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Where Angels Fear to Tread: The Availability of Disclosure in Support of an Application to Remove a Tribunal

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The recent decision in ***P v Q*** [2017] EWHC 148 (Comm) provided, for the first time, guidance on how a Court will approach an application for disclosure in support of an application to remove Arbitral Tribunal members under s.24 Arbitration Act 1996.

Background

The Claimant had brought an application to remove two wing members (the "Co-Arbitrators") of an Arbitral Tribunal under s.24(1)(d)(i) Arbitration Act 1996 ("AA 1996").[1)] The Claimant had previously applied before a specialised LCIA Division (appointed by the LCIA Court) for dismissal of the entire Tribunal, based on the arbitrators' alleged failure to appropriately conduct the arbitral proceedings by delegating their roles to the Tribunal Secretary. Further, serious doubts were raised as to the Chairman's impartiality. This application culminated in the removal of the Chairman but not the Co-Arbitrators, and so the Claimant applied to Court for their removal.

In support of that application, the Claimant applied for disclosure of various documents from the Co-Arbitrators, including "instructions, requests, queries or comments from the Co-Arbitrators (or from [the Chairman] to which the Co-Arbitrators were copied) to the Secretary" and all communications sent or received by the Co-Arbitrators which related to the role of the Secretary and/or the tasks delegated to the Secretary.

The principles governing the disclosure application

The Claimant contended that the governing principles were those in respect of specific disclosure pursuant to CPR 31.12, from which the Court derived its power to make the order sought. Provided the documents were relevant, the Court had discretion to order disclosure, to be exercised in accordance with the overriding objective.

The Defendants argued that given that the material sought was especially sensitive (being akin to documents relating to Judge's deliberations); the nature of the s.24 proceedings; and the policy considerations reflected in sections 1, 33, and 40 of AA 1996, disclosure should only be granted in "rare and compelling cases" where there was a strong prima facia case on the merits of the s.24 challenge, and disclosure was strictly necessary for the fair disposal of the s.24 application.

Popplewell J acknowledged that there was no existing case law on such an application. He held

that the following principles should govern an application for disclosure of a Tribunal's materials:

Principle 1 – real prospect of success

Popplewell J declined to impose a merits threshold which was higher than the default position on "normal" interlocutory applications. He reasoned that the relevance and nature of the material sought, and the merits of the removal application, could be taken into account in the exercise of the Court's discretion. The correct test was that which would have to be established if facing a summary dismissal, i.e. namely that the s.24 application has a real prospect of success.

Given the Claimant's failure to fulfil the necessary criteria laid down under Principles 2 and 3 (see below), Popplewell J did not consider it necessary to express his views on whether this test was satisfied in the current case.

Principle 2 – strict necessary

Popplewell J held that the documents sought in the disclosure application must be "strictly necessary for the fair resolution" of the s.24 application, for the following reasons:

• This is the test generally applicable in interlocutory proceedings.
• Perhaps more significantly, the arbitral context (and the overriding objective) requires cases be resolved without unnecessary delay or expense and with minimal Court intervention. Popplewell J commented that the s.24 process is an intrusion by the courts into the arbitral process (especially where, as here, the arbitral institution has already considered and ruled on the question) and an order for disclosure would likely delay the resolution of the dispute, enforcement of the award and increase the costs.
• Where disclosure is sought in litigation from non-parties, the test is one of necessity. While the Co-Arbitrators were technically parties to the s.24 application, their position was analogous to non-parties.

Popplewell J held that the documents sought were not strictly necessary, pointing out that s.24 and s.68 AA 1996 claims are regularly concluded without disclosure, as are recusal applications to judges.

Principle 3 – factors affecting the exercise of discretion

Popplewell J held that in exercising its discretion, the Court will have regard to the overriding objective and all the circumstances of the case. In particular, given the arbitral context:

• disclosure in support of Arbitration Claims will usually be inimical to the principles of efficient and speedy finality and minimal Court intervention which underpin AA 1996;
• where an arbitral institution has the power to grant disclosure and has declined to do so, the Court will not normally order disclosure;
• the Court will not normally order disclosure of documents which the parties have expressly/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 (who are in a position analogous to the judiciary) 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.

On the facts, Popplewell J held the case was neither wholly exceptional nor rare. Moreover, the

documents sought would amount to disclosure of the confidential deliberations of the Tribunal, which would be impermissible under the principles applying to disclosure of a Judge's deliberations and under the parties' agreement on confidentiality in Article 30.2 of the LCIA Rules.

Conclusion

The theme throughout Popplewell J's judgment is that the Court will respect its role in the context of arbitral proceedings of supporting Tribunals and arbitral institutions, and the principle of party autonomy, with minimal intervention. This is as laudable as it is clear.

Practically speaking, it is apparent that a Claimant is unlikely to obtain disclosure from the Tribunal in support of an s.24 application, meaning that he will face considerable (if not insurmountable) evidential difficulties.

In the circumstances, parties should give serious consideration as to whether to bring a removal application under s.24 AA 1996, given the unavailability of disclosure, the reluctance of Courts to intervene in the arbitral process, and the damage it will do to relations with the Tribunal.

References

?1 Judgment was handed down on this application on 9 February 2017 and is reported at 2017 EWHC 194 (Comm)

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