjoy (instructed by **Bird & Bird LLP**) for the **First Defendant**
The Second Defendant in Person (Written Submissions only)
The Third and Fourth Defendants did not appear and were not represented.

Hearing date: 24 February 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE PELLING QC SITTING AS A JUDGE OF THE HIGH COURT

HH Judge Pelling QC :

Introduction

1. The issue that I now have to determine concerns the degree to which if at all the substantive judgment in these proceedings should be published un-anonymised and unredacted (the claimant's preferred position) or not published at all or at any rate not published until after publication of the Final award in the pending arbitration between the claimant ("NUFC") and the first defendant ("PLL") ("the index reference"), as is PLL's preferred outcome. Both parties' fallback positions involve some redaction but NUFC maintains there should in any event be no anonymisation whereas PLL maintains that if the objective of redaction is to be achieved then anonymisation is also necessary. So far as that is concerned, PLL is content to adopt the anonymisation I set out in the draft judgment that I circulated prior to the last hearing with the additional anonymisation to "J" of the English Football League ("EFL") to which the 2017 Advice was provided jointly with PLL. Both parties are content that if I direct anonymisation and redaction, I should create a confidential appendix consisting of the whole of the substantive judgment in its unredacted and un-anonymised form rather than the specific parts removed from the published version. This is obviously sensible.

NUFC's Submissions

2. NUFC submits that the whole of the judgment should be published in an unredacted and un-anonymised form. In support of that submission, Ms Shaheed Fatima QC submits on behalf of NUFC that this follows as a matter of established general principle, which she argues is to be found in two recent authorities, which apply earlier authorities to broadly similar effect. Her broad submission is that the substantive judgment does not contain significant confidential information and so should be published without either redaction or anonymisation.

PLL's Submissions

3. PLL submits that the judgment ought not to be published or at any rate consideration as to whether it should be published should be postponed until after the arbitration has been concluded because:

    i) Even with very significant redaction and anonymisation, there remains a real risk that an informed member of the public and/or the press would know precisely who the parties are, and what this judgment concerns;

    ii) The risk referred to in (i) is heightened by the fact that there is limited material in the public domain that would make the linking of the judgment to the dispute and the parties to it much easier than would otherwise be the case;

    iii) Once the judgment is identified as being concerned with the dispute, that will result in much more material entering the public domain than would otherwise be the case; and

    iv) There is no countervailing public interest that justifies publication because:

a) No new point of law or practice arises or is considered in the judgment;

b) The extent of the redaction that would be necessary to eliminate all reference to "*significant confidential material"* that is not already in the public domain would be such as to render the judgment incomprehensible and thus destroy any value that might be obtained from the judgment as an example of the application of established principle to particular facts; and

c) NUFC has not demonstrated any legitimate reason for wanting the judgment to be published.

In relation to (iii) above it is worth highlighting at this stage that the result for which PLL contends would only occur if there was within the judgment "*significant confidential material"* (as to which see paragraph 8(ii) below) that is not already in the public domain.

Applicable principles

4. The principal authority on which Ms Fatima QC relies is City of Moscow v. Bankers Trust Co [2004] EWCA Civ 314; [2005] QB 207, which was an appeal from a refusal by a Commercial Court Judge to permit publication of a judgment in an arbitration claim. The Court of Appeal permitted the publication of a summary of the judgment by Lawtel which did not disclose any sensitive or confidential information but otherwise upheld the decision of the judge. The Court of Appeal judgment sets out the principles that apply both to deciding whether an arbitration claim hearing should be heard in private and whether the resulting judgment should be published other than to the parties. I referred to that judgment in my substantive judgment when deciding that the hearing should take place in private.

5. Before turning to the points of principle set out in City of Moscow v. Bankers Trust Co (ibid.), it is important to remember that that case was concerned with an arbitration claim brought under s.68 of the Arbitration Act 1996 after publication of the arbitral award to which that case related. In this case, the arbitral proceedings have not got further than the appointment of a panel. That is a material distinction relied on by PLL because it submits that makes the issues of confidentiality that arise more sensitive than may be the position after completion of the arbitral process. In my judgment, whilst the distinction is a valid one to bear in mind, whether it is material in any particular case will itself be fact sensitive and will depend on what is said to be the significant confidential information that would emerge from the publication of the judgment in an un-anonymised and unredacted form.

6. Two other preliminary points need to be mentioned at this stage. Firstly, NUFC relies on the fact that the substantive first instance judgment in City of Moscow v. Bankers Trust Co (ibid.) contained "*... material of a highly sensitive nature both politically and commercially ..."* – see paragraph 9 of Mance LJ's judgment. It maintains that that elevates that case into a different category of sensitivity from this case. I return to that point later in this judgment. I reject however any implicit suggestion that it is only where such material is to be found in a judgment that publication other than to the parties will be refused.

7. Finally, whilst City of Moscow v. Bankers Trust Co (ibid.) contains a comprehensive summary of the general principles leading to court proceedings generally taking place in public, it is not necessary that I refer to them further in this judgment. I have summarised the law in this area as it relates to arbitration claims in paragraph 16-18 of my substantive judgment and I do not understand either party to contend that my summary of the applicable general principles is wrong. I don't intend to repeat the same summary. I incorporate it by reference into this judgment and apply it as necessary below. That said, this judgment is concerned with the publication of a judgment rather than the conduct of a hearing and in that context it is necessary at this stage to note two points emphasised in the Vice-Chancellor's judgment in that case – first that a greater need for imposing a requirement for confidentiality must be shown before it is decided not to publish a judgment – see paragraph 56 – and secondly that the weight of the onus resting on the party seeking to keep from the public the judge's reasons for the order he has made is a heavy one – see paragraph 57.

8. With these preliminaries put to one side, the following general principles are set out principally in the judgment of Mance LJ in relation to the publication of judgments following a private hearing of an arbitration claim. In summary:

   i) The starting point in relation to a hearing, although relevant to determining what should be done in respect of a judgment, is not determinative and there is a clear distinction to be maintained between the considerations governing a hearing and those governing the resulting judgment or order – see City of Moscow v. Bankers Trust Co (ibid.) *per* Mance LJ at paragraph 37 - because a reasoned judgment following a hearing in private of an arbitration claim stands at a different point in the spectrum to the hearing itself (as to which see (iv) below) and so raises different considerations – see City of Moscow v. Bankers Trust Co (ibid.) *per* Mance LJ at paragraph 43 and the Vice Chancellor's judgment at paragraphs 56-57;

   ii) The judgment should be given in public where this can be done without disclosing significant confidential information or can be done so by suitable anonymisation and/or redaction - see City of Moscow v. Bankers Trust Co (ibid.) *per* Mance LJ at paragraph 39 and 40;

   iii) The desirability of a public judgment is particularly present where a judgment involves points of law or practice which may offer future guidance to lawyers or practitioners or where the judgment concerns a claim under s.68 of the Arbitration Act 1996 because of the public interest engaged in such cases of maintaining appropriate standards of fairness in the conduct of arbitrations - see City of Moscow v. Bankers Trust Co (ibid.) *per* Mance LJ at paragraph 39;

   iv) A party seeking to maintain privacy in the context of an arbitration claim does not have to prove positive detriment beyond the undermining of its expectation that the subject matter would be confidential - see City of Moscow v. Bankers Trust Co (ibid.) *per* Mance LJ at paragraph 46;

   v) 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 bearing in mind the spectrum between the arbitration itself at one

end and a reasoned judgment under s.68 at the other - see City of Moscow v. Bankers Trust Co (ibid.) *per* Mance LJ at paragraph 40; and

vi) When weighing the factors, a judge has to consider primarily the interests of the parties in the litigation under consideration, and the concerns and fears of other parties cannot be the dominant consideration – see City of Moscow v. Bankers Trust Co (ibid.) *per* Mance LJ at paragraph 41.

In relation to (iii) above, I consider that the public interest in maintaining appropriate standards of fairness in the conduct of arbitrations that arises or may arise in relation to s.68 claims applies with equal force to s.24 claims.

9. The other authority relied on by NUFC is Symbion Power LLC v. Venco Imtiaz Construction Company [2017] EWHC 348 (TCC). This too was a s.68 challenge based on an allegation that the tribunal had failed to deal with all the issues that were put to it. NUFC relies upon it as authority for the proposition that any expectation of privacy disappears when the existence of an arbitration and the issues it is to determine are in the public domain. In my judgment that case is not authority for such a widely formulated proposition not least because in any case where it is alleged that information has entered the public domain it will be a fact sensitive question whether in consequence the party seeking to assert that privacy be maintained has lost any expectation that the subject matter of the arbitration would be confidential.

10. The facts of that case are markedly different from the facts of this case. In that case the relevant Award was in the public domain because of enforcement proceedings commenced in the United States of America which had been publicised on a legal website. It was this that led the party seeking publication to argue that there was no expectation of confidentiality in the award. The judge appears to have accepted that submission and directed publication without redaction or anonymisation on the basis that no evidence had been filed that demonstrated a positive detriment – see paragraph 94 of the judgment. Although it is not entirely clear, the judge appears to have accepted the premise of the submission that any expectation of privacy had been lost and to have concluded that non anonymisation could therefore be justified in the absence of proof of positive detriment from non-anonymised publication.

Discussion and conclusions

11. At the heart of NUFC's submissions is the proposition that there is such a quantity of material in the public domain concerning the arbitration, the parties to it and the substance of the issue to be determined in the arbitration as to destroy what would otherwise be a substantial factor in the evaluation exercise namely PLL's expectation that the subject matter of the arbitration would be and remain confidential.

12. This led me to ask NUFC's counsel to identify the publicly available material on which she relied as demonstrating that the substance of the dispute was in the public domain. The principal article on which she relied was an article published in Mail online on 13 August 2020 – that is 2 months after PLL had sent to NUFC its decision letter giving rise to the dispute and just short of a month before NUFC referred the dispute to arbitration. Thus by definition that article cannot and does not reveal the existence of the arbitration or the parties to it or the issues that have been referred. I return to the article in more detail below.

13. The other article relied on by NUFC was published on 14 August 2020 (thus broadly in the same timeline as the Mail online article) by Sky Sports. The substance of the article consists of the reproduction of part of a letter sent by the PLL's chief executive to Ms Chi Onwurah MP, the MP for Newcastle Central. It identifies Public Investment Fund ("PIF") and the Kingdom of Saudi Arabia ("KSA") by name and identifies the issue between NUFC and PLL as being whether the KSA would have control over NUFC. The article records that PLL offered to refer the dispute concerning control to arbitration but that offer was refused by NUFC and those interested in acquiring NUFC. Although I have not referred to this event in the substantive judgment because it is not material to the issues that arise, it is not in dispute. There is no reference to the terms of the decision letter or the reasons for PLL's decision and it does not refer at all to the reasons why NUFC rejects that reasoning. There is no suggestion that the parties were about to arbitrate (the only reference to arbitration being to the refusal by NUFC of the offer to arbitrate made by PLL in June 2020) because, as I have said, NUFC had not at that stage referred the dispute to arbitration.

14. On an assumed spectrum, the publicity that NUFC relies on in this case is close to the polar opposite of the entry into the public domain of the Award in Symbion Power LLC v. Venco Imtiaz Construction Company (ibid.). That said all the principal parties to the dispute – NUFC, PLL, PIF and KSA are all identified by name in the articles in relation to the dispute that exists between NUFC and PLL. It is common ground that the second to fourth defendants are not themselves entitled to have their names anonymised and they do not seek any such order. They are in effect neutral on the issue other than to the extent that they contend through the second defendant that they should each be treated in the same way. I do not understand it to be contended that PLL's Rules are confidential either.

15. In those circumstances, it is difficult to see how anonymisation can be regarded as necessary unless for the purpose of avoiding significant confidential information entering the public domain because publication of the judgment without anonymisation will enable interested readers to link the information in the judgment to the dispute as summarised in the articles I have mentioned. I return to that issue having considered whether publication of the judgment would involve disclosing significant confidential information.

16. The facts and matters that will enter the public domain if the judgment is published that are not there currently will be:

    i) The terms of the decision letter;

    ii) That NUFC disputes the conclusions reached by PLL as expressed in the decision letter and the lawfulness of the process by which PLL arrived at that decision;

    iii) That on 10 September 2020, NUFC referred the dispute to arbitration in accordance with the Arbitration Code within PLL's Rules;

iv) That the third and fourth defendants were appointed arbitrators by NUFC and PLL respectively and that the third and fourth defendants appointed the second defendant as the chair of the arbitral tribunal;

v) That a dispute arose between NUFC and both the second defendant and PLL concerning the impartiality of the second defendant and the facts and matters giving rise to that dispute;

vi) That in March 2017 the second defendant was instructed by PLL and EFL to advise concerning a potential amendment to Section F of PLL's Rules and that the 2017 Advice provided did not relate to the definitions of "*Director*" and/or "*Control*" within Section A of PLL's Rules; and

vii) That PLL was not prepared to waive privilege in relation to the 2017 Advice.

17. It is difficult to see how any of this material can be characterised as "*significant confidential information*". The decision letter by its nature is not of itself confidential at all. That there is a dispute between NUFC and PLL concerning that decision is in the public domain as is apparent from the articles referred to earlier. The headline in the Mail online article refers to the acquisition having "*collapsed because of concerns the Saudi Arabian state would control the club*…". In the text the dispute was summarised as being " … *an impasse, with [PLL] refusing to recognise the Saudi Arabia PIF as different to or independent from the state, given that its chairman, Mohammed bin Salman, is also the de facto head of Saudi Arabia.*" The Sky News article quotes extensively from a letter sent by the chief executive of the PLL to Ms Chi Onwurah MP in these terms:

> "… In June, the Premier League board made a clear determination as to which entities it believed would have control over the club following the proposed acquisition, in accordance with the Premier League rules.
>
> Subsequently, the Premier League then asked each such person or entity to provide the Premier League with additional information, which would then have been used to consider the assessment of any possible disqualifying events. …
>
> In this matter, the consortium disagreed with the Premier League's determination that one entity would fall within the criteria requiring the provision of this information.
>
> The Premier League recognised this dispute, and offered the consortium the ability to have the matter determined by an independent arbitral tribunal if it wished to challenge the conclusion of the board. …
>
> The consortium chose not to take up that offer, but nor did it procure the provision of the additional information. Later, it [or PIF specifically] voluntarily withdrew from the process."

18. The existence of the March 2017 Advice is not currently in the public domain but there is an obvious distinction to be drawn between its existence and its contents. The contents of the Advice are not set out in or summarised in the judgment other than to the extent that PLL by its solicitors authorised. Whilst the contents of the Advice may be significantly confidential, that PLL and EFL had sought and the second defendant had given the Advice in March 2017 is at least less so. PLL could have but has not produced any evidence demonstrating any positive detriment that it will suffer as a result of those facts entering the public domain and for that reason I conclude that there will be none.

19. It remains the case however that the identity of any of the arbitrators appointed or by whom they were appointed is not in the public domain. Since parties enter into arbitration agreements in expectation that the whole process will be confidential, this leads PLL to submit that the judgment should be treated as entirely private or alternatively should be heavily redacted so as to remove most of the section headed background, substantial parts of the correspondence quoted in that section of the judgment, large parts of the part appearing under the heading "*The 2017 Advice*" including the quotations therein from its own Rules (even though those cannot on any view be regarded as confidential in any sense) and large parts of the text of the judgment that follows.

20. I reject PLL's submission. In formulating the substantive judgment I tried to ensure that as much of the detail concerning the underlying dispute as possible did not appear in the judgment, not least because it was immaterial to the issue to be decided. In the result, having re-read the substantive draft judgment following the hearing at which the parties made submissions concerning whether the judgment should be published other than to the parties, I am satisfied that there is nothing significantly confidential within it that expands materially on the information already in the public domain. Where information appears in the judgment that is not currently in the public domain (as to which see paragraphs 18-19 above) it is not "*significant confidential information*". It is simply not correct to say that much more of the detail surrounding the dispute including disputed facts concerning the substantive dispute is to be found in the judgment than is currently in the public domain. The most that can be said is that PLL's decision letter appears in full but as I have said that is not and could not be confidential and even if that is wrong there is no evidence that its publication will cause any positive detriment to it or any of its members. Although it is said that great interest by the public in the subject matter is irrelevant – a point that I accept, applying the principles summarised at paragraph 8(vi) above – that misses the relevant point concerning the public interest, which is that summarised at paragraph 8(iii) above, as expanded in the final three lines of that paragraph.

21. In summary:

    i) There is a public interest in the publication of a judgment determining a s.24 application because there is a public interest in maintaining appropriate standards of fairness in the conduct of arbitrations. That is the interest that could (but does not necessarily) outweigh the importance of arbitral privacy;

    ii) There is no significant confidential information contained in the judgment other than the existence of the arbitration and the parties to it. PLL has not

demonstrated with evidence any positive detriment that it will suffer if the judgment is published unredacted and un-anonymised and so is limited to relying on publication undermining its expectation that the existence of the arbitration and its subject matter would be confidential;

iii) The desirability of preserving the confidentiality of the original arbitration and its subject matter has to be balanced in each case against the factors that suggest publication should be permitted; and

iv) The outcome of that exercise in this case comes down in favour of publishing the judgment because PLL's expectation has been circumscribed by what is in the public domain already, which includes the names of all the relevant participants, because of the absence of any significant confidential information in the judgment and because there is a public interest in publication of judgments determining s.24 applications.

In those circumstances, I consider redaction is not necessary because of the absence of any significant confidential information in the substantive judgment that is not already in the public domain. Anonymisation is not necessary either both for that reason and because the names of all the relevant parties affected by the dispute are in the public domain. Having heard the claim in private, I have come to the firm conclusion that the judgment can and should be published without either any redaction or anonymisation.

Directions

This Judgment and the Substantive Judgment.

22. This judgment will be circulated in draft and will be handed down at the same time as the substantive judgment in its present form unless either party applies for any alternative process to be adopted by no later than 4pm on 3 March 2020.

23. The substantive judgment with all anonymisation removed will be sent to the parties at the same time as a draft of this judgment and will be handed down in that form unless either party applies for any alternative process to be adopted by no later than 4pm on 3 March 2020.

Costs

24. It was agreed that costs would be determined on paper since my determination of the publication issue might impact on that issue. As I indicated in the course of the hearing to determine the publication issues, I direct that:

i) NUFC files and serves it submissions in answer to the first defendant's application for costs by no later than 4pm on Thursday 4 March 2021; and

ii) PLL files and serves its submissions in reply by no later than 4pm on 10 March 2021.

Order

25. The parties are directed to submit a draft order for approval giving effect to the judgments and my decision concerning permission to appeal by 4pm on 4 March 2021. There will be a separate order concerning costs once I have determined PLL's costs application.

Hand Down of the Judgments

26. I direct that this case be listed on Friday 5 March 2021 for the hand down of the judgments. No attendance will be required. If either the claimant or first defendant applies under either paragraph 22 or 23 above, then hand down will be postponed until any such applications have been determined.