Client Update

English High Court Gives Guidance on Disclosure and Use of Arbitral Secretaries in Applications to Remove Arbitrators

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In two recently released and anonymised decisions, Popplewell J gave his reasons for dismissing two applications under s.24 (1)(d)(i) of the Arbitration Act 1996 (the "Act"), arising from the same facts, for: (a) disclosure of documents in support of an application to remove two arbitrators ([2017] EWHC 148 (Comm)); and (b) removal of the arbitrators for failing properly to conduct the proceedings ([2017] EWHC 194 (Comm)). The decisions provide important guidance for seeking disclosure in connection with removal applications, and the use of arbitral secretaries in the context of a challenge under s.24 of the 1996 Act.

RELEVANT BACKGROUND

The respondent to the applications, the First Defendant, had commenced arbitration against the applicant, the Claimant, in respect of a dispute arising from a Joint Venture Framework Agreement. The arbitration clause provided for arbitration in accordance with the rules of the London Court of International Arbitration (the "LCIA Rules") with a tribunal of three arbitrators. The second and third respondents (the "Co-Arbitrators") were party-appointed; the Chairman was appointed subsequently. With the agreement of the parties, the Chairman then appointed a further individual as Secretary to the Tribunal (the "Secretary").

The application for removal of the Co-Arbitrators was founded on conduct in relation to three procedural decisions made by the Tribunal. A month or so after the last of these decisions, on 23 March 2016, the Chairman had sent an email that created the trigger for the s.24 application. The email was intended for the Secretary, but was mistakenly sent to a paralegal at the Claimant's lawyers, who had the previous day sent by email a letter to the Tribunal relating to the last procedural decision and seeking an extension of time. The Chairman's

misdirected email, intended for the Secretary, attached the Claimant's lawyer's covering email and asked "*Your reaction to this latest from* [Company1]?"

On 5 May 2016, the Claimant filed a challenge against all three members of the Tribunal seeking to have them removed on five grounds (the "LCIA Challenge"). The Claimant argued that: (1) the Tribunal improperly delegated its role to the Secretary by systematically entrusting the Secretary with tasks beyond what was permissible under the LCIA Rules and the LCIA Policy on the use of arbitral secretaries; (2) the Chairman breached his mandate as an arbitrator and his duty not to delegate by seeking the views of a person who was neither a party to the arbitration nor a member of the Tribunal on substantial procedural issues (*i.e.* the Secretary); (3) the other members of the Tribunal equally breached their mandate as arbitrators and their duty not to delegate by not sufficiently participating in the arbitration proceedings and the decision-making process; (4) there were justifiable doubts as to the Chairman's independence or impartiality arising out of comments the Chairman had made at an international conference; and (5) the Chairman breached his duty to maintain the confidentiality of the arbitral proceedings.

The evidential basis for the challenge was essentially (a) the misdirected email; and (b) an analysis of the time spent by the Secretary, Chairman, and the Co-Arbitrators respectively in relation to the three decisions. In short, it was said that the time spent by the Secretary was so high that it indicated that there had been an improper delegation of functions to him, and that by comparison the relatively short period of time spent by the Co-Arbitrators indicated that they had failed properly to fulfil their adjudicative function.

All three members of the Tribunal declined to withdraw from the arbitration, and the First Defendant declined to agree to the LCIA Challenge.

On 4 August 2016, the LCIA Division issued its decision. It dismissed grounds 1 to 3 and 5. It upheld ground 4, finding that circumstances existed giving rise to justifiable doubts as to the Chairman's impartiality and revoking his appointment. As to ground 1, the LCIA Tribunal concluded that the tasks undertaken by the Secretary were the sort of tasks which it was permissible for him to perform, and that there had been no improper delegation; and that there was no basis for concluding that the Secretary had been involved in the decision-making process or drafting without adequate supervision. As to ground 3, the LCIA Division concluded that the Co-Arbitrators had spent appropriate and proportionate time on each of the decisions in issue; that their approach of commenting on drafts prepared by the Chairman was entirely in keeping with the way that arbitral tribunals function; and that the number of hours spent

corresponded with the specific nature of the decisions with no indications that they had simply rubber stamped the decisions of the Chairman. The Fourth Defendant was appointed as the new Chairman by the LCIA Court on 17 August 2016.

THE APPLICATIONS TO THE HIGH COURT

On 7 October 2016, the Claimant issued an Arbitration Claim Form seeking the removal of the Co-Arbitrators under s.24 of the 1996 Act. The grounds were essentially the same as the first and second grounds that had been rejected by the LCIA Division. The Claimant issued two applications for: (a) disclosure of documents in support of an application to remove two arbitrators (the "disclosure application", [2017] EWHC 148 (Comm)); and (b) removal of the arbitrators for failing properly to conduct the proceedings (the "removal application", [2017] EWHC 194 (Comm)).

OBTAINING DISCLOSURE IN CONNECTION WITH A REMOVAL APPLICATION

In the disclosure application, counsel had not found any case in which an arbitrator has been ordered to give disclosure in connection with a removal application under either s.24 of the 1996 Act or a challenge to the award under s.68 of the 1996 Act. Popplewell J formulated the following governing principles for disclosure applications in support of relief sought in an Arbitration Claim to the Court:

- The applicant must establish that the Arbitration Claim has a real prospect of success. Provided such threshold is met, the merits of the Arbitration Claim, insofar as they are capable of assessment on an interlocutory basis, are a matter to be taken into account in the exercise of discretion. However the Court will only go into the merits for these purposes if on a brief examination of the material it can be clearly demonstrated one way or the other that there is a high degree of probability of success or failure.
- The documents sought must be shown to be strictly necessary for the fair disposal of the Arbitration Claim. Applying by analogy the principle formulated by the Court of Appeal in *Locabail (UK) Limited v. Bayfield Properties Limited* [2000] QB 451 that cross-examination or seeking disclosure from the judge in the context of a challenge to a judge's impartiality is impermissible, Popplewell J held that "*it can only be in the very rarest of cases, if ever, that arbitrators should be required to give disclosure.*"
- In exercising its discretion, the Court will have regard to the overriding objective and all the circumstances of the case, but will have particular regard to the following considerations in the arbitral context:

- the Court will not normally order disclosure in support of Arbitration Claims because that would usually be inimical to the principles of efficient and speedy finality and minimum court intervention which underpin the 1996 Act;
- where there exists an arbitral institution vested by the parties with power to grant disclosure, and it has declined to do so, the Court will not normally order disclosure;
- the Court will not normally order disclosure of documents that the parties have expressly or implicitly agreed with each other and/or the tribunal should remain confidential; and
- it will only be in the very rarest of cases, if ever, that arbitrators will be required to give disclosure of documents; it would require the most compelling reasons and exceptional circumstances for such an order to be made, if ever.

Popplewell J expressed no view, at this stage, as to the merits of the removal application. He dismissed the disclosure application because the disclosure "*sought would amount to disclosure of the confidential deliberations of the tribunal which is impermissible both under the* Locabail *principle and under the parties' agreement contained within Article 30.2 of the LCIA Rules*." The documents sought were not strictly necessary for a fair determination of the application. The Court could and would decide the application on the basis of the available material in the same way as any other interlocutory application. Popplewell J observed that s.24 claims are regularly concluded without such disclosure, as are equivalent claims under s.68 of the 1996 Act. Similarly, recusal applications to judges are determined without material from the judge, as per *Locabail*.

REMOVAL OF THE ARBITRATORS FOR FAILING PROPERLY TO CONDUCT THE PROCEEDINGS

Popplewell J dismissed the removal application. He held that there was no merit in any of the arguments that the Co-Arbitrators failed properly to conduct the proceedings. He held that, *first*, based on his own experience of litigation and arbitration, there was no proper basis for arguing that the time spent by the Co-Arbitrators was insufficient to consider the issues and review the Chairman's draft decisions. *Second*, more importantly, the LCIA Division was satisfied that the time spent by the Co-arbitrators on the procedural decisions was appropriate and proportionate. The Court should be very slow to differ from the view of the LCIA Division, because (a) the LCIA Division was the parties' chosen forum for resolution of the question in issue, and (b) it had considerable experience and

was well-placed to judge how much time would be required for a co-arbitrator properly to consider interlocutory issues of this type.

The judge concluded that, in any event, even if there had been merit in the arguments, the application would have failed because the Claimant had not established any substantial injustice. Popplewell J endorsed the formulation at paragraph 106 of the Report on the Arbitration Bill by the Departmental Advisory Committee of February 1996 (the "DAC Report") that substantial injustice has resulted or will result *"... only... where the conduct of the arbitrator is such as to go so beyond anything that could reasonably be defended". Thus, s.24(1)(d) "... exists to cover what we hope will be the very rare case where an arbitrator so conducts proceedings that it can fairly be stated that instead of carrying through the object of arbitration as stated in the* [Act]*, he is in effect frustrating that object*". The Claimant failed to show that the relevant decisions might have been different had the Co-Arbitrators taken a different approach to decision-making.

Popplewell J's guidance on the use of arbitral secretaries in the context of a removal application can be summarised as follows:

- Whatever the divergence of views amongst arbitration practitioners and commentators, "*the critical yardstick for the purposes of s.24 of the* [1996] *Act is that the use of a tribunal secretary must not involve any member of the tribunal abrogating or impairing his non-delegable and personal decision-making function. That function requires each member of the tribunal to bring his own personal and independent judgment to bear on the decision in question, taking account of the rival submissions of the parties; and to exercise reasonable diligence in going about discharging that function. What is required in practice will vary infinitely with the nature of the decision and the circumstances of each case.*"
- Alluding to the *Locabail* principle applied in the disclosure application, Popplewell J emphasised that the adjudicative function is an iterative process, and that there is nothing offensive *per se* to performance of that function in receiving the views of others, provided the adjudicator makes his own mind up by the exercise of independent judgment. An arbitrator who receives the views of a tribunal secretary does not therefore necessarily lose the ability to exercise full and independent judgement on the issue in question.
- However, care must be taken to ensure that the decision-making is indeed that of the tribunal members alone. The safest way to ensure that is for the secretary not to be tasked with anything that involves expressing a view on the substantive merits of an application or issue. Otherwise, there may arise a real danger of inappropriate influence over the decision-making process by

the tribunal, which affects the tribunal's ability to reach an entirely independent minded judgment.

- The danger may be greater with arbitrators who have no judicial training or background, than with judges who are used to reaching entirely independent adjudicative decisions with the benefit of law clerks or other junior judicial assistants.
- Best practice is to avoid involving a tribunal secretary in anything that could be characterised as expressing a view on the substance of that which the tribunal is called upon to decide. If the secretary's role is limited in this way, there is no risk of inappropriate influence on the personal and non-delegable decision-making function of the tribunal.
- A failure to follow best practice is not synonymous with failing properly to conduct proceedings within the meaning of s.24(1)(d) of the 1996 Act. Soliciting or receiving any views of any kind from a tribunal secretary on the substance of decisions does not of itself demonstrate a failure to discharge the arbitrator's personal duty to perform the decision-making function and responsibility himself. That is especially so where, as in this case, the relevant arbitrator was an experienced judge who is used to reaching independent decisions which are not inappropriately influenced by suggestions made by junior legal assistants.

Applying these principles, Popplewell J held that there was no basis for finding that the Chairman's use of the Secretary in relation to the three decisions involved delegating to the Secretary any adjudicative functions or responsibilities, or was in any way inappropriate. Further, it was "*logically incoherent*" to suggest that the Co-Arbitrators delegated some part of their adjudicative functions to the Chairman by entrusting the Chairman with the task of preparing drafts of the decisions for their consideration. They delegated to the Chairman that task in fulfilment of their own adjudicative functions and responsibilities, not in delegation of them. There was no part of the Co-Arbitrators' own adjudicative responsibility that was delegated to the Chairman or which could have been sub-delegated by the Chairman to the Secretary.

TAKEAWAYS

Both decisions provide welcome and clear guidance in the context of removal applications under s.24 of the 1996 Act, which will likely be applied by extension to challenges under s.68 of the 1996 Act and other Arbitration Claims. Popplewell J made clear that the High Court will not normally grant an order where the arbitral institution vested by the parties with power to grant the same order has refused to do so. This principled and non-interventionist approach

exemplifies the English courts' long-standing respect for parties' choice to arbitrate.

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Please do not hesitate to contact us with any questions.