



Neutral Citation Number: [2019] EWHC 1929 (Comm)

Case No: CL-2018-000631

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**COMMERCIAL COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 19 July 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**

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**Sa'ad Hossain QC, Sam O'Leary and Joyce Arnold (instructed by Reynolds Porter  
Chamberlain LLP for the Claimant)**  
**Ben Quiney QC and Michael Ryan (instructed by Mills & Reeve LLP) for the Defendant**

Hearing dates: 15-18 April 2019

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**APPROVED JUDGMENT**  
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Mr Lionel Persey QC

## Lionel Persey QC:

### Introduction

1. The parties to this dispute are well-known – not only in the wider sporting world but also to this Court. The Claimant is SDI Retail Services Limited (“**SDIR**”), a company within the Sports Direct group. The Defendant is The Rangers Football Club Limited (“**Rangers**” or “**the Club**”). The parties’ disputes arise out of a Retail Operations, Distribution and IP Licence Agreement concluded on 21 June 2017. I will refer to this as “**the Agreement**”. SDIR is a special purpose vehicle that was set up for the purposes of being Rangers’ counterparty to the Agreement and its predecessor, in circumstances that I will describe more fully below. This is the third trial between the parties since October 2018 and the court has also been kept busy with numerous interlocutory skirmishes. Teare J. was right to observe at the outset of his judgment following the first trial that the parties to this action are keen on litigation and that it was doubtful that their appetite for litigation would be satisfied following his decision: *SDI Retail Services Limited v The Rangers Football Club* [2018] EWHC 2772 (Comm) at [1] (“**the October 2018 Judgment**”).
2. The sale of replica playing kits and other merchandise is a source of considerable income and plays an important part in the business model of football clubs such as Rangers. Pursuant to the Agreement SDIR was appointed by Rangers to operate and manage its retail operations on an exclusive basis. Retail Operations are defined under the Agreement as meaning 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. The Agreement was to continue in force until 31 July 2018 (the “**Initial Term**”). Rangers was permitted to approach and enter into negotiations with third parties from six months prior to expiry of the Initial Term. In the event that Rangers received an offer from a third party it was required to provide written notice of that offer to SDIR who would then have the right to match the Material Terms of the offer.
4. On 30 March 2018 Rangers concluded an agreement with LBJ Sports Apparel Limited trading as the Elite Group (“**Elite**”) and Hummel A/S (“**Hummel**”) which has come to be known as the **Elite/Hummel Agreement**. Pursuant to the Elite/Hummel Agreement Rangers appointed Elite as the exclusive worldwide supplier of Technical Products and Hummel as the exclusive worldwide Technical Brand. Elite and Hummel were granted the rights to manufacture and supply official and replica home, away and third playing kits for the 2018/2019, 2019/2020 and 2020/2021 Scottish football seasons and also for the European/Europa league until the end of the 2020/2021 season.
5. It is common ground that Rangers never gave SDIR the opportunity to match the Elite/Hummel Agreement.
6. The issue between the parties in this trial is whether the Elite/Hummel Agreement falls within the ambit of the Agreement and was concluded in breach of SDIR’s matching rights. SDIR submits that Rangers was required to offer all of the elements of the Elite/Hummel Agreement to SDIR and that it would have exercised its right to match had that been done. SDIR seeks injunctive relief to hold Rangers to what

SDIR says is its bargain, together with declaratory relief and damages. Rangers contends that the matching rights under the Agreement did not confer any right upon SDIR to supply products wholesale or to manufacture replica kit or other products. The matching rights were instead confined only to the renewal or further grant of retail rights.

### **The evidence**

7. The issues of liability depend entirely upon the proper construction of the relevant terms of the Agreement. Some of those terms have already been construed by Teare J in the October 2018 Judgment and by Sir Ross Cranston (sitting as a Judge of the High Court) in his March 2019 judgment given in related Part 8 proceedings: *SDI Retail Services Ltd v The Rangers Football Club Ltd* [2019] EWHC 591 (Comm) (“**March 2019 Judgment**”).
8. Five witnesses gave evidence at the trial and a considerable body of documentary evidence was produced. The witnesses were:
  - (1) Mr Justin Barnes, a business consultant to the Sports Direct group.
  - (2) Mr James Don Blair, Rangers’ Company Secretary.
  - (3) Mr Stewart Robertson, Rangers’ Managing Director.
  - (4) Mr Neil Friar, the Chairman of Elite.
  - (5) Mr Mark Underwood, the Managing Director of Elite.With the notable exception of Mr Underwood I found much of the witness evidence to be unhelpful and unsatisfactory, as I will describe below.
9. Mr Barnes is an experienced business consultant who had previously served as Sports Direct’s Head of Brands between late 2006 until May 2008. He subsequently started to provide consultancy services to Sports Direct in 2010, albeit in a limited capacity. His role has since expanded. He has considerable experience in trade marks, brands, licensing and the retail sector. He was the primary contact between Sports Direct and SDIR’s solicitors, Reynolds Porter Chamberlain LLP (“**RPC**”), and took his instructions from executives of Sports Direct. Much of Mr Barnes’ written evidence consisted of argument, assertion and inadmissible opinion evidence regarding the meaning to be given to the Agreement. It became clear during cross-examination that he did not have a good grasp of events or of the matters about which he was purporting to give evidence. Mr Quiney QC, who appeared for Rangers, described Mr Barnes as a mouthpiece for SDIR. I consider this to be a fair assessment.
10. Mr Blair was, until late 2018, a partner in the firm of Anderson Strathern LLP who were Rangers’ legal advisors in Scotland. He is still a consultant with the firm. He has held the position of Rangers’ Company Secretary since 2015. He was closely involved with the disputes between the parties, with the drafting of the Agreement and the other contracts to which I will refer and with dealing with Elite. It appears that Rangers’ legal team obtained their instructions from him. Much of the correspondence between RPC and Rangers involved Mr Blair. His principal witness statement prepared for the purposes of the trial (his eighth statement) contains a considerable amount of “evidence” and argument as to what the intentions and understandings of the parties, and Rangers, were when concluding the Agreement and other contracts relevant to this dispute. This is all inadmissible. What it does confirm, however, is that Mr Blair has not been shy to enter into the arena on behalf of Rangers and that he

sees his role as that of an advocate as much as a witness of fact. This was also apparent from the correspondence which he authored and from his oral testimony. Mr Quiney submitted that Mr Blair's evidence could be seen as arising out of a desire as a drafter and a lawyer to explain why some of the points made against his client were wrong. That may be so, but it does not make it any the more attractive or relevant or admissible.

11. Mr Robertson was appointed as Managing Director of Rangers in June 2015. His statement also contained evidence and argument about the intention of the parties and the meaning of the Agreement. He was shown documents that clearly suggested that Rangers were having discussions with other kit suppliers from as early as 12 July 2017 (ie very shortly after the Agreement was concluded and in breach of the non-solicitation provisions in the Agreement). Although he did not accept this there was, in my judgment, considerable force in the point. Mr Robertson was, in my view, a mouthpiece for Rangers.
12. Mr Friar was somewhat defensive in his evidence and appeared reluctant to answer some quite straightforward questions, simply saying that he did not remember. I found some of his answers to be unconvincing. He was, for example, reluctant to accept that Elite appreciated that there was a risk that SDIR would make a claim against Elite if it entered into an agreement with Rangers. The documents showed that Elite was aware that there was such a risk.
13. Mr Underwood was, as I have intimated above, a good witness and answered all questions in an open and helpful way.
14. Much of the evidence was, as I have said inadmissible. Although some useful background and contextual evidence was given by the witnesses much of it has little bearing on the issues which I have to decide.

### **Background to the conclusion of the Agreement**

#### *RRL, the Puma Agreement and the IP Licence*

15. Between July 2012 and June 2017 SDIR and Rangers were shareholders in a joint venture company, Rangers Retail Limited ("**RRL**"), through which the manufacture, supply and retailing of Rangers official replica kit and other merchandise was carried out. The day-to-day running of RRL was carried out by SDIR. Puma was appointed by RRL as manufacturer and supplier of the kit by an agreement dated 27 February 2013 ("**the Puma Agreement**"). Retail activities were carried out by SDIR and the wider Sports Direct group on SDIR's behalf.
16. On 27 January 2015 Rangers and RRL concluded an IP Licence Agreement (the "**IPLA**"). This superseded an earlier licensing agreement made in 2012. Rangers granted certain rights to RRL under the IPLA, including: the right to manufacture (or have manufactured) and produce a maximum of three Official Rangers Kits and three Replica Kits during each year of the term; the right to operate and manage the Retail Operations; and the right to distribute, market, advertise, promote, sell and/or supply additional Rangers branded products on a retail basis only.

17. The Puma Agreement granted Puma an exclusive right to the development, manufacture, distribution, promotion, marketing, advertising and sale of Puma licensed products. Puma had a further right to extend the agreement through the exercise of matching rights.

*The Fan Boycott*

18. Rangers and SDIR did not have an easy relationship. Sports Direct's involvement with the Club had its origin in the financial difficulties faced by the Club in 2012. The company that owned the Club was placed into interim liquidation in 2012. The assets and business of the Club were purchased by Rangers on 14 June 2012 following which the parties concluded a shareholders' agreement pursuant to which Rangers undertook to transfer all of its IP rights to RRL. At about the same time, Mr Mike Ashley, Sports Direct's Chief Executive, subscribed for shares in Rangers in the name of his holding company and took a minority shareholding in the Club.

19. The Club's fans disapproved of Sports Direct's involvement with the Club and its perceived stranglehold over Rangers' commercial operations. From December 2014 the Union of Fans, an umbrella group of Rangers supporters, boycotted the sale of Rangers' replica kit and other products. There is evidence to suggest that the supporter boycott went hand in hand with repeated public calls by Mr David King (who, together with his family, is the beneficiary of a trust that is the biggest shareholder in the Club) and other directors for the renegotiation of the commercial relationship between SDIR and Rangers. As well as being company secretary of Rangers Mr Blair was also a director of Club 1872 Ltd., a group of Rangers supporters' groups. Club 1872 issued statements that supported the fan boycott, although Mr Blair sought to distance himself from this in evidence by saying that the statements were in fact issued on behalf of another supporters' group called Supporters Voice Limited (of whom he was also a director). It was suggested to Mr Blair in cross examination that he had, through Club 1872, himself encouraged the fan boycott. He did not accept this. He did not accept that it was in the interest of Rangers to try and stop the fan boycott. He did accept that he had taken no steps to do so. I found Mr Blair's evidence to be unconvincing. I share the view taken by Mr Richard Millett QC (sitting a Deputy Judge of the Chancery Division) in the derivative proceedings to which I refer below that the evidence strongly suggests that the fan boycott was not merely being tolerated by Rangers and Mr King in particular but was actively approved of and promoted by it and him. I consider it probable that Mr Blair played at least some part in this.

*Termination of the IPLA*

20. The fan boycott, which continued into 2016, had a significant effect on RRL's business. On 17 March 2017 Rangers purported to terminate the IPLA on the grounds of various alleged repudiatory breaches. SDIR issued a derivative claim on 4 August 2016 on behalf of RRL in which it sought declaratory and injunctive relief the effect of which was to maintain the IPLA in place and to claim damages for breach of contract from Rangers and compensation from Mr King and another director, Mr Murray. The application was heard by Richard Millett QC in March 2017. He gave judgment on 6 April 2017 – *SDI Retail Services Limited v David King & Ors* [2017] EWHC 737. SDIR was given permission to continue its claim as a derivative claim.

21. Rangers, together with the other defendants in the derivative action, obtained permission from the Court of Appeal to appeal Mr Millett QC's judgment. Before any further steps in those proceedings were taken, on 21 June 2017 the parties concluded a settlement agreement. The effect of this settlement agreement was to compromise a number of actions between the parties and their directors, to provide for the run off and cessation of the trading activities of RRL, and for the execution of what the Settlement Deed describes as new commercial arrangements. The Settlement Deed provided, amongst other things, that in consideration of a settlement payment from Rangers to SDIR:-
- (1) RRL would be wound up and the IPLA would be terminated. The effect of this was that Rangers thereby regained the rights and licenses that had been transferred to RRL.
  - (2) The Puma Agreement would be novated to Rangers.
  - (3) The parties would enter into the Agreement, which was executed on the same day as the Settlement Deed.

### **Subsequent Events and Proceedings**

22. The Elite/Hummel Agreement was, I have said, concluded on 30 March 2018. Before this Rangers had had discussions with a number of well-known technical kit manufacturers such as Macron, Fanatics and JD Sports. This was all with the intention of replacing Puma, who did not want to extend the novated Puma Agreement. Rangers also held detailed discussions with Elite.
23. On 20 April 2018, Rangers issued a press release in which it announced a new kit and manufacturing agreement with Hummel. This press release confirmed that Hummel would be the new technical kit supplier for the next season and that Hummel had been appointed on an initial three year agreement. No mention was made of Elite's involvement.
24. SDIR considered that the rights granted by Rangers to Hummel must have included rights falling within SDIR's Matching Right under the Agreement such as distributing, marketing, advertising, promoting or selling the Official Kit and Replica Kit. On 11 May 2018 RPC wrote to Mr Blair and advised him that SDIR considered it should have been notified of the Hummel offer and have been given the opportunity to match it pursuant to the Agreement. RPC asked for a copy of the Hummel agreement. Mr Blair responded on 14 May 2018, and asserted that Hummel had simply contracted in respect of rights previously granted to Puma. Further correspondence followed in which RPC pressed for production of the Hummel agreement and asked Rangers to confirm that Hummel had not been granted rights of distribution, marketing, advertising, promoting, offering for sale and/or selling the Official or Replica kit. On 18 May Mr Blair gave that confirmation, stating that "Hummel has not been granted any of the rights set out in your email". This was untrue. He later acknowledged in his Seventh Witness Statement that "... Of course Hummel did have rights to distribute, market, advertise, promote, offer for sale and/or sell the Official Kit and/or Replica Kit ..."
25. On 4 June 2018, Rangers served a purported Notice of Offer in relation to a proposed agreement with Elite. SDIR considered that this did not comply with the requirements of the Matching Right because it did not set out separately the Material Terms for

each Offered Right. This led to a dispute between SDIR and Rangers as to what the requirements were for a compliant Notice of Offer. SDIR obtained urgent interim injunctive relief at a hearing on 2 July 2018 before Bryan J. Following the return date hearing on 10 July 2018, Phillips J ordered that the injunctive relief continue until an adjourned return date on 30 July 2018, at which 6 preliminary issues would be tried.

26. By letter dated 12 July 2018, Rangers provided to SDIR a further Notice of Offer said to set out the full terms of a Third Party Offer. This notice did set out the Material Terms for three separate Offered Rights. Following further clarification SDIR matched the Third Party Offer by letter dated 25 July 2018. The parties' solicitors then exchanged correspondence about the terms of the Further Agreement but were unable to reach agreement as to what they should be. On 6 November 2018 SDIR issued the Part 8 Proceedings which were subsequently heard by Sir Ross Cranston and which are the subject of the March 2019 judgment. Sir Ross Cranston held at [84] that a further agreement came into existence on 25 July 2018.
27. In the meantime, between July 2018 to September 2018, RPC (on SDIR's instructions) made requests on behalf of SDIR for the supply of Rangers Replica Kit. These requests were made pursuant to Rangers' obligation under clause 5.1 of the Agreement to supply SDIR with Replica Kit (or to procure the supply thereof) and then pursuant to the Further Agreement entered into following SDIR's exercise of its Matching Right in relation to the July Notice. Rangers did not, however, supply SDIR with any Replica Kit, giving unconvincing reasons, including for example Mr Blair's assertion on 3 September 2018 that Rangers' supplier could not make units of kit available to SDIR until such time as the Further Agreement was in place. It has now been held by Sir Ross Cranston that (as SDIR had always contended) the Further Agreement was already in place at that time. Correspondence between Mr Blair and Elite in late August shows that Mr Blair's strategy was, in his own words, to lead SDIR a dance.
28. On 11 September 2018 Rangers and Elite entered into two further agreements, the "**Elite Non-Exclusive Rights Agreement**" and the "**Elite Retail Units Agreement**".
29. The Elite Non-Exclusive Rights Agreement (referred to by Teare J as the "**Elite Agreement**" in the October 2018 Judgment) granted Elite worldwide non-exclusive rights from 15 September 2018 to the end of the 2019/2020 Football Season to (1) distribute, market, advertise, promote, offer for sale and/or sell products bearing any Rangers brands or Rangers related brands and replica kit; (2) manufacture and/or have manufactured products bearing any Rangers brands or Rangers related brands; and (3) the non-exclusive right to use the Rangers brands and Rangers intellectual property in connection with the exercise of these rights. In Clause 11 of the Elite Agreement Rangers warranted that it had all of the necessary rights to grant to Elite the rights set out in the agreement and agreed to indemnify Elite against all costs incurred in defending any proceedings against it.
30. The Elite Retail Units Agreement provided that, in consideration for Elite entering into leases for retail units in Belfast, Argyle Street and Glasgow, Rangers granted Elite a non-exclusive licence to use Rangers' branding, logo and related intellectual property and to procure that any manufacturer of Rangers' replica kit would make it available for sale in the retail units.

31. On 21 September 2018, Rangers released a statement advising that a webstore, [www.theegersstoreonline.com](http://www.theegersstoreonline.com) (the "**Elite Website**") had gone live and that Elite would be selling Rangers' replica kit and branded products. SDIR only learned of the Elite Agreement on 25 September 2018 when it saw an announcement describing Elite as Rangers' "new non-exclusive partners". As Teare J sets out at [16] of the October 2018 Judgment, Rangers' statement on its website went live at 1730 on 21 September, just 15 minutes after a letter was sent on behalf of Rangers to SDIR which set out its view that Rangers retained "*the right to grant non-exclusive rights on the same or similar terms to those which will be granted pursuant to the Further Agreement with SDIR*" (in respect of the matched July 2018 offer), but made no mention of the Elite Agreement which had been signed ten days earlier.
32. SDIR's immediate response to Rangers' announcement was to commence this action on 27 September 2018. SDIR made an application for an interim injunction against Rangers which was then heard by Teare J as an expedited trial on liability and relief in October 2018. The issue in those proceedings was, in summary, whether once SDIR had exercised a matching right in respect of a non-exclusive Offered Right, was Rangers then free to offer the same right to others on a non-exclusive basis without going through the matching right process. That issue was resolved in SDIR's favour in the October 2018 Judgment. Teare J held that Rangers had breached the Agreement by entering into the Elite Agreement (and in failing to offer SDIR the opportunity to exercise its matching right in relation to Elite's offer). Teare J granted SDIR final injunctive relief against Rangers. Teare J refused permission to appeal from his decision, as did the Court of Appeal.
33. On 25 October 2018, the day after the October 2018 Judgment had been handed down, Elite provided SDIR with copies of 2 further agreements concluded between Rangers and Elite. These were the Elite Retail Units Agreement and the Elite/Hummel Agreement. SDIR says that it was only at this point that it realised that Elite was also party to an agreement between Rangers and Hummel.
34. Following the injunction ordered by Teare J, Rangers wrote to Elite to inform them that (with immediate effect) Rangers would cease to perform the Elite Non-Exclusive Rights Agreement and the Elite Retail Units Agreement. Mr Blair later explained in his seventh witness statement the Elite Retail Units Agreement was a "subsidiary letter" to the Elite Agreement; that he had treated the Elite Retail Units Agreement in the same way as the Elite Agreement (i.e. as if it were covered by the injunctions granted by Teare J); and that Rangers had confirmed to Elite that it would therefore be unable to perform the Elite Retail Units Agreement.
35. SDIR then sought permission to amend their Particulars of Claim in order to raise claims arising out of what it said were Rangers' breaches of the Matching Right provisions in the Agreement in entering into the Elite/Hummel Agreement. I gave permission for those amendments to be made and directions for the hearing of this trial. I refused an application by Elite to participate in the trial in order to adduce factual evidence, to make submissions on the issue of final injunctive relief and to cross-examine SDIR's witnesses. I did, however, indicate that I would be receptive to an application by Elite to be joined as a party pursuant to CPR Part 19.2. Elite did not in the event apply to be joined as a party because, as Mr Friar has explained, of



concerns over the costs of becoming involved. Mr Friar and Mr Underwood gave evidence on behalf of Rangers and Elite provided Third Party Disclosure.

36. SDIR's Amended Particulars of Claim ("AmPoC") were served on 22 January 2019. Rangers' Amended Particulars of Defence were served on 25 January 2019 and the Counterclaim was introduced by further amendment on 28 February 2019.
37. SDIR's Part 8 Claim was heard on 18 and 19 February 2019. At issue was Rangers' Notice of Offer dated 12 July 2018 and whether and, if so, how the contractual mechanism in the Agreement resulted in an amended contract in respect of offered rights. Rangers contended at that hearing that SDIR was not entitled to accept the offered rights in the narrow way that it claimed to have done, but had also to accept the other material terms and any connected commercial arrangements in the Notice of Offer. Sir Ross Cranston rejected Rangers' arguments. He held that a Notice of Offer only had to match the material terms identified in paragraphs 5.3.1-5.3.5 of Schedule 3 and that SDIR had matched those material terms. He made some important findings in relation to the contractual issues with which I have to deal. I will return to these below. Rangers' application for permission to appeal was rejected by Sir Ross Cranston and by the Court of Appeal. Rangers were not prepared to agree to the terms of the Further Agreement which Sir Ross Cranston held had come into existence on 25 July 2018 and the matter came before me on 22 May 2019 to determine the terms of that Further Agreement. I held that the terms were those set out in a draft agreement that had been provided to the Court during the hearing before Sir Ross Cranston.

## The Agreement

38. I set out the relevant terms of the Agreement below:-

### "... 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 ...”

## **The Construction of the Agreement**

### *The issues*

39. The principal issues which arise both turn on the proper construction to be given to the Matching Right provisions in Schedule 3, paragraph 5 of the Agreement.
40. The first issue is whether SDIR’s Matching Rights were engaged where Rangers proposed to appoint a third party as a kit distributor. SDIR says that they were and Rangers disagrees.
41. The second issue is whether the right to manufacture and the appointment as technical brand were connected commercial arrangements to the Offered Rights granted to Elite/Hummel under the Elite/Hummel Agreement.
42. Rangers also argues that terms are to be implied into the Agreement and relies upon an estoppel by convention.

### *The Elite/Hummel Agreement*

43. 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”.

### *Approach to construction*

44. Both parties referred me to the well-known decisions of the Supreme Court in *Arnold v Britton* [2015] UKSC 36 [15] and in *Wood v Capita Insurance Services Limited* [2017] UKSC 24 [10-12]. The principles have been helpfully distilled by Popplewell J in *The Ocean Neptune* [2018] 1 Lloyd’s Rep.654 at [8] as follows:

“... The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The

court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Interpretation is a unitary exercise; in striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest; similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. It does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each ...”

This distillation is cited in full in the latest edition of *Chitty on Contracts* (33<sup>rd</sup> Ed) at §13.07 and has been described as helpful by the Court of Appeal in *Ark Shipping Co LLC v Silverburn Shipping (IoM) Ltd* [2019] EWCA 1161 at [41].

45. It is a fundamental principle of English contract law that the subjective intention of the parties and their previous negotiations are not admissible as an aid to the construction of a contract, except in very limited circumstances such as a claim for rectification or of estoppel by convention. One has to read no further than §1.01(3) of Lewison on the Interpretation of Contracts for a succinct statement of the principle:

“... The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent ...”

46. I have already referred to the extensive references to the parties’ subjective intentions and arguments on construction in the witness statements. The witnesses should not have entered into the arena in this way. Nor should their legal teams have allowed them to do so. Much of the argument in Rangers’ skeleton argument refers to and relies upon this inadmissible evidence and argument. Teare J observed at [19] of his October 2018 Judgment that neither party relied upon any particular background knowledge available to the parties when they made their contract. Nor does there appear to have been any reference to subjective intention or arguments from witnesses on construction in the argument before Sir Ross Cranston. Both of those trials proceeded on the basis that the Agreement was to be construed in light of the well-established principles of contractual construction and that the court’s task was to ascertain the objective meaning of the parties’ language by considering the

Agreement as a whole in its wider context. That is the basis upon which I will proceed.

*Admissible background*

47. In my judgment, the parties' previous agreements and disagreements are part of the admissible background as, in particular, is the fact that the Agreement was concluded in settlement of previous proceedings. As Sir Ross Cranston held at [51] of the March 2019 Judgment:

“... In my view, a particularly significant factor in interpreting the Agreement is the context that it was part of a settlement of the derivative action regarding RRL: SDI Retail Services Ltd v King [2017] EWHC 737 (Ch). Against that background it seems to me that SDIR is correct in its submission that the parties aimed for certainty in the drafting of the Agreement; that paragraph 5 of Schedule 3 is carefully worded (the same could be said of other provisions); and that that paragraph was designed to produce a clear and relatively simple process for SDIR to match a notice of offer, following a third party offer, or to renew the Agreement where Rangers had not received one. That is supported by other provisions in the Agreement showing that the parties were concerned to produce certainty in their relationship, such as clause 14 ruling out termination for repudiatory breach ...”

I respectfully agree.

*The Scheme of the Matching Rights provisions*

48. The starting point is paragraph 5.11 of Schedule 3. This provides that Rangers may not approach, solicit, tender for or enter into negotiations or any agreement with any third party in relation to any of the Offered Rights. Offered Rights are defined in paragraph 1.1.4 of Schedule 3 as, inter alia, the right to operate and manage the Retail Operations and the right to perform the Permitted Activities. The Permitted Activities are themselves defined in clause 1.1 of the Agreement as meaning:

“... 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) ...”

49. Paragraph 5.1 permits Rangers to approach, solicit, tender for or enter into negotiations (but not to enter an agreement) with a third party in relation to the provision of Offered Rights from 6 months prior to the expiry of the Initial Term. If a Third Party Offer is received in respect of any Offered Right then Rangers is obliged under paragraph 5.2 to provide a Notice of Offer to SDIR. The required form and content of any Notice of Offer is set out in paragraphs 5.2 and 5.3.
50. Should SDIR elect to match the Third Party Offer in relation to any or all of the Offered Rights, paragraph 5.7 provides that Rangers and SDIR are required to enter into a further agreement on the same terms as the Agreement in respect of the Offered Rights (and, if relevant, connected commercial arrangements) that SDIR has agreed to

match, save for any variations required to effect the Material Terms in the Third Party Offer.

51. Paragraph 5.8 provides that, once SDIR has exercised its Matching Right, the general prohibition against approaching etc. any third party applies once again in language similar to that in paragraph 5.11.
52. Paragraph 5.8 also provides that if SDIR does not elect to exercise its Matching Right for some or all of the Offered Rights in the Third Party Offer then (and only then) may Rangers contract with the third party on the Material Terms set out in the Notice of Offer in respect of those Offered Rights which SDIR has not matched.
53. Teare J has found that before any Offered Rights can be granted to any person, they must be first offered to SDIR in accordance with paragraph 5.2: see [41 and 65] of the October 2018 Judgment. In holding that this right applied not only to the first occasion on which SDIR matched (non-exclusive) Offered Rights but also to all subsequent offers from third parties in respect of the same Offered Rights within the matching right period, he acknowledged that SDIR had thereby secured itself a “very beneficial right to match offers made by third parties”. Rangers had argued that this construction led to a commercially unreasonable result. That argument failed.
54. The first question to consider, therefore, is whether any of the rights granted to Elite/Hummel fall within the definition of “Permitted Activities” under the Agreement such as to make them “Offered Rights” under the Agreement. If they are, then the Matching Right provisions are engaged.
55. Sir Ross Cranston held in his March 2018 Judgment that, once it is established that a third party has made an offer in relation to one of the Offered Rights, the other terms offered by that Third Party in connection with its offer are connected commercial arrangements and must be offered separately to SDIR. Accordingly, if any of the rights granted to Elite/Hummel are “Permitted Activities” then the other rights granted to Elite/Hummel are required to be offered separately to SDIR as “*connected commercial arrangements*” pursuant to paragraph 5.7. Of particular relevance here are the manufacturing rights that were granted to Elite/Hummel. SDIR’s case is that it has the right to match each of the rights or benefits that make up the whole bargain, and not only those elements that are Offered Rights.

*The first issue – Permitted Activities*

56. SDIR submits that Permitted Activities include the distribution and sale of products higher up the supply chain than ordinary retail sales. SDIR relies upon the following in support of this submission:-
  - (1) The OED defines a “*distributor*” as “*a person who distributes something; ... an agent who markets goods, esp. a wholesaler*”. A person who is given the right to carry on the activity of “*distributing*” is being given the status of a distributor/wholesaler.
  - (2) The marketing, distribution and sale of products which *could be* sold in a retail store is plainly a description of activities at a prior stage to retail itself, i.e. wholesale activities.
  - (3) This is underlined by the fact that such activities are stated to be additional to (or “*together with*”) “*the right to retail*”. There is no sensible way in which



the tail-piece of the definition “*together with the right to retail*” can be understood to condition the permitted activities as being subordinate to, or qualified by, the right to retail. Rather, the definition is expressly authorising certain activities, and then additionally granting a right to retail the goods.

57. Rangers submits that the Permitted Activities are only relevant in the retail context and are therefore restricted to the right to make retail sales. “Retail” is usually used to mean the sale of goods to the public in relatively small quantities whereas “wholesale” is used to mean the business of selling goods in large quantities. The language used in the Agreement makes it plain, Rangers<sup>1</sup> say, that the parties intended that SDIR would only have rights to sell on the retail basis.

58. I am firmly of the view that SDIR’s construction is to be preferred. Rangers’ construction assumes that the scope of the Offered Rights is somehow circumscribed, or otherwise to be defined by, the scope of the original Agreement. I do not agree. As Teare J held in his October 2018 Judgment at [23]:

“... Depending upon the terms of the third party offer which Sports Direct matches pursuant to paragraph 5.6 and the further agreement entered into pursuant to paragraph 5.7, business might be done between the parties after the expiry of the initial period on a different basis from that contemplated and provided for in the Retail Agreement. Paragraph 5.7 provides that the further agreement between Rangers and Sports Direct will be on the same terms as the Retail Agreement save only as to any variation required to effect the Material terms of the matched offer. Thus there is a limit to the extent to which the commercial purpose of the initial period of the agreement can be used to interpret the provisions relating to the matching rights which determine the basis upon which business may be conducted by the parties after the initial period of the agreement ...”

59. The Offered Rights are part of a special contractual regime that only becomes relevant in the context of the Matching Right provisions. Offered Rights are distinct from Rangers Rights as Teare J observed: October 2018 Judgment at [22].

60. Permitted Activities are referred to in both Clause 3.1.2 and Schedule 3, clause 1.1.4 (which confers a non-exclusive right to perform the Permitted Activities in relation to the Branded Products, Replica Kit and Additional Products). The words have the same meaning in both contexts.

61. The definition of Permitted Activities is not consistent with Rangers’ construction. I say this for the following reasons:-

(1) “Distributing” does, in my judgment, have the meaning for which SDIR contends. Rangers points to definitions in the OED which it says are wide and support its interpretation: eg “*give a share or unit of (something) to each of a number of recipients*” or “*The action of dealing out in portions or shares amongst a number of recipients; apportionment, allotment; the dispersal of commodities among consumers effected by commerce*”.

(2) The definitions of “distributing” are wide and embrace the definition for which SDIR contends. The scope of the Agreement is not confined to Retail

Operations. For example, the Rangers Rights granted to SDIR under the Agreement also included the non-exclusive right to manufacture and/or have manufactured the Branded Products (Clause 3.1.3). This is about as far removed from Retail Operations as it is possible to get. Rangers submitted that the Agreement contained no clauses regulating manufacture. This is simply incorrect.

- (3) It follows from this that I do not agree that “distributing” is used by the parties purely in the retail context. If the parties had wanted to confine the right to the distribution of goods by SDIR from its warehouses to retail stores or from its warehouse direct to customers then they could and would have said so in this carefully drafted Agreement. If, as Rangers also argues, the parties had intended to confine the meaning to retail distribution as opposed to wholesale distribution then again they could and would have said so.
- (4) The definition of Permitted Activities shows that such activities are not confined to purely retail activities or Retail Operations. The Permitted Activities embrace the distribution etc of all products “*which are or could be sold in a retail outlet*”. This strongly suggests that they are not confined just to retail sales. As SDIR submits, the sale of products which *could* be sold in a retail store points to there being a right to wholesale – such a sale is not, by definition a sale of products that are being sold in a retail store.
- (5) The matter is, to my mind, put beyond doubt by the words “*together with the right to retail*”. Rangers contend that the effect of these words is to make clear the delineated Permitted Activities are only relevant in the retail context and thereby restricted to the right to make retail sales. The right to retail, Rangers submits, qualifies the words which precede it and identifies an intention of the parties to define the permitted activities as needing to be attached to or conditional upon the sale of the goods on a retail basis only. This is not an appropriate reading of the words. The definition lists a number of Permitted Activities to which the right to retail is added. The right to retail does not qualify the words which precede it but rather extends the list of those activities which are permitted. There is no justification for reading the definition as if it meant:

“Permitted Activities means retail activities including 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)”.

62. Rangers take a number of other points with which I should briefly deal. I will not address those arguments which are founded upon inadmissible assertions as to the parties’ intentions.
63. First, Rangers relies heavily on the use of the word “Retail Operations” in the title of the Agreement. There is nothing in this point. The word “Distribution” is also used in the title – it is a Retail Operations, Distribution and IP Licence Agreement. It is necessary to look at the terms of the Agreement in order to determine its true scope.
64. Secondly, Rangers points to the fact that Sports Direct is an experienced retailer and maintains a distribution network in respect of its retail operations across its many

retail stores. That is undoubtedly so, but is not a matter that assists in the construction of the Agreement. The evidence showed that Sports Direct also had and continues to have commercial relationships with a number of football and other sports brands and had arranged for the manufacture and supply of official and replica kit to a number of professional football clubs.

65. Thirdly, Rangers relies on the fact that the Agreement explicitly recognises that Puma will be the manufacturer and wholesale supplier of Replica Kit and that such kit will be supplied to SDIR at a price equal to the wholesale price: see clause 5 and Schedule 3, paragraph 5.10.2. This, Rangers contends, shows that the parties intended to draw a clear distinction between manufacture and supply on the one hand and retail sales on the other. At the time the Agreement was concluded Puma was the distributor of the Rangers Official and Replica Kit. Rangers had a right under the Puma Agreement to obtain Replica Kit and SDIR had the right under clause 5.1 of the Agreement to obtain from Rangers such quantities of Replica Kit as it wished to order. The Agreement recognised that Puma would not necessarily continue in the role of manufacturer and distributor forever. If, as in fact happened, Rangers was to grant the right to distribute to another party then there would be a real risk that SDIR might face the prospect of only being able to obtain kit on unfavourable terms or, perhaps, not at all. This is in fact what happened when Elite failed to supply SDIR with kit that it had ordered. There was, therefore, considerable commercial sense in SDIR wishing to have the right to match rights higher up the supply chain. Without such a right there was a real risk that they would find themselves without any source of supply.
66. Fourthly, Rangers argues that there was a potential clash between the Agreement and the Puma Agreement because both contained matching rights in respect of distribution. This clash would be avoided if distribution in the Permitted Activities was confined to retail distribution. As SDIR explains, however, the clash is readily explained by the circumstances in which the Agreement came to be concluded. The Puma Agreement was not renegotiated at the time. It was instead novated from RRL to Rangers. That left the possibility that provisions of the Puma Agreement might clash with the Agreement. SDIR was content to proceed with Puma, with whom it had a close commercial relationship, as manufacturer and wholesale distributor. The risk of clashing rights was a very small one. SDIR was only likely to wish to match in the event that SDIR and Puma did not extend the Puma Agreement. I do not consider that the theoretical risk of a clash of matching rights affects the proper construction to be given to the Permitted Activities in the Agreement.
67. Finally, Rangers complain that SDIR is attempting, without justification, to assert control over the entire supply chain of Rangers' merchandise. I am not much impressed with this *in terrorem* submission. The only relevant question is whether Rangers' has breached its obligations in relation to matching rights and, if so, the consequences which follow from such a breach.
68. In conclusion, I consider that the Elite/Hummel Agreement did involve the grant to Elite/Hummel of Offered Rights. It follows from this that Rangers was obliged to provide SDIR with a Notice of Offer in relation to the terms of Elite/Hummel's Third Party Offer, together with any connected commercial arrangements. Rangers did not

do so and was therefore in breach of the Matching Right provisions in Schedule 3, paragraph 5 of the Agreement.

*Second Issue – Connected Commercial Arrangements*

69. I can take this second issue quite shortly because Sir Ross Cranston has largely determined the meaning and role of connected commercial arrangements in his March 2019 Judgment.
70. SDIR's case is that:-
- (1) The Matching Right scheme under the Agreement divides terms of any Third Party Offer into Material Terms, other terms, and connected commercial arrangements.
  - (2) These are mutually exclusive. A connected commercial arrangement is, by definition, not a term of the Offered Right.
  - (3) The references to connected commercial arrangements in the Matching Right provisions address ancillary arrangements that nevertheless form part of the overall bargain offered to Rangers by a third party.
  - (4) The commercial rationale for allowing SDIR to match connected commercial arrangements is that where a Third Party Offer involves not only Offered Rights but other benefits being granted by Rangers to the third party, there is a risk that the price payable for the Offered Rights may be distorted. In other words, it is possible that the consideration paid for the various rights could involve (whether deliberately or not) a cross-subsidy, such that part of the consideration nominally offered for the Offered Rights was in fact paid in respect of collateral rights, thus making the Offered Rights taken alone more expensive. It is equally possible that an Offered Right and a connected commercial arrangement might be more attractive in combination with each other, such that a party who has both is willing to pay more for the complete package.
  - (5) There would be obvious unfairness if, for example, the payment for an Offered Right was artificially high because it was combined with a connected commercial arrangement at an artificially low price, unless SDIR was given the opportunity, through the matching right, to match both. Otherwise, SDIR's right to match an individual Offered Right would not reflect the true offer made to Rangers by a third party and SDIR would not be given a true chance to match.
  - (6) Similarly, where an Offered Right and a connected commercial arrangement are more attractive together, such that the price for each is higher, it is in both Rangers and SDIR's commercial interests that SDIR be given the chance to match the whole set.
  - (7) Thus, the requirement for Rangers to set out any connected commercial arrangements in the Notice of Offer ensures that SDIR has a view of the whole commercial deal of which the Third Party Offer for the Offered Rights may be only a part. It also means that there is no incentive for Rangers to artificially make the Third Party Offer less attractive by entering into cross-subsidising arrangements.
  - (8) By way of example, if a third party makes a very high offer to take over the retail activities carried out by SDIR under the Agreement and at the same time makes a very low offer to acquire the naming rights for the Ibrox Stadium, it would be unfair if SDIR were only able to match the retail activity component

because it would be plain that the price offered for the Offered Rights was in part also designed to acquire the naming rights.

- (9) The same is the case with the rights given to Elite/Hummel to manufacture the kit and to be appointed as the Technical Brand (with associated benefits). Those are valuable rights and yet no distinct payments are made by Elite/Hummel in relation to those rights.

**71.** Rangers submits that there is no scope for the application of connected commercial arrangements to the Elite/Hummel Agreement for the following reasons:-

- (1) It is necessary, when considering the specific terms, to consider the degree of connection involved and ask whether they were intended by the parties to be matched in the event that the Offered Rights were in play.
- (2) Connected commercial arrangements cannot serve to expand the scope of SDIR's matching rights to matters of manufacture and wholesale supply which were excluded from the scope of the Offered Rights.
- (3) It would be commercially absurd for the scope of the matching right to be extended through the back door so as to enable SDIR to acquire such manufacturing rights and block the grant of such rights to third parties. SDIR never held such rights under the Agreement and the parties expressly excluded rights to manufacture from the definition of Offered Right in Schedule 3, paragraph 1. Manufacturing arrangements and rights were plainly not intended by the parties to be the type or class of rights that should be capable of being matched, whether as a connected commercial arrangement or at all.
- (4) Further, a connected commercial arrangement should be connected to the Offered Right that is being matched. It should be subsidiary and supportive to the activity in question. Even if the right to supply wholesale is an Offered Right the right to manufacture is not sufficiently connected.

**72.** I have no hesitation in rejecting Rangers' submissions. They are inconsistent with the findings of Sir Ross Cranston in his March 2019 Judgment and with the clear meaning of and intent behind the matching right provisions.

**73.** Sir Ross Cranston found [at 74] that a "connected commercial arrangement" in paragraph 5.3 of Schedule 3 cannot be a detail or a term of an offered right. That is because in the Schedule "offered right" and "connected commercial arrangement" are distinct concepts.

**74.** Sir Ross Cranston went on to hold [at 76] that a commercial arrangement in Schedule 3 which is connected to an offered right is a relationship or understanding which forms part of the same overall deal. It cannot be a detail of an offered right. The concept of connection means that things are separate but related. The rationale of this contractual scheme is straightforward: it enables SDIR to view the overall commercial deal of which both an offered right and any connected commercial arrangement are part.

**75.** Sir Ross Cranston accepted [at 77] SDIR's submission that this contractual scheme reflects the need to ensure that the matching right scheme is not undermined, for example, by the payment for an offered right being artificially high because it is combined with a connected commercial arrangement at an artificially low price. To ensure the integrity of the scheme and the true offer Rangers has obtained from a third

party, SDIR must be given the details of both the offered rights and any connected commercial arrangement, as well as the opportunity to match both.

76. There is nothing surprising about this analysis, with which I respectfully entirely agree. The end aim of the connected commercial arrangement provisions was to enable SDIR to match any proposed composite deal of which Offered Rights form a part. Rangers chose to bundle wholesale distribution rights (which are, as I have found, an Offered Right) together with manufacturing rights as part of a proposed composite deal which subsequently became the Elite/Hummel Agreement. If a separate deal had been concluded in respect of manufacturing rights then SDIR would have had no right to match it. When, however, the right to manufacture was offered as part of a bundle, or deal, or package that also included one or more Offered Rights that right to manufacture became a connected commercial arrangement. It was part of the commercial deal. As Teare J has found, the effect of the matching right provisions means that business will be conducted on a different basis from that contemplated and provided for in the Agreement (October 2018 Judgment at [23]).
77. In conclusion, I find that Rangers was obliged to set out the terms of the connected commercial arrangements offered to Elite/Hummel (the manufacturing rights and the appointment as a Technical Brand) in a Notice of Offer. It was in breach of its obligations under Schedule 3, paragraph 5 in failing to do so. I am satisfied that SDIR would have matched those arrangements had it been given the opportunity to do so.

*Implied terms*

78. Rangers contend for two implied terms:
- (1) First, that the Agreement, as a relational contract, is subject to an implied term of good faith (AmPoDCC at §4B.7.4); and
  - (2) Secondly that there is an implied term restricting the definition of “Permitted Activities” to retail matters only (AmPoDCC at §4B.8).
79. In *Marks & Spencer plc v. BNP Paribas Securities Services* [2016] AC 742 the Supreme Court confirmed that a term has to satisfy the following conditions if it is to be implied into a contract:
- (1) It must be reasonable and equitable. A term will not be implied into a detailed commercial contract merely because it appears fair or because the court considers that the parties would have agreed to it if it had been suggested to them.
  - (2) It must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it.
  - (3) It must be so obvious that ‘it goes without saying’.
  - (4) It must be capable of clear expression.
  - (5) It must not contradict any express term of the contract.
- These conditions are cumulative, save for (2) and (3).
80. Rangers’ first proposed implied term is said to arise out of SDIR’s illegitimate attempt to take control of the entire supply chain to the detriment of Rangers and that the potential effect of the injunctions which it seeks is to strangle the supply of replica kit. Rangers contends SDIR are in breach of the implied duties of good faith which arise in a relational contract such as the present. Rangers rely on the decision of

Leggatt J (as he then was) in *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB), in which he held at [131] that there was no difficulty in implying a duty of good faith into a commercial contract “based on the presumed intention of the parties”. At [142] Leggatt J suggested that a duty of good faith may more readily be implied in contracts which:

“... involve a longer term relationship between the parties [in] which they make a substantial commitment. Such ‘relational’ contracts, as they are sometimes called, may require a high degree of communication, cooperation and predictable performance based on mutual trust and confidence and involve expectations of loyalty which are not legislated for in the express terms of the contract but are implicit in the parties’ understanding and necessary to give business efficacy to the arrangements. Examples of such relational contracts might include some joint venture agreements, franchise agreements and long-term distributorship agreements ...”

He went on to say at [144] that:

“... The test of good faith is objective in the sense that it depends not on either party’s perception of whether particular conduct is improper but on whether in the particular context the conduct would be regarded as commercially unacceptable by reasonable and honest people ...”

- 81.** Rangers submits that this approach has been approved by the Court of Appeal in *Globe Motors Inc & Ors v TRY Lucas Varity Electric Steering Limited* [2016] EWHC Civ 396. This goes too far. As Beatson LJ observed at [68]:

“... This is the not occasion to consider the potential for duties of good faith in English law because the question in this case is one of interpretation or construction, and not one of implication. It suffices to make two observations. The first is to reiterate Lord Neuberger’s statement in *Marks and Spencer PLC v BNP Paribas Security Services Trust Co (Jersey) Ltd* (see [58] above) that, whatever the broad similarities between them, the two are “different processes governed by different rules”. This is, see the statement of Lord Bingham in *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472 , at 481 cited by Lord Neuberger, because “the implication of contract terms involves a different and altogether more ambitious undertaking: the interpolation of terms to deal with matters for which, *ex hypothesi*, the parties themselves have made no provision”. The second is that, as seen from the *Carewatch Care Services* case, an implication of a duty of good faith will only be possible where the language of the contract, viewed against its context, permits it. It is thus not a reflection of a special rule of interpretation for this category of contract ...”

- 82.** In my judgment, considerable care needs to be taken before implying a term of good faith into a commercial contract. In *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2015] EWHC 283 (Comm), [2015] 1 Lloyd’s Rep. 359, Leggatt J held that Braganza-type implied terms were applicable to a party’s choice whether or not to terminate a contract in response to a repudiatory breach. The Court of Appeal

disagreed: [2016] EWCA Civ 789; [2016] 2 Lloyd's Rep. 494. Moore-Bick LJ (who presided in the *Globe Motors* case, above), said at [45]:

“... There is in my view a real danger that if a general principle of good faith were established it would be invoked as often to undermine as to support the terms in which the parties have reached agreement. The danger is not dissimilar to that posed by too liberal an approach to construction, against which the Supreme Court warned in *Arnold v Britton* ...”

**83.** I see no basis for the implication of Rangers’ first implied term. The Agreement sets out the parameters pursuant to which Rangers is required to issue a Notice of Offer and the rights which SDIR is entitled to match. If SDIR is entitled to match upon a true construction of the Agreement then that is an end of it. If the effect of the exercise of its matching rights is to give SDIR control over part or all of the supply chain then so be it. That is a consequence of Rangers’ decision to bundle together all of the manufacturing/supply chain rights in the Elite/Hummel offer, and has nothing to do with the exercise of any bad faith on the part of SDIR. In short, the implied term is not obvious; it is not necessary to give business efficacy to the Agreement; and it cuts across the express terms of the Agreement.

**84.** The less that is said about Rangers’ second proposed implied term, the better. Rangers argues that if the ordinary meaning of the Agreement compels the court to accept SDIR’s interpretation then the Agreement lacks business efficacy and a term should be implied such that the definition of Permitted Activities reads as follows:

“... Permitted Activities means retail activities including 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) ...”

**85.** There is no need to rewrite the definition of Permitted Activities to give business efficacy to the Agreement. The term for which Rangers contends directly contradicts the express terms of the Agreement.

*Estoppel by Convention*

**86.** Finally, Rangers relies upon an alleged estoppel by convention, based it is said upon a clear understanding between the parties as to what the Agreement would govern, and what the matching rights would cover. Rangers argues that both parties knew that the Agreement focussed on the retail of replica kit and that SDIR always intended to and did only undertake retail operations under the Agreement. It follows from this, Rangers say, that it does not lie in SDIR’s mouth to assert that the parties intended that the Agreement should be interpreted so as to allow the overreach contended for into the manufacture and wholesale parts of the supply chain. This is a thoroughly bad point. There is no evidential basis to support the contention that the parties had an unambiguous and unequivocal common understanding that the Permitted Activities would be limited only to retail activities.



## Relief

### *The relief sought*

87. The consequence of my findings is that Rangers was in breach of its obligations under Schedule 3, paragraphs 5.2 and 5.11 of the Agreement. I am satisfied that SDIR was not only entitled to match the rights offered to Hummel/Elite but would have done so. Those rights were not only not offered to them but Rangers, through Mr Blair, untruthfully asserted that Hummel had not been granted any Offered Rights and did not provide SDIR with a copy of the Elite/Hummel Agreement. The upshot of all this is that Rangers, Elite and Hummel have until now performed and enjoyed the benefit of the Elite/Hummel agreement. The 2018/2019 season has been completed and, as the evidence before me showed, preparations for the 2019/2020 season were well underway by the time of the hearing. Had the rights been offered to SDIR then SDIR would have found itself in the shoes of Elite and would have been in a position to make the sales and profits that Elite has made. Mr Sa'ad Hossain QC, who appeared on behalf of SDIR, acknowledged that as matters now stand SDIR is reduced to a damages claim in respect of the 2018/2019 and 2019/2020 seasons.
88. SDIR now seeks an order for damages to be assessed, an order for declaratory relief, and an injunction in the following terms:

**“... UPON SDIR agreeing that, for the 2019/2020 season, the Rangers FC teams may wear any Official Rangers Kit (as that term is defined in the Agreement between Rangers and SDIR dated 21 June 2017) that had been approved by Rangers prior to 17 April 2019**

1. Rangers shall:

- (i) not perform the Elite/Hummel Agreement;
- (ii) not assist Elite or Hummel to perform the Elite/Hummel Agreement;
- (iii) inform Elite and Hummel that it will not perform the Elite/Hummel Agreement.

2. Without prejudice to the generality of paragraph 1 above, Rangers shall:

- (i) not propose or agree sale dates in respect of Replica Away and Third playing kits (as those terms are defined in the Elite/Hummel Agreement);
- (ii) not advise Elite of sponsor's logotypes in respect of future football season 2020/2021;
- (iii) not propose and shall not agree kit designs in respect of future football season 2020/2021;
- (iv) not create a Hummel branded area within the Rangers Megastore at Ibrox Stadium;
- (v) not deliver (insofar as not already delivered) any of the items noted in points under “Sponsorship” on pages 5 and 6 of the Elite/Hummel Agreement for the football seasons 2018/2019, 2019/2020 or 2020/2021;
- (vi) not assist Elite in the co-ordination of any product launches, in particular, shall not respond to any requests for assistance and co-operation by Elite in relation to the same and shall not indicate to Elite that it may act unilaterally in relation to product launches; and shall

(vii) forthwith terminate the Elite Non-Exclusive Rights Agreement in the event that Elite fails to comply with any of its obligations under such agreement ...”

89. Rangers accepts it is liable for damages in the event that it is in breach but argues that it is not appropriate for the Court to give injunctive relief.

*Injunctive relief*

90. The principles which govern the grant of injunctive relief when it is sought on a final basis were considered by Teare J in the October 2018 Judgment at [46-52]. The argument before Teare J traversed very much the same ground that I have had to consider. In summary Teare J held (and SDIR submitted):-

- (1) where, as in this case, a final injunction is sought to enforce a negative covenant the claimant is prima facie entitled to such an injunction, unless it would be unjust, unconscionable or out of all proportion to the relief which the claimant ought to obtain or would cause particular hardship to the defendant or otherwise be oppressive: see *Chitty on Contracts* (32 Ed.) at [27-065]; *Doherty v Allman* (1878) 3 App Cas 708, 720, per Lord Cairns LC; *Insurance Co v Lloyd's Syndicate* [1995] 1 Lloyd's Rep 272, 277 per Colman J; *Araci v Fallon* [2011] EWCA Civ 668.
- (2) If the prejudice which would be caused by the injunction heavily outweighs the advantage to the claimant then the grant of the injunction may be oppressive or unjust; Teare J at [50].

91. The cases show that although the interests of third parties may be a factor to be taken into account, they are not a bar to relief: see *Araci* (above) and *Ernst & Young Nominees v Kiwi Property* [2003] 3 NZLR 103. It is noteworthy that in the present case Teare J made an injunction against Rangers which ordered it not to perform the Elite Agreement, and noted that Rangers had entered into that agreement without giving any notice of its intention to do so and with its eyes open.

92. If relevant, I am satisfied that damages are not an adequate remedy for Rangers' breaches. SDIR's losses are likely to be in the order of many millions of pounds. Rangers has pleaded in §42A AmPoDCC that it will rely upon clause 16.3 of the Non-Exclusive Rights Agreement to limit its damages to £1,000,000. I accept SDIR's submission that it would be unjust to deprive SDIR of the benefit of its matching right provisions.

93. Rangers has placed considerable reliance upon the losses that Elite will suffer if injunctive relief is granted. These are the same arguments that were run before Teare J in relation to the Elite Agreement. Teare J rejected them. Although I have had more evidence about the potential losses that Elite would suffer in the event that I were to grant the injunction this does not alter the fact that the Elite/Hummel Agreement was entered into in breach of the Agreement. As Teare J said at [60] of the October 2018 Judgment:-

“... There is a risk that damages may not be an adequate remedy having regard to the cap on damages and the exclusion of consequential losses. But more significantly, in my judgment, this is not a case where it can be said that the grant would be out of all proportion to the requirements of

the case or that the order would operate with extreme (or any) harshness on Rangers. It will be exposed to a claim by Elite but that is because of action taken by Rangers with its eyes open to the risk, as the indemnity provisions of the Elite Agreement make clear ...”

Similar considerations apply in the present case.

- 94.** Rangers assert that an injunction should not be granted because:-
- (1) It will lose significant revenues and will be exposed to claims for damages from Elite.
  - (2) The club, players and fans will be unable secure kit and other products; and
  - (3) Rangers’ ability to function as a football club will be impaired.
- 95.** As to the first point, I am not satisfied that Rangers will lose significant revenues. It has already received the revenues due in respect of the 2018/2019 season and, given the limited nature of the injunctive relief now sought, will likely receive those due from Elite in the 2019/2020 season. It will also be entitled to receive revenues from SDIR in respect of the 2020/2021 season. In any event the potential loss of revenues and exposure to claims from Elite are both ordinary and natural consequences of Rangers’ breaches of the Agreement. As to the second point, the limited nature of the injunctive relief now sought means the supply of kit and other products will not be interrupted for the forthcoming season. There is in my judgment no sensible risk that fans will be deprived of the opportunity to spend their hard-earned money on purchasing the forthcoming season’s kit. Nor do I consider that there is any risk that Rangers’ ability to function as a football club will be impaired.

### **The Elite Retail Units Agreement**

- 96.** I need finally to address the Elite Retail Units Agreement. Rangers has admitted that it was in breach of this agreement and, as I have set out in paragraph 34 above, Rangers has treated it as subsidiary to the Elite Non-Exclusive Rights Agreement and, it would appear, consider themselves to be bound by the injunction that Teare J granted in respect of that agreement. SDIR nevertheless wishes to regularise the position and seeks declaratory and injunctive relief at paragraphs 34(5F)-(5I) of its AmPoC in order to do. Rangers did not argue against this in its skeleton argument or in its oral submissions. I consider it appropriate to grant the relief sought by SDIR.

### **Conclusions**

- 97.** In summary:-
- (1) Rangers was in breach of the Agreement by entering into the Elite/Hummel Agreement and by failing to offer SDIR the opportunity to exercise its matching rights in respect of Elite/Hummel’s offer.
  - (2) SDIR is entitled to the declaratory relief which it seeks.
  - (3) SDIR is entitled to an injunction in broadly the terms set out in paragraph 87 above, although I will hear counsel as to the precise form of that injunction.

- (4) SDIR is entitled to the declaratory and injunctive relief sought in paragraphs 34(5F)-(5I) of the AmPoC.