Neutral Citation Number: [2019] EWHC 207 (Comm)

Case No: CL-2018-000631

IN THE HIGH COURT OF JUSTICE
BUISNESS AND PROPERTY COURTS
OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 08/02/2019

Before :

LIONEL PERSEY QC
(Sitting as a Judge of the High Court)

- -

Between :

SDI RETAIL SERVICES LIMITED	**Claimant**
- and -	
THE RANGERS FOOTBALL CLUB LIMITED	**Defendant**

- -
- -

Sa'ad Hossain QC and Sam O'Leary (instructed by **Reynolds Porter Chamberlain LLP**) for the **Claimant**
Ben Quiney QC, Jason Evans-Tovey and Michael Ryan (instructed by **Mills & Reeve LLP)**) for the **Defendant**
Daniel Hubbard (instructed by **Enyo Law**) for **LBJ Sports Apparel Limited** (t/a "**Elite"**)

Hearing dates: 11 January 2019

- -

Approved Judgment

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LIONEL PERSEY QC

Lionel Persey QC :

Introduction

1. This matter first came before me on 13 December 2018 for the hearing of a CMC. One of the principal matters for determination at that hearing was the Claimant's ("**SDIR**") application to amend its Particulars of Claim in order to add two additional claims. I adjourned that application to allow the Defendant ("**Rangers**") to submit further evidence of fact in response to that application.

2. The CMC had been listed pursuant to the order of Teare J. dated 24 October 2018. On that day Teare J. gave judgment in respect of those liability issues which were at that time in issue between the parties. These issues arose out of a Retail Operations, Distribution and IP Licence Agreement ("**the Retail Agreement**") dated 21 June 2017. The Retail Agreement granted SDIR the exclusive right to operate and manage "the Retail Operations", defined as the retail sale of Branded Products, Replica Kit and additional products at Rangers Ground and Megastore and on the Rangers Webstore, together with other non-exclusive rights. The main issue before Teare J. concerned the true construction of the Retail Agreement, and in particular whether Rangers was, in the circumstances of the case before him, free to do deals with third parties and, if they wished to do so, whether they were under a contractual obligation to give SDIR a right to match any third party offer ("**matching rights**"). The third party in question was LBJ Sports Apparel Limited t/a "Elite" ("**Elite**"). Teare J. found that Rangers had breached the Retail Agreement by entering into a separate agreement with Elite ("**the Elite Agreement**") and in failing to provide SDIR with a Notice of Offer in respect of Elite's offer. He also granted injunctive relief and ordered a CMC, the principal purpose of which was to address a timetable leading up to a hearing at which causation and the quantum of any damages to which SDIR was entitled were to be decided.

3. On 25 October 2018 SDIR was provided with two further agreements between Rangers and Elite, the "**Elite Retail Units Agreement**" dated 11 September 2018 and the "**Elite/Hummel Agreement**" dated 30 March 2018 (to which Hummel A/S was also a party). SDIR claims that Rangers was in further breach of the Retail Agreement by entering into those agreements and by failing to offer SDIR the opportunity to exercise its matching rights in relation to the offers made by Elite and Hummel.

4. On 30 November 2018 SDIR served draft Amended Particulars of Claim. The amendments added claims in respect of alleged breaches of both the Elite Retail Units Agreement and the Elite/Hummel agreement. Rangers has consented to those amendments made in respect of the Elite Retail Units Agreement. Rangers opposes the amendments made in respect of the Elite/Hummel Agreement on the grounds that these have no real prospect of success.

5. On 17 December 2018 I ordered a "Speedy Trial" of all remaining issues of liability and final declaratory and injunctive relief between the parties. This has been fixed to commence on 12 April 2019. The balance of all further issues in dispute, that is to say causation, loss and damage, have been stayed until judgment has been given in the Speedy Trial.

6. The hearing of the restored CMC took place on 11 January 2019. The two main issues for determination were:-

(1) SDIR's application for permission to amend its Particulars of Claim ("**the Amendment Application**").

(2) Elite's application for permission to participate in the trial of SDIR's claims for injunctive relief ("**Elite's Application**").

I was also asked to rule on the parties' respective costs' budgets. It was agreed that this would be done on paper following the hearing.

Ruling

7. On 17 January 2019 I ruled on the Amendment Application and Elite's Application in the following

terms:-

> SDIR's application to amend
> I allow SDIR's application for permission to amend its Particulars of Claim in the form of the draft attached to the draft order. I have concluded that SDIR has a real prospect of success within the meaning of the Rules and the applicable case law in relation to each of its proposed amendments.
>
> Elite's application to participate in the Speedy Trial
> I dismiss Elite's application to participate in the Speedy Hearing on the basis put forward by it at the hearing. I am, however, presently minded to permit Elite to become a party to these proceedings should it be minded to apply pursuant to Part 19.2. This would be on the basis that its participation would be limited to the issue of the appropriateness and effect upon Elite of the relief sought by SDIR in the event that SDIR ultimately proves successful at trial. The terms upon which such permission would be given (in particular with regard to disclosure) will need to be worked out.

8. I now give my reasons for those rulings.

The Amendment Application

Applicable principles

9. SDIR's application to amend is made under CPR 17. There is no issue between the parties as to the correct test to be applied when considering whether to grant permission to amend. An application to amend will be refused if it is clear that the proposed amendment has no prospect of success. The applicant must therefore show that the proposed amendment has a real prospect of success, that is to say a realistic as opposed to a fanciful prospect of success. A realistic claim is one that carries some degree of conviction and is more than merely arguable: see *Global Asset Capital Inc v Aabar Block SARL* [2017] 4 WLR 163 (CA) at [27], per Hamblen LJ. It is not appropriate to conduct a mini-trial of the merits when deciding an application to amend. As the Court of Appeal put it in *Sabbagh v Khoury & Ors* [2017] EWCA Civ 1120

> "... 94. ... The purpose of the real prospect test is to exclude summarily cases that are fanciful or bound to fail: not to conduct an abbreviated form of trial on the basis of incomplete evidence": see *Standard Bank plc v Via Mat International Ltd* [2013] EWCA Civ 490 per Moore-Bick LJ at [17] ..."

10. In the context of strike out and summary judgment applications, it is well established that if the application gives rise to a short point of law or construction, and if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should "grasp the nettle and decide it": see *Global* (above) at [27(3)]; *Easyair Ltd (trading as Openair v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]. The applicable threshold on strike out and summary judgment applications (realistic prospect of success) is the same as that for amendment applications.

The Retail Agreement and Elite/Hummel Agreements

11. The Retail Agreement contains the following relevant terms:

> "... **Recital 3**
> Rangers wishes to appoint SDIR to operate and manage the Retail Operations on an exclusive basis and SDIR wishes to accept such appointment. In relation to such appointment, Rangers also wishes to grant and SDIR wishes to receive: (a) the non-exclusive right to perform the Permitted Activities

in relation to the Branded Products, replica Kit and Additional products; and (b) the non-exclusive right to manufacture (and/or have manufactured) the Branded Products. Rangers and SDIR shall co-operate with each other in relation to the Retail Operations on the terms of this Agreement."

Clause 1 – Definitions and Interpretation

[...]

Additional Products means such Rangers branded products or products dealing with Rangers content (not including the Products or any Replica Kit) which are supplied by or on behalf of Rangers to SDIR which may include DVDs, videos (and other multi-media items), books and other publications, i-pods and other electronic devices, non-alcoholic beverages and alcoholic beverages (including whisky);

[...]

Branded Products means the Products bearing any Rangers-related brands (including the Rangers Brands).

[...]

Permitted Activities means distributing, marketing, advertising, promoting, offering for sale and/or selling all products which are or could be sold in a retail outlet or online or via any other medium together with the right to retail (whether bricks and mortar, online or via any other medium);

[...]

Retail Operations means the retail sale of Branded Products, Replica Kit and Additional Products at the Ground (including at the Rangers Megastore) and on the Rangers Webstore) ...

[...]

3 Rangers Rights

3.1 Rangers hereby grants SDIR the following rights (together with the rights to sub-license such rights within the SDIR Group) in the Territory for the Term:

3.1.1 the exclusive right to operate and manage the Retail Operations;

3.1.2 the non-exclusive right to perform the Permitted Activities in relation to the Branded Products, Replica Kit and Additional Products;

3.1.3 the non-exclusive right to manufacture (and/or have manufactured) the Branded Products;

3.1.4 the Ancillary Rights; and

3.1.5 the non-exclusive right to use the Rangers Brands and the Rangers IPR as may be required in connection with the exercise of its rights under clauses 3.1.1 to 3.1.4 (inclusive),

(together the **Rangers Rights**).

3.2 Rangers shall not operate or manage, nor grant any third party any rights to operate or manage on its behalf, the retail sale of Branded Products, Replica Kit and/or Additional Products at bricks and mortar stores or online in the Territory during the Term.

3.3 Rangers shall not do, nor grant any rights to any third party to do, anything that would conflict with SDIR's rights to use and exploit the Rangers Rights in accordance with this Agreement. For the avoidance of doubt, the granting of non-exclusive rights to third parties to carry out activities in areas where SDIR's rights are non-exclusive (and the exercise of these rights) shall not be deemed to conflict with SDIR's rights to use and exploit the Rangers Rights in accordance with this Agreement.

[...]

Schedule 3 – Commercial terms

1 Definitions and Interpretation

1.1.4 **Offered Right** means each of the following rights (in whole or in part):

(i) the right to operate and manage the Retail Operations;

(ii) the right to perform the Permitted Activities in relation to the Branded Products and/or Additional Products; and/or

(iii) the right to perform the Permitted Activities in relation to the Official Kit and/or Replica Kit.

[...]

5 Matching Right

5.1 From the date falling 6 months prior to the expiry of the Initial Term, Rangers may approach, solicit, tender for or enter into negotiations with a third party in relation to that third party providing any of the Offered Rights or all or any combination of the Offered Rights.

5.2 In the event that Rangers receives an offer from such a third party (**Third Party Offer**) to enter into an agreement with Rangers for any of the Offered Rights or all or any combination of the Offered Rights, Rangers shall provide SDIR with written notice (**Notice of Offer**) of the terms of the Third Party Offer […]

5.3 The Notice of Offer shall include whether the Third Party Offer is made for any of the Offered Rights or all or any combination of the Offered Rights (identifying which Offered Rights as applicable), in each case together with any connected commercial arrangements, and full details of:

5.3.1 any payments to be made by the third party to Rangers;

5.3.2 any revenue share or royalties to be paid between Rangers and the third party; and

5.3.3 the duration of the agreement between Rangers and the third party (together, the **Material Terms**). […]

5.6 Within 10 Business Days of SDIR's receipt of the Notice of Offer (or further information / clarification from Rangers, if requested), SDIR shall provide written notice to Rangers as to whether it is willing to match the Material Terms of the Third Party Offer in all material respects in relation to any of the Offered Rights or in relation to all or any combination of the Offered Rights (and, in each case, any connected commercial arrangements if applicable).

5.7 If SDIR is so willing, Rangers and SDIR shall enter into a further agreement on the same terms as this Agreement, save only as to any variation required to effect the Material Terms and whether such agreement shall relate to any of the Offered Rights or all or any combination of the Offered Rights (and, in each case, any connected commercial arrangements if applicable).

5.8 Should SDIR exercise its matching right in accordance with this paragraph, Rangers shall not approach, solicit, tender for, negotiate with or enter into any agreement with that third party or any other third party in respect of the Third Party Offer and/or the *[sic.]* any of the Offered Rights (and, in each case, any connected commercial arrangements if applicable) in respect of which the matching right is exercised. Should SDIR exercise its matching right in respect of some but not all of the Offered Rights, Rangers may enter into an agreement with that third party on the Material Terms set out in the Notice of Offer only in respect of the Offered Rights over which SDIR has not exercised its matching right only *[sic.]* . Should SDIR not exercise its matching right over any of the Offered Rights, Rangers may enter into an agreement with that third party on the Material Terms set out in the Notice of Offer.

5.9 Subject to paragraph 5.8, any new or amended offer or indication of interest from a third party in respect of any of the Offered Rights shall be a separate Third Party Offer and the terms of this paragraph 5 shall apply.

5.10 In the event that Rangers does not receive a Third Party Offer to enter into an agreement with Rangers for any or all of the Offered Rights within 30 days prior to expiry of the Initial Term, Rangers shall immediately notify SDIR in writing, and SDIR shall have the right to renew this Agreement on the same terms for the element(s) on which no offer has been received, save only that the Agreement will be renewed for 2 years from the expiry of the Term and:

5.10.1 the same terms would apply in respect of the operation and maintenance of the Retail Operations and the performance of the Permitted Activities; and

> 5.10.2 to the extent relevant, terms which are at least as favourable to SDIR as the terms that currently apply under the Puma Agreement would apply in relation to the supply by Rangers (or on its behalf) to SDIR of the Official Kit and/or Replica Kit[;]
>
> and SDIR shall notify Rangers in writing if it chooses to exercise its right to renew this Agreement within 21 days of receiving Rangers' notification that a Third Party Offer was not received for any or all of the Offered Rights.
>
> 5.11 Save as expressly permitted in this paragraph, Rangers shall not approach, solicit, tender for or enter into negotiations or any agreement with any third party in relation to any of the Offered Rights.
>
> […]
>
> 5.14 Notwithstanding any provision to the contrary this paragraph 5 shall continue in full force and effect for a period of 2 years from the expiry of the Term but that shall not prevent Rangers from the date falling 6 months prior to the expiry of that period approaching, soliciting, tendering for or entering into negotiations with any third party in relation to that third party providing any of the Offered Rights or all or any combination of the Offered Rights.
>
> 5.15 Nothing in this paragraph 5 shall prevent SDIR from approaching, tendering for, entering into negotiations with and/or making any offers to Rangers in respect of the Offered Rights, separately to the process set out in this paragraph 5 or independently of any Third Party Offer ..."

12. The Elite/Hummel Agreement provided, inter alia, that:-

(1) Elite was appointed by Rangers as the "exclusive worldwide supplier of Technical Products" from 1 June 2018 to the end of the 2020/2021 Scottish football and European/Europa League seasons. Technical Products are defined as including official and replica Rangers Home, Away and Third playing kits and the Official Rangers training wear.

(2) Rangers further appointed Elite as a non-exclusive worldwide supplier of Leisurewear and Accessories for Rangers FC as well and "preferred supplier of all Rangers branded leisurewear, clothing and wearable accessories".

(3) Rangers appointed Hummel as the exclusive worldwide Technical Brand on all Rangers' Technical Products throughout the period of the appointment.

(4) Hummel's appointment included "the right to manufacture and supply Technical Products and Leisurewear and Accessories and to enjoy the sponsorship opportunities provided to the Technical Brand".

The parties' positions

13. SDIR contends that the Elite/Hummel agreement conferred rights upon Elite/Hummel that fall within the definition of "Permitted Activities" under the Retail Agreement such as to make them "Offered Rights" within the scope of paragraph 1.1.4 of Schedule 3. SDIR argues that although the right to manufacture was not a "Permitted Activity" for the purposes of the definition of "Offered Rights", it was a "connected commercial arrangement" within Schedule 3, paragraph 5(6) of the Retail Agreement. SDIR asserts that Rangers failed to provide a Notice of Offer to SDIR in respect of the proposed Elite/Hummel agreement in breach of paragraphs 5.2 and 5.11 of Schedule 3.

14. Rangers contends that SDIR's proposed amendments are misconceived. Rangers argues that the Retail Agreement is concerned simply with retail rights and does not encompass the right to manufacture Replica Kit or other Rangers products nor the right to supply such products on a wholesale basis. Rangers submits that this is clear from the wording of the Retail Agreement and relies also upon the relevant factual matrix as set out in their evidence (principally in the 7th witness statement of James Don Blair).

Discussion

15. Both parties referred me to a number of recent Supreme Court cases on the construction of commercial contracts, and in particular the judgments of Lord Neuberger in *Arnold v Britton* [2015] UKSC 36 at [15] and of Lord Hodge in *Wood v Capita Insurance Services Limited* [2017] UKSC 24 at [10-12]. I am familiar with these and have kept the relevant principles well in mind.

16. SDIR submits that the natural and ordinary meaning of the words in the Retail Agreement supports their construction. Rangers disagrees, contending that the language in dispute does not support SDIR's construction and that the factual matrix is in any event fatal to that construction. In particular, Rangers argues that it was always the intention of the parties to draw a clear distinction between manufacturing and wholesale activities on the one hand and retail activities on the other, and that the Retail Agreement did just this.

17. Both parties presented their respective cases very well, and there was much to argue about. By the end of the argument I had formed the firm conclusion that SDIR's proposed amendments were neither fanciful nor bound to fail; in other words, that they had real prospects of success within the meaning of the applicable case law.

18. I am not going to give detailed reasons for my decision because, having reached the conclusion that I did, I do not think it right for me to do so. I was not satisfied that I had before me all of the material necessary to enable me to decide the construction question. The arguments (together with any relevant matrix evidence) will need to be considered in greater detail at the Speedy Hearing. By way of example:-

(1) Mr Quiney sought, for the purposes of this hearing and for sound forensic reasons, to downplay the significance of the matrix evidence upon which Rangers wishes to rely. One of the principal reasons for my adjourning the amendment application in December 2018 was to give Rangers sufficient time in which to respond to it and in particular to adduce such matrix evidence as it considered to be relevant. Some of the evidence set out in Mr Blair's 7th witness statement is arguably inadmissible – particularly insofar as it consists of assertions as to both parties' and/or Rangers' intentions prior to and at the time of contracting. Some, however, could (if accepted) prove to be relevant to the proper construction of the Retail Agreement and provide assistance in construing it within its proper context. SDIR disputes certain of the factual matters upon which Rangers relies. It is neither possible nor appropriate for me to conduct a mini-trial in respect of these matters.

(2) I am unable to conclude on the disputed evidence before me whether or not there is a clear distinction between parts of the supply chain dealing with manufacture and wholesale supply on the one hand and retail supply on the other. I have been told that an earlier agreement between Rangers and Puma, said to have been a predecessor agreement to the Elite/Hummel agreement and of which SDIR was aware, supports such a distinction. SDIR dispute this. This is not an issue that can be resolved on a summary application.

(3) Although the Retail Agreement would appear on its face (and as its name suggests) to be largely directed towards retail sales it does contain provisions that arguably support SDIR's case. For example:-

(a) The definition of "Offered Rights" makes no distinction between retail and wholesale rights;

(b) The definition of "Permitted Activities" includes the distribution and sale of products which could be sold in a retail store. These words are arguably wide enough to encompass wholesale goods.

(c) There is scope for considerable debate about the meaning of "connected commercial arrangements" within the meaning of paragraph 5.6 of Schedule 3 to the Retail Agreement and whether these words are sufficiently wide to embrace manufacturing. The proper construction of those words is one of the issues to be determined in the very near future in Part 8 proceedings between

the parties. It is not in these circumstances appropriate for me to seek to construe the meaning of the words, save to say that I consider that SDIR's case is sufficiently arguable for the purposes of giving leave to amend.

19. For the avoidance of doubt, I should make clear that I have not formed any provisional, let alone final, view on the merits of the claims arising out Elite/Hummel Agreement. Both parties have everything to play for at the Speedy Trial.

Elite's Application

20. Elite applied to participate in the Speedy Trial in order to adduce factual evidence and make submissions on the issue of final injunctive relief and to cross-examine SDIR's witnesses on issues going to the appropriateness or otherwise of final injunctive relief. Elite submits that it will suffer very significant financial losses if SDIR is successful at trial and the court grants injunctive relief. I am for present purposes prepared to accept that this may well be so.

21. It is important to note from the outset that Elite has not applied to be made a party to these proceedings, although SDIR was prepared to consent to its participation as a party. During the course of his oral submissions Mr Hubbard, who appeared for Elite, initially resisted the suggestion that Elite should give any disclosure beyond those documents upon which it wished to rely in support of its position. He subsequently offered to give some limited disclosure. I found this all to be highly unsatisfactory. It seemed to me that Elite wants to have all the advantages of being a party without any of the disadvantages. It would not, in my judgment, be right for Elite to be permitted to tender its own witnesses for cross-examination or to cross-examine SDIR's witnesses without first giving disclosure of all those documents relevant to the issue of the appropriateness of injunctive relief. As Mr Hossain pointed out in argument, such disclosure could well extend beyond documents simply going to financial loss to those concerned with Elite's awareness of the Retail Agreement and foreseeability.

22. As set out in my Ruling, should Elite wish to participate in these proceedings then it must apply to become a party pursuant to Part 19.2. Subject to the agreement of appropriate terms I am minded to accede to such an application.

Costs Budgets for the Speedy Trial

23. The final matter upon which I am asked to rule is upon the parties' Cost Budgets for the Speedy Trial. SDIR has agreed Rangers' costs budget. I approve that costs' budget in the sums agreed. Rangers takes issue with SDIR's costs budget which is over 60% higher than Rangers'.

24. I have carefully considered SDIR's costs budget, together with Rangers' offers in respect thereof and their written submissions. I also have well in mind the complexity of this case (I do not regard it as complex), the fact that SDIR will carry a greater burden than Rangers (but not much greater), the fact that much of the argument has already been deployed in this application, and that this is not a case in which I would expect SDIR's costs to be significantly disproportionate to Rangers'. I have concluded that the total costs budget assessment in respect of SDIR's costs to the conclusion of the Speedy Trial should be **£405,155**, calculated as follows:-

Phase	Sum allowed	Comment
	£	
CMC	25,000	Many of the costs claimed relate to the earlier CMC hearing.

Disclosure	45,000	SDIR's costs are likely to be lower than Rangers, who will have more documents to disclose.
Witness Statements	65,000	There is an excessive amount of grade A fee earner time claimed in SDIR's budget.
Trial Preparation	55,000	SDIR's costs will probably be higher than Rangers. I do not consider that the latter's offer makes sufficient allowance for this.
Trial	175,000	Ditto
Contingent costs	40,155	I find Rangers' offer to be reasonable.
Total:-	**£405,155**	

25. The parties should seek to agree a draft order reflecting my findings above together with the other directions that I gave at the hearing.