Neutral Citation Number: [2021] EWCA Civ 1110

Case Nos: A4/2021/0615 & A4/2021/0617

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
(COMMERCIAL COURT, QBD)
MOULDER J
[2021] EWHC 711 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/07/2021

Before :

SIR GEOFFREY VOS
THE MASTER OF THE ROLLS
- and -
SIR JULIAN FLAUX
THE CHANCELLOR OF THE HIGH COURT
- and -
LORD JUSTICE MALES

- -

Between :

MANCHESTER CITY FOOTBALL CLUB LTD	**Appellant**
- and -	
THE FOOTBALL ASSOCIATION PREMIER LEAGUE LTD & OTHERS	**Respondent**

- -
- -

Lord Pannick QC, Paul Harris QC and David Gregory (instructed by **Clifford Chance LLP**) for the **Appellant**
Adam Lewis QC and Andrew Hunter QC (instructed by **Bird & Bird LLP**) for the **Respondents (by written submissions only)**

Hearing date : Wednesday 30 June 2021

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Approved Judgment

Sir Julian Flaux C:

Introduction

1. Manchester City Football Club Limited ("the Club") appeals, with the permission of Males LJ granted on 14 April 2021, against the Order of Moulder J dated 23 March 2021 that her Merits Judgment and Publication Judgment (as defined hereafter) should be published other than to the parties. The appeal concerns the circumstances in which judgments of the Court on applications under sections 67 and 68 of the Arbitration Act 1996 ("the Arbitration Act") should be published or should remain private, applying the principles set out by this Court in *City of Moscow v Bankers Trust* [2004] EWCA Civ 314; [2005] QB 207 (hereafter *"City of Moscow"*). There is also a preliminary question as to whether, given the terms of the relevant provisions of the Arbitration Act, this Court has jurisdiction to hear the present appeal, permission to appeal against the Order of 23 March 2021 having been refused by the judge.

Factual background

2. The Football Association Premier League Limited ("the PL") is a company in which the shareholders are the clubs playing in the Premier League in a particular season ("the member clubs"). The relationship between the PL and the member clubs is governed by the articles of association and the Rules of the PL ("the Rules").

3. In December 2018, the PL commenced a disciplinary investigation into the Club after allegations about the Club appeared in various European media reports which disclosed details of confidential documents obtained from a hack of the Club's email servers. The PL contends that the media reports contain information suggesting breaches of the Rules by the Club. During the course of its investigation, the PL requested information and documents from the Club (including copies of various documents identified in those media reports) under Rule W.1. The Club objected to disclosure of that material.

4. The allegations in the media reports led to The Union of European Football Associations ("UEFA") commencing on 7 March 2019 a formal investigation into the Club over alleged breaches of UEFA's financial fair play ("FFP") regulations.

5. The following day, 8 March 2019, the PL announced that it had also commenced an investigation into the same allegations, releasing the following statement:

> "The Premier League has previously contacted Manchester City to request information regarding recent allegations and is in ongoing dialogue with the club. The league has detailed financial regulations and strong rules in the areas of academy player recruitment and third-party ownership. We are investigating and will allow Manchester City every opportunity to explain the context and detail surrounding them."

6. Subsequent developments in the UEFA investigation have been widely reported in the media and have been publicly commented on by both the Club and the PL. That investigation initially led to the Club being banned from UEFA's European club competitions for two years as well as being fined €30 million, but the ban was overturned and the fine reduced to €10 million by a tribunal in the Court of Arbitration

for Sport ("CAS") in July 2020. It has been reported that, whilst the CAS tribunal held that the most serious allegations against the Club could either not be proved or were time barred, the reduced fine was upheld on the basis that the Club had breached UEFA's regulations by failing to co-operate with the investigation.

7. Apart from the PL's statement on 8 March 2019, neither the PL nor the Club has publicly commented on the PL's investigation. By a letter dated 18 July 2019 to the Club's then solicitors, the PL's solicitors confirmed that the investigation process was confidential and both parties had made strenuous efforts to ensure that this was so, for example by the use of secure file transfer technology.

8. On 21 August 2019, the PL issued a disciplinary complaint against the Club under Section W seeking disclosure of certain documents and information. A Commission was appointed pursuant to Rule W.21, but its composition and the disciplinary system were challenged by the Club as not sufficiently independent or impartial. Although the PL proposed an ad hoc procedure for the appointment of a new Commission, the Club objected.

9. By a request dated 22 October 2019, the PL then commenced an arbitration against the Club under Section X of the Rules seeking a declaration and/or determination that the Club was obliged to provide the PL with requested documents and information and an order for specific performance of the Club's contractual obligation to deliver up documents and information which were being withheld. Under Rule X.8 then in force, the PL provided a list of people who were on a panel from which arbitrators were to be appointed ("the Panel"). The Club appointed John Machell QC from the Panel and the PL Daniel Alexander QC, and, in accordance with the Rules, the two arbitrators then appointed a chairman, Philip Havers QC.

10. The Club challenged the jurisdiction of the arbitrators, submitting to the tribunal that, on a proper construction of the Rules, the PL had no power to institute a Section X arbitration in respect of its information claim. Accordingly it was submitted that the tribunal lacked substantive jurisdiction and the arbitration could not proceed. It was also submitted that the tribunal did not have the appearance of impartiality.

11. On 6 February 2020, the Rules relating to the disciplinary and dispute resolution procedures were amended at a meeting of the shareholders.

12. By its Award dated 2 June 2020, the arbitration tribunal rejected the Club's challenge to its jurisdiction and impartiality and held that it had substantive jurisdiction to hear the PL's claim and that it did not lack the appearance of impartiality.

13. On 26 June 2020, the Club then issued an application by an Arbitration Claim in the Commercial Court contending that:

    (1) the tribunal lacked jurisdiction because, on the true construction of the Rules, the PL did not have the power to institute the arbitration under Section X ("the Section 67 Challenge");

    (2) the tribunal was tainted with apparent bias due to the process for appointment and reappointment to the Panel from which arbitrators could be appointed to tribunals for arbitrations instituted under Section X ("the Section 68 Challenge"); and

(3) the arbitrators should accordingly be removed under section 24 of the Arbitration Act.

14. Before that application was heard, the arbitration continued. On 24 July 2020, the tribunal rejected the Club's arguments resisting the PL's case that it was under an obligation to provide certain documents and information to the PL. Accordingly, on 2 November 2020, the tribunal ordered the Club to provide certain documents and information to the PL and to make enquiries of third parties. That order was stayed pending the hearing of the Club's application to the Commercial Court.

15. The hearing of the Club's application before the judge on 1 and 2 March 2021 was in private pursuant to CPR 62.10. In her judgment dated 17 March 2021 ("the Merits Judgment") the judge dismissed the application. In relation to the Section 67 Challenge, she concluded that the language of Rule X.2 which permitted "all disputes" to be referred to arbitration is not limited by Section W of the Rules (which concern the powers of the PL to deal with suspected or alleged breaches of the Rules). In relation to the Section 68 Challenge she concluded that applying the decision of the Supreme Court in *Halliburton Company v Chubb Bermuda Insurance Ltd* [2020] UKSC 48 (hereafter *"Halliburton"*), the matters relied on by the Club (the remuneration of the arbitrators from being on the Panel, the process by which they were appointed to the Panel under the Rules and the control by the PL over reappointment, so the arbitrators lacked security of tenure) 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. Accordingly the section 24 application was also dismissed.

16. By her Order dated 17 March 2021, the judge dismissed the Arbitration Claim and refused permission to appeal to the Court of Appeal, giving as her reasons: (i) that the construction issue was decided on the basis of the application of the principles in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; (ii) that there was no other compelling reason for an appeal as the implications for other clubs was limited since as members of the PL they collectively had power to change the Rules and (iii) that the issue of apparent bias had been decided applying the test of general application approved and having regard to the features of arbitration identified by the Supreme Court in *Halliburton*.

The judgment under appeal

17. When the judge sent out the draft of the Merits Judgment to the parties to provide typographical corrections, the covering email indicated that she was minded to publish that judgment. Both parties provided written submissions on the issue of publication and indicated that they were content for the judge to deal with the issue on the papers without the need for a further hearing. Both parties opposed publication, albeit the PL did so subject to an important caveat or condition to which I will return.

18. By the Publication Judgment dated 24 March 2021, the judge rejected those submissions opposing publication and determined that the Merits Judgment should be published. Having set out the parties' submissions, at [11] 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*. It was not suggested by Lord Pannick QC on behalf of the Club that this summary of the principles by the judge was inaccurate:

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" (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]).

19. In the Discussion section of her judgment the judge then considered whether publication would lead to disclosure of "significant confidential information". She noted that the first such piece of confidential information identified by the Club was the existence of a dispute concerning the PL's request for documents and information. The judge considered this could not be considered "significant" confidential information for two reasons. First, as a result of the PL's public statement in March 2019 (as quoted in [5] above), the existence of the investigation had been in the public domain for some time. Whilst it was not in the public domain that the PL had requested documents and information and that the Club had resisted the request, the judge considered that any reasonable reader of the public statement would be likely to infer that the investigation might involve the production of documents and information so that she considered that it was difficult to see how it could be viewed as "significant" confidential information.

20. Second, she considered that the Merits Judgment did not contain any significant details relating to the disclosure dispute: the judgment does not state the nature of the documents and information requested or the significance of those documents and information to the wider investigation and it does not state the outcome of the arbitration other than on procedural matters.

21. The judge said at [14] that the only confidential information that would be disclosed is the existence of the dispute and the arbitration. Where it was already public knowledge that the underlying investigation was taking place, she did not regard that confidential

information as significant. At [15] she noted: "the desirability of preserving the confidentiality of the original arbitration and its subject-matter" referred to at [40] of *City of Moscow*, but said that there was nothing about the details of the underlying dispute in the Merits Judgment. At [16], she said that, whilst the expectation of the parties of confidentiality in arbitration was a factor to be taken into account, it was not determinative, even where both parties are opposed to publication.

22. The judge went on to consider whether publication would result in real prejudice or significant detriment to the Club, whilst accepting that it was not necessary for the Club to prove detriment. She considered that, given that the investigation into the alleged breach of the Rules was already public knowledge, although publication of the Merits Judgment might attract media interest it was difficult to see any detriment. She took into account the Club's legitimate interest in ensuring that a fair procedure was followed and noted that, whilst the Merits Judgment made reference to the PL's submission that the Club's challenge was tactical, it also set out the Club's submissions in response and that neither the tribunal nor the Merits Judgment made such a finding. Whilst the Club may wish to avoid further media attention regarding the investigation, it was difficult to see any real prejudice from disclosure of the existence of the dispute as to production of documents and information.

23. The Club had also submitted that public comment and press speculation would prejudice the future investigation. The judge said it was difficult to see how that could arise when the investigation was carried out by the PL, which was already privy to the information said to be confidential and should a Commission or Appeal Board be appointed under the Rules as now amended those appointments were made by a senior judicial figure. If the matter went to arbitration, the arbitrators had each to be a "Suitably Qualified Person", that is a barrister or solicitor of 10 years standing and "independent of the party appointing him and able to render an impartial decision" (Rule X.10). The judge could not see how public comment or press speculation would undermine the independence of these individuals and prejudice the future investigation.

24. In conclusion at [19], the judge said it was desirable for any judgment to be made public in order to ensure public scrutiny and the transparent administration of justice providing "this can be done without disclosing significant confidential information". The confidential nature of arbitration had to be weighed against the public interest in ensuring appropriate standards of fairness in the conduct of arbitrations. She concluded at [20]-[21] that the desirability of public scrutiny and the transparent administration of justice outweighed the competing considerations against publication so that the Merits Judgment ought to be published.

25. On 26 March 2021, the judge refused permission to appeal against the Publication Judgment. She held that she had applied the principles in *City of Moscow* and neither taken account of irrelevant matters nor failed to take account of relevant matters. She said at [14] that in her view the Club had a right to make an application for permission to appeal against the Publication Judgment to the Court of Appeal, because it was neither an appeal under section 67 nor section 68 of the Arbitration Act which would be precluded by the terms of respectively section 67(4) and section 68(4). The policy considerations of finality of arbitration did not appear relevant to the separate issue of publication of a judgment and the appeal would not be concerned with the substantive issue dealt with in the Merits Judgment. There was some support for this conclusion from the authorities relied upon by the Club.

26. The judge granted a stay for seven days so that the Club could make an application for permission to appeal to the Court of Appeal.

The grounds of appeal

27. The Club puts forward two grounds of appeal:

    i) First, the Judge erred by ordering the publication of the Judgments.

    ii) Second, in the alternative, the Judge erred by failing to stay publication of the Judgments pending the conclusion of the PL's investigation.

28. On 20 April 2021, Males LJ granted permission to appeal on both grounds on the assumption that the Court of Appeal had jurisdiction to do so, saying that whether the Court of Appeal had such jurisdiction was a point of general importance which it was appropriate for this Court to consider. He also ordered that the appeal should be heard in private, that the papers in the appeal should be confidential and not made available to anyone other than the parties and he continued the stay on publication granted by the judge until the conclusion of the appeal.

29. In the circumstances, I will consider first the issue of jurisdiction. Before doing so, I should refer to the fact that, on the eve of the hearing of the appeal, Associated Newspapers Limited (publishers of the Mail on Sunday) made an application for one of their journalists, Mr Dan Matthews, to be present at the hearing and to be provided with copies of the judgments of Moulder J and the parties' skeleton arguments, to enable them to understand and to scrutinise the process of the Court. Lord Pannick QC resisted this application on the basis that the hearing was in private and the subject-matter was confidential. However, we acceded to the application, upon Associated Newspapers Limited and Mr Mathews giving undertakings (which they were willing to give) not to publish or disclose the judgments or the skeleton arguments without further Order of the Court and on the basis that the hearing of the appeal remained private.

Jurisdiction

30. The consequence of the judge's refusal of permission to appeal against the Merits Judgment in her Order of 17 March 2021 was that this Court has no jurisdiction to entertain an appeal against the Merits Judgment. This is the effect of sections 67(4), 68(4) and 24(6) of the Arbitration Act, each of which provides: "The leave of the court is required for any appeal from a decision of the court under this section." Lord Phillips MR, giving the leading judgment of the Court of Appeal in *Athletic Union of Constantinople v National Basketball Association (No 2)* [2002] EWCA Civ 830; [2002] 1 WLR 2863, held at [12] that "the court" in the sections means the Commercial Court (which was the court that made the decision in that case) saying:

> "(4) Sections 67, 68 and 69 demonstrate a consistent legislative policy that no appeal shall be made against the decision of a court without the permission of that court. In this respect, there is no logical reason for distinguishing between the effects of sections 67(4) and 68(4) on the one hand, and the effect of section 69(8) on the other hand.

> (5) In reserved judgments, this court has recently unanimously held that, on the true construction of section 69(8), a party who wishes to appeal from the decision of the High Court or the county court on appeal from an arbitration award requires the permission of the High Court or the county court, as the case may be, and that the Court of Appeal has no jurisdiction either to grant permission itself or to review a refusal of the High Court or county court to grant permission: (see *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* [2001] 1 QB 308). Much of the reasoning of Waller LJ, who gave the leading judgment in that case, can be applied to section 67(4)."

31. Lord Pannick QC accepted that the jurisdiction of the Court of Appeal to hear an appeal from a decision under one of those sections was restricted to cases where the Court at first instance had granted permission to appeal, but submitted that the separate issue of an appeal against an Order for publication of the Merits Judgment was not within that restriction for three reasons.

32. First, as a matter of language of the statutory provisions, taking section 67(4) as the example, what was being referred to was an appeal from a decision as to the substantive jurisdiction of the arbitration tribunal under section 67. An appeal against a decision to publish a decision under section 67 was not itself a decision under section 67. Second, this conclusion was supported by the policy reason for the restrictions in each of these sections, which was to limit further appeals because they would lead to delay in the resolution of a dispute decided by arbitration. This policy reason was explained cogently by May LJ in *Amec Civil Engineering Ltd v Secretary of State for Transport* [2005] EWCA Civ 291; [2005] 1 WLR 2339 at [9]:

> "Mr Robert Akenhead QC was appointed arbitrator. He is a specialist leading counsel with wide experience of construction contract matters. He rejected Amec's contentions that he had no jurisdiction because the notice of arbitration was ineffective. He also rejected their contention as to the limited scope of the arbitration. Amec appealed against this decision under section 67 of the 1996 Act. On 11th October 2004, Jackson J, sitting in the Technology and Construction Court, dismissed Amec's appeal in a persuasive judgment. He gave Amec leave to appeal to this court, his leave being a necessary precondition of such an appeal under section 67(4) of the 1996 Act. I am not convinced that he was right to do so. The policy of the 1996 Act does not encourage such further appeals which in general delay the resolution of disputes by the contractual machinery of arbitration. The judge and Mr Akenhead had reached the same conclusion for substantially the same reasons. Their combined experience and authority was, I think, sufficient to conclude the matter without an expensive second appeal."

33. Lord Pannick QC submitted that to recognise that this Court has jurisdiction in respect of the appeal against the Publication Judgment would not impede that policy objective. The appeal would not delay the ongoing arbitration process which would continue to

take place in private. It was not suggested by the PL that the appeal against the Publication Judgment would impede the investigation.

34. Third, Lord Pannick QC submitted that the conclusion that the Court did have jurisdiction to hear this appeal was supported by previous judicial decisions. He relied primarily on the analysis of section 18(1)(g) of the Senior Courts Act 1981 by the House of Lords in *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586. Section 18(1)(g) provides: "No appeal shall lie to the Court of Appeal: …(g) except as provided by Part I of the Arbitration Act 1996 [Part I includes sections 24 and 67 to 69], from any decision of the High Court under that Part."

35. In that case, the defendants applied to stay an action under section 9 of the Arbitration Act on the basis that the parties had agreed to refer the relevant dispute to arbitration. The judge at first instance held that the arbitration agreement was null and void and refused a stay. He also refused leave to appeal on the ground that, under section 18(1)(g) of the Senior Courts Act 1981, the Court of Appeal did not have jurisdiction to entertain an appeal against the grant or refusal of a stay in favour of arbitration. The Court of Appeal granted permission to appeal and allowed the appeal on the basis that the judge should have granted a stay. The House of Lords refused a further appeal, holding that the Court of Appeal had jurisdiction to hear the appeal. Lord Pannick QC referred in particular to what Lord Nicholls of Birkenhead said at 592A-C:

> "I am left in no doubt that, for once, the draftsman slipped up. The sole object of paragraph 37(2) in Schedule 3 was to amend section 18(1)(g) by substituting a new paragraph (g) that would serve the same purpose regarding the Act of 1996 as the original paragraph (g) had served regarding the Act of 1979. The language used was not apt to achieve this result. Given that the intended object of paragraph 37(2) is so plain, the paragraph should be read in a manner which gives effect to the parliamentary intention. Thus the new section 18(1)(g), substituted by paragraph 37(2), should be read as confined to decisions of the High Court under sections of Part I which make provision regarding an appeal from such decisions. In other words, 'from any decision of the High Court under that Part' is to be read as meaning 'from any decision of the High Court under a section in that Part which provides for an appeal from such decision'."

36. Lord Pannick QC also relied on the decision of the Court of Appeal in *Virdee v Virdi* [2003] EWCA Civ 41. In that case, this Court held that it had no jurisdiction in relation to the appointment of arbitrators by the Court under section 18 of the Arbitration Act (subsection (5) of which contains the same limitation on the right of appeal as the sections relied upon here) where the judge had refused permission to appeal. However, it held that it did have jurisdiction in respect of other orders the judge had made as to whether legal representation was allowed and as to costs between the parties, since the relief sought did not fall within any of the sections of the Arbitration Act.

37. Lord Pannick QC recognised that *Virdee* was of little if any precedential value, since only one party was present at the hearing and he was not legally represented. Brooke LJ said at [4]:

> "Given that we have not had the benefit of counsel's arguments on both sides, although we have had access to the material to which I have referred, this case should not be regarded as binding precedent in the sense that, if the matter comes before the court again, the court should not have the opportunity of considering it and hearing full argument on it free from the shackles of precedent. In all the circumstances, however, we must, of course, deal with the point now on the material which is in front of us."

38. Lord Pannick QC also relied upon the decision of the Court of Appeal in *Peel v Coln Park LLP* [2010] EWCA Civ 1602, which was an application for permission to appeal against a refusal by the judge at first instance to extend the 28-day period for challenging an award under section 70(3) of the Arbitration Act. Again that case is of little precedential value since counsel for the respondents conceded that there was jurisdiction to grant permission to appeal, although Longmore LJ thought this must be right saying at [13]:

> "that must be right since section 80(5) of the 1996 Arbitration Act requires that rules of court relating to extending periods of time apply in relation to any time requirement, and so we have the slightly paradoxical situation that, whereas the refusal of the judge at first instance on a matter of substance under section 68 or section 69 cannot be reconsidered by this court, an application of a preliminary nature for extension of time is apparently a matter which can be reconsidered by this court."

39. Citation of those cases provoked a debate between counsel and the Court as to where the line was to be drawn between decisions which would be caught by the limitation on the right of appeal in the relevant section of the Arbitration Act and decisions which would not. Lord Justice Males posited the example of a case management decision about how a section 68 application should be dealt with. As I said at the time, that would seem to be an example of something which is part of the process of reaching a decision under section 68, so would be caught by the limitation on the right of appeal. The Master of the Rolls suggested to Lord Pannick QC that a consequential decision on a section 68 application, for example as to costs, would also be caught by the limitation.

40. Lord Pannick QC made it clear that he was not inviting this Court to lay down any general principles applicable in every case, but only to determine that this Court had jurisdiction to hear the appeal from the Publication Judgment. I agree that it is not necessary for present purposes to determine the more difficult question whether case management decisions either side of the substantive decision under, say, section 67 or 68, for example as to how a hearing is to be conducted or as to costs, would be caught by the limitation in sub-section (4) of each section. Whilst such case management decisions may be said to be part of the process of reaching the substantive decision, the question whether the substantive decision should be published is a distinct question separate from the decision itself. In the present case, the judge's decision that the Merits Judgment and the Publication Judgment should be published was an application of common law principles as set out in the decision of this Court in *City of Moscow*. It was not a decision of the Court under sections 24, 67 or 68 and was, therefore, not caught by the limitation on the right of appeal. In those circumstances, I am satisfied that this

Court has jurisdiction to hear this appeal under section 16 of the Senior Courts Act 1981 and that the restriction in section 18(1)(g) of that Act is not applicable.

The parties' submissions on the appeal

41. In addition to the passages in the judgment of Mance LJ in *City of Moscow* to which the judge referred, Lord Pannick QC referred the Court to [28], [30]-[32] and [34]. For present purposes it is only necessary to set out [32] and [34]:

> "32. The rule makers clearly deduced from the principles of the Arbitration Act 1996 that any court hearing should take place, so far as possible, without undermining the reasons of inter alia privacy and confidentiality for which parties choose to arbitrate in England. Their conclusion in this regard has not been challenged. It may be justified on the simple basis that arbitration represents a special case, in relation to which there has been very considerable development during recent years. An alternative and overlapping consideration is that parties may be deterred from arbitrating or at any rate from invoking the court's supervisory role in relation to arbitration if their understanding regarding arbitral confidentiality and privacy is ignored. I would personally doubt whether it can be said without any positive evidence that the publication that has in the past frequently followed applications to set aside arbitration awards, e.g. for misconduct, has itself been likely to be detrimental to parties' keenness or otherwise to agree to arbitrate in London. But I find it easier to accept that, having arbitrated unsuccessfully here, a party could well be deterred from making an arbitration claim in court if there was a risk that by doing so really confidential matters might be disclosed.
>
> 34. The consideration that parties have elected to arbitrate confidentially and privately cannot dictate the position in respect of arbitration claims brought to court under CPR 62.10. CPR 62.10 therefore only represents a starting point. Such proceedings are no longer consensual. The possibility of pursuing them exists in the public interest. The courts, when called upon to exercise the supervisory role assigned to them under the Arbitration Act 1996, are acting as a branch of the state, not as a mere extension of the consensual arbitral process. Nevertheless, they are acting in the public interest to facilitate the fairness and well-being of a consensual method of dispute resolution, and both the Rule Committee and the courts can still take into account the parties' expectations regarding privacy and confidentiality when agreeing to arbitrate."

42. Lord Pannick QC accepted that the judgment of Mance LJ demonstrates that, in each case, in considering whether a judgment should be published, it is a question of weighing confidentiality and any detriment to the parties from publication against the public interest in publication, particularly where the judgment raises matters of some general importance.

43. He submitted that the circumstances in which an appellate court can interfere with an evaluative judgment by a lower court are accurately set out by Lord Carnwath JSC in *R (AR) v Chief Constable of Greater Manchester police* [2018] UKSC 47; [2018] 1 WLR 4079 at [64]:

> "In conclusion, the references cited above show clearly in my view that to limit intervention to a "significant error of principle" is too narrow an approach, at least if it is taken as implying that the appellate court has to point to a specific principle - whether of law, policy or practice - which has been infringed by the judgment of the court below. The decision may be wrong, not because of some specific error of principle in that narrow sense, but because of an identifiable flaw in the judge's reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion. However, it is equally clear that, for the decision to be "wrong" under CPR 52.11(3), it is not enough that the appellate court might have arrived at a different evaluation. As Elias LJ said (*R (C) v Secretary of State for Work and Pensions* [2016] EWCA Civ 47; [2016] PTSR 1344, para 34):
>
> > "… the appeal court does not second guess the first instance judge. It does not carry out the balancing task afresh as though it were rehearing the case but must adopt a traditional function of review, asking whether the decision of the judge below was wrong.""

44. Lord Pannick QC submitted that there had been errors of principle by the judge in her evaluation. As she had indicated in refusing permission to appeal the Merits Judgment, she had applied the principles in *Halliburton* and there was no novelty in her decision, so there was no question of the judgment requiring publication.

45. In [5] of his Reasons for granting permission to appeal, Males LJ had said that it was arguable that the question dealt with in the Merits Judgment whether, at least until the Rules changed in February 2020, the system for appointing arbitrators in disputes involving the Premier League was structurally biased, was itself a matter of some public interest telling in favour of publication. Lord Pannick QC sought to counter this by submitting that the judge had decided the issue by applying the principles in *Halliburton* and, in any event, this would only be of historical interest because the Rules had changed and appointment of arbitrators was now made by an independent chair. The Club's complaint had been specific to its case.

46. In relation to her determination that publication would not involve disclosure of significant confidential information, the judge had referred to the public statement by the PL as reported in the Times on 8 March 2019. For completeness, it was pointed out that there had been a recent article in the New York Times on 4 May 2021 about the dispute. This said, inter alia:

> "City [the Club] has spent millions of dollars defending itself since the allegations first emerged. Its lawyers are fighting against the [PL]'s arbitration process, arguing that the club will

> not get a fair hearing, according to documents. The [PL] did not reply to a request for comment."

Essentially the same story was reported in the Mail Online the same day.

47. Lord Pannick QC submitted that, notwithstanding the publication of these three articles, publication of the Merits Judgment would disclose that there was a decision in the arbitration at an early stage, when the parties had a reasonable expectation of confidentiality being maintained. What was not publicly known was that the Club had argued that there was no power to arbitrate the particular dispute under the Rules and that there was apparent bias. All of that was confidential and publication would tell the world what was going on and why, in circumstances where the arbitration was not concluded. Lord Pannick accepted the point made by the judge at [13(ii)] of her judgment, summarised at [20] above, that the Merits Judgment does not contain any significant details of the substance of the disclosure dispute.

48. However he submitted that the judge had not recognised that, contrary to her conclusions at [17] and [18], publication of the Merits Judgment will inevitably lead to extensive press comment and speculation in relation to a matter which had been confidential to date and which the parties were entitled to expect to remain confidential. The press would report whatever they could arising from the judgment and this would be prejudicial to the Club. It was contended that press comment and speculation could be prejudicial to the Club, for example in its dealings with commercial partners. The Club's skeleton argument served on 6 May 2021 referred to it being in advanced negotiations regarding a potential deal, but Lord Pannick QC informed the Court on instructions that this was no longer the case. Such publicity and press speculation could also potentially disrupt the orderly conduct of the investigation by the PL.

49. Lord Pannick QC submitted that the judge had erred in finding that publication would not involve disclosure of significant confidential information and in concluding that the Club would suffer no real detriment from publication. She had placed undue weight on the desirability of public scrutiny and therefore had erred in the performance of the relevant balancing exercise, so that it was open to this Court to interfere.

50. If the Court were against the Club on the first ground of appeal, Lord Pannick QC pursued the second ground, which was that any publication should be stayed until the end of the disciplinary process, which would ensure that any wider public benefit from the publication of the Merits Judgment would accrue, but only at a time when it would not cause the Club and the PL harm in the context of the ongoing proceedings. Contrary to what Males LJ had said at [4] of his Reasons for granting permission to appeal, this alternative argument had been relied upon by the Club before the judge.

51. The Club also relied upon the fact that its appeal is supported by the PL. The PL put in written submissions from Mr Adam Lewis QC and Mr Andrew Hunter QC, but they did not attend the hearing. They contended that the privacy of Section X arbitrations under the Rules was significant and in need of protection, although they recognised that this argument had been run unsuccessfully in the Commercial Court in *Newcastle United Football Club Ltd v The Football Association Premier League* [2021] EWHC 450 (Comm). The PL's argument was that the substantive judgment of HHJ Pelling QC rejecting that club's bias application should not be published, because the arbitration was pending and was confidential and there was no countervailing public interest

justifying publication of the judgment, which raised no new point of law or practice. That argument was rejected by HHJ Pelling QC who ordered publication.

52. The PL's support for the Club's position was conditional, however, on the Club's agreement 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 proceedings against member clubs under Section X of the Rules. The Club had agreed to this condition both before the judge and before this Court.

Discussion

53. In my judgment, the judge made the correct evaluative assessment in ordering that the Merits Judgment and the Publication Judgment should be published, for a series of inter-related reasons.

54. First, I agree with the judge that publication will not lead to disclosure of significant confidential information. What will be disclosed is 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, as the judge said, the reasonable reader of the Times article would assume that the investigation would involve the production by the Club of documents and information. Furthermore, since the judge's judgments, the existence of a dispute and of the arbitration is now in the public domain, as a consequence of the articles in the New York Times and the Mail Online. Specifically it is known that there is an arbitration in progress and that the Club is arguing that it cannot have a fair hearing (which would seem to be a non-lawyer's interpretation of the allegation of apparent bias). Given what is now in the public domain, it is unreal to suggest that what will be disclosed by the publication of the Merits Judgment, namely the challenge to the jurisdiction of the arbitrators and the unsuccessful allegation of apparent bias, is in any sense significant confidential information. What will not be disclosed by the publication is any details of the substance of the underlying disclosure dispute.

55. Second, I was not impressed with Lord Pannick QC's argument that publication was not in the public interest because the Club's complaint was specific to the Club's case and, in any event, the judge had simply applied the principles recently confirmed by the Supreme Court in *Halliburton*. I consider that there is a legitimate public interest in how disputes between the PL and member clubs are resolved and, in particular, in the allegation of structural bias made by the Club which appears to have led to a change in the Rules. As HHJ Pelling QC said at [21] of his judgment in the *Newcastle United* case, there is a public interest in the publication of a judgment determining an application under section 24 of the Arbitration Act (in other words a judgment dealing with an allegation of apparent bias), because there is a public interest in maintaining appropriate standards of fairness in the conduct of arbitrations. This is so even if the judges determining such applications are applying the principles confirmed by *Halliburton* rather than making new law. I also consider that there is a public interest in there being some explanation for the delay in the present case, where the investigation was made public as long ago as March 2019 but has hardly advanced since.

56. Third, the fact that the PL supports the Club's appeal so that both parties to the arbitration are opposed to publication is of some weight, but should lead to the Court being careful not simply to accept the parties' wishes without scrutiny. As Sir Christopher Staughton said in *Ex parte P* (1998) (unreported) (as cited with approval by Lord Woolf MR giving the judgment of this Court in *R v Legal Aid Board ex parte Kaim* Todner [1999] QB 966 at 977, in turn cited by Mance LJ at [20] of *City of Moscow*): "When both sides agreed that information should be kept from the public, that was when the court had to be most vigilant".

57. Fourth, in so far as the Merits Judgment confirms the entitlement of the PL to claim specific performance against member clubs, it is of public interest and significance. This point is confirmed by the condition which the PL has imposed on its support of the appeal, that it should be free to rely on and disclose the Merits Judgment in other arbitration proceedings against other member clubs. This demonstrates that whatever interest the parties have in confidentiality is far outweighed by the public interest in the publication of an important judgment on the scope of Section X of the Rules. This point about the importance of the judgment is put clearly in the PL's own skeleton argument for this appeal at [2]:

> "It is correct that the Merits Judgment turned on the application of the normal rules of construction [of] a contract and the application of the undisputed bias test in *Halliburton* to the uncontested facts. However the specific and clear confirmation in it by the Commercial Court that the PL is entitled to bring specific performance proceedings against a member club under Section X of [the PL Rules] for enforcement of its contractual right to documents (and by parity of reasoning for enforcement of other contractual rights in the PL Rules), is of great significance in the future for the PL, for all member clubs and for practitioners. The PL was concerned before Moulder J, and remains concerned, that absent publication, this important Commercial Court guidance would not be available to those whom it might affect."

58. Whilst the desire of the PL to have the best of both worlds is commercially understandable, it is difficult to envisage a more eloquent demonstration as to why publication of the Merits Judgment is in the public interest.

59. Fifth, I consider that the judge was right to view the Club's case that publication would cause it prejudice or detriment with considerable scepticism. Given what is already in the public domain, disclosure of the existence of the dispute as to production of documents and information could hardly give rise to any prejudice or detriment to the Club. The suggestion that press interest and speculation might disrupt the investigation or the arbitration, where both are being conducted by experienced professionals is entirely fanciful. Likewise the suggestion that press comment and speculation following publication might damage the Club's relations with commercial partners was unconvincing. As Lord Justice Males said during the course of argument, any potential commercial partner with whom the Club might enter a contract would be bound to conduct due diligence, which would reveal the existence of the investigation and the dispute.

60. In all the circumstances, I consider that the judge was entirely correct to order publication of the Merits Judgment so that the first ground of appeal fails. Likewise, given that the public interest in publication outweighed any confidentiality, there was no good reason for deferring publication until after the conclusion of the disciplinary process so that the second ground of appeal also fails. This appeal must be dismissed.

Lord Justice Males:

61. I agree that this appeal must be dismissed for the reasons given by the Chancellor. I add a few comments in view of the interest and importance of this case in ensuring the correct balance between the confidentiality of arbitration proceedings and the principle of open justice for court proceedings.

62. As explained in *City of Moscow*, when considering whether a judgment on an arbitration claim should be published, with or without anonymisation, the court must weigh the factors militating in favour of publicity against the desirability of preserving the confidentiality of the original arbitration and its subject matter. In general, the imperative of open justice, involving as it does the possibility of public scrutiny as a means by which confidence in the courts can be maintained and the administration of justice can be made transparent, will require publication where this can be done without disclosing significant confidential information.

63. In the present case Moulder J weighed the various considerations appropriately. Her conclusion that her judgment should be published was one which she was entitled to reach. It was not, in my view, a marginal decision. On the contrary, bearing in mind the careful way in which the judge expressed herself in the Merits Judgment in order to avoid revealing information about the underlying dispute, the balance here was clearly in favour of publication.

64. That would be so even without the condition imposed by the Premier League that it should be free to rely on and disclose the Merits Judgment in other arbitration proceedings (see [57] above), a condition which the judge did not need to mention in the Publication Judgment (and of which I was not aware when granting permission to appeal). But in my judgment the imposition of that condition is fatal to this appeal. The compromise negotiated between the Club and the Premier League whereby the judgment would not be published, but would be available to the Premier League in the event of disputes with other clubs, is unacceptable. If the judgment is to be available as a potentially important precedent, it must be available to all.

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.

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.

The Master of the Rolls:

67. I agree with both judgments.