

## Legal Briefing

### Ted Lowery discusses a decision not checked by VAR

*Newcastle United Football Company Ltd v The Football Association Premier League Ltd and others* [2021] EWHC 349 (Comm)

Before His Honour Judge Pelling QC

*London Circuit Commercial Court*

Judgment delivered 24 February 2021

#### The facts

By a decision letter dated 12 June 2020 the Football Association Premier League Ltd ('PLL') advised Newcastle United Football Company Ltd ('NUFC') that if the club was purchased by the Saudi Arabian Public Investment Fund, where the latter was state owned, then in accordance with Section A of the PLL's Rules, the Kingdom of Saudi Arabia would become a director of NUFC. NUFC challenged this decision and commenced arbitration pursuant to the PLL's Arbitration Code. On 9 October the arbitrators nominated by NUFC and PLL jointly appointed Michael Beloff QC as chairman.

On 23 October 2020 PLL notified NUFC that over the last three years their solicitors had been involved in 12 arbitrations in which Mr Beloff had been an arbitrator (including three in which he had been nominated by PLL's solicitors) and that more than two years previously Mr Beloff had advised PLL on four occasions including in March 2017 in relation to Section F of the PLL's Rules which concerned director disqualification. Relying on this disclosure NUFC invited Mr Beloff to recuse himself but on 25 October he declined to do so.

On 28 October Mr Beloff exchanged emails with PLL's solicitors that primarily concerned locating the March 2017 advice but included an enquiry as to whether PLL thought he should stand down. At Mr Beloff's request, these exchanges were provided to NUFC on 29 October. On 2 November 2020 PLL indicated that it was not prepared to disclose the March 2017 advice.

On 4 November 2020 NUFC applied to the court to remove Mr Beloff under section 24 of the Arbitration Act 1996 on grounds that there were justifiable doubts as to his impartiality, where Mr Beloff had: (i) previously been retained by PLL to advise on overlapping issues under the PLL Rules; (ii) previously been appointed on three occasions by PLL's solicitors; (iii) initially failed to disclose these matters; and, (iv) engaged in private communications with PLL's solicitors on 28 October.

PLL opposed the application contending that: (i) the March 2017 advice concerning Section F did not relate to any of the issues in the present arbitration; (ii) Mr Beloff had been appointed chairman by his fellow arbitrators and not by PLL's solicitors; (iii) he was not dependent for his income on appointments by PLL's solicitors which were not anyway in excess of IBA Guidelines; and, (iv) the exchanges on 28 October were not in breach of IBA Guidelines and would not create a real possibility of bias.

#### The issue

Was the test for apparent bias satisfied?

#### The decision

The judge found that there was no overlap as the present arbitration was to focus on Section A of the PPL Rules and the March 2017 advice was unlikely to have touched upon Section A issues. He acknowledged that whilst it would have been helpful to see the March 2017 advice, no adverse inference should be drawn from PLL's refusal to waive privilege and there was no evidence to suggest that either PLL's solicitors or Mr Beloff would have misrepresented the contents of the advice.

As to the other arbitral appointments the judge thought that a fair minded and informed observer would not infer a real risk of bias given the small pool of suitably experienced sports arbitrators.

Regarding the 28 October exchanges the judge observed that as the emails were concerned with obtaining privileged information, Mr Beloff could not be criticised for not copying these emails to NUFC. Mr Beloff's unilateral enquiry to PLL about standing down had been an error of judgment but could be explained by the pressure of time and was mitigated by Mr Beloff's request that all emails should be disclosed to NUFC. This did not amount to evidence of a real risk of bias.

Finally, looking at things in the round, given Mr Beloff's limited income from historic and future PLL work, and applying the IBA Guidelines the judge decided that a fair minded and informed observer would not conclude there was a risk of bias.

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### Commentary

This decision has some parallels with construction adjudication where adjudicators with good reputations may be repeatedly nominated by law firms and will often also act as consultants or expert witnesses within a relatively small circle of practitioners. Each case will turn on its own facts but this judgment reinforces the need for adjudicators to make full and early disclosure of previous connections with their nominating solicitors and clients and for the other party to study this information closely and promptly come to a view as to whether or not the nomination is to be opposed on grounds of apparent bias.

Ted Lowery  
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