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Case No: IP-2021-000073

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (ChD)
INTELLECTUAL PROPERTY ENTERPRISE COURT

Rolls Building
New Fetter Lane
London

Date: 2 November 2022

Before :

HER HONOUR JUDGE MELISSA CLARKE
sitting as a Judge of the High Court

- -

B E T W E E N :

PIXDENE LIMITED

Claimant

- and -

PADDINGTON AND COMPANY LIMITED

Defendant

- -
- -

Mr Philip Roberts KC and **Mr Daniel Fletcher** (instructed by Suttons) for the **Claimant**
Mr Nicholas Caddick KC (instructed by Reed Smith LLP) for the **Defendant**

Hearing date: 29 June 2022

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Judgment

Her Honour Judge Melissa Clarke:

A. INTRODUCTION

1. Paddington Bear surely needs no introduction, being such a well-loved character that Her Late Majesty the Queen was filmed taking tea with him during her recent Platinum Jubilee celebrations. However, anyone opening this judgment hoping to read an interesting, perhaps illustrated, intellectual property case about the rights in Paddington Bear will be disappointed. It concerns the proper contractual interpretation of an audit clause in a royalty distribution agreement entered into on 12 March 2013 between Paddington and Company Limited ("**Paddington**"), which then, as now, owned the intellectual property rights in and arising out of Paddington Bear, and Pixdene Limited ("**Pixdene**") which had an existing right to a share of the net merchandising income from the worldwide exploitation of the Paddington Bear merchandising rights (the "**RDA**"). The RDA is a short four page document consisting of three recitals and nine clauses. Paddington and Pixdene are the only parties to it.

2. The third recital to the RDA states that Paddington had licensed the worldwide merchandising rights in Paddington Bear to a company called The Copyrights Group Limited ("**Copyrights**"), and that under the terms of that licence, Copyrights accounted to Paddington's agent (Harvey Unna and Stephen Durbridge (1975) Limited) (the "**Agent**") on a quarterly basis for net merchandising revenue.

3. Clause 1 of the RDA provides that Pixdene is entitled to 10% of the final share of the net Paddington Bear worldwide merchandising income paid by the Agent to Paddington, after payment by the Agent of all prior participations in Paddington Bear worldwide merchandising revenue and all other deductions.

4. The dispute which is before me relates to the true construction of clause 5 of the RDA. That provides:

“**5. AUDIT**

During the term of this Agreement a third party auditor may, upon prior written notice to Paddington and not more than once per every two year period, inspect the agreements and any other business records of Paddington with respect to the relevant records or associated matters during normal working hours to verify Paddington’s compliance with this Agreement.”

5. Pixdene appointed a third party auditor, a firm called Haysmacintyre, to carry out audits pursuant to clause 5 in February 2014 and September 2017. No issues arise for my consideration from those audits. In 2019 Pixdene appointed Mr David Lawler, who now operates through Lawler Consulting Limited, to carry out a third audit pursuant to clause 5 (the “**Third Audit**”), but the parties disagreed about the extent of the rights granted by clause 5, and so the Third Audit has not yet been carried out.

6. Pixdene brings a claim seeking remedies of specific performance (requiring Paddington to perform its obligations under clause 5 RDA) and seeking declarations of the meaning of clause 5; Paddington defends and brings a counterclaim for declarations of its own, which Pixdene defends. The Amended Particulars of Claim, Defence and Counterclaim and Defence to Counterclaim are signed by the parties with a statement of truth, and stand as evidence in these proceedings. There has been no live evidence before me, merely written and oral submissions. None of the pleadings address the factual or commercial context of the entry by the parties into the RDA or plead any facts and circumstances known or assumed by the parties at the time that the RDA was executed. Accordingly the only context for the entry by the parties into the RDA available to the Court is that which can be gleaned from the RDA itself.

7. It is convenient to note here that Pixdene’s skeleton argument sought to provide *“factual background”* about, inter alia: the purpose of the RDA and intention of the parties in entering into the RDA; the history of ownership of intellectual property rights in Paddington; the value of transactions in which such IP rights were transferred; the ownership of Pixdene and personal details about its current and previous sole shareholder; the commercial

success of Paddington in particular arising out of the recent Paddington movies; and allegations about difficulties in accessing Paddington's offices. None of this is found in the pleadings (which stand as evidence) and it should not need saying that a skeleton argument should not be used to seek to introduce evidence by the back door. It is not admissible, and I do not take it into account.

8. Pixdene is represented by Mr Philip Roberts KC and Mr Daniel Fletcher and Paddington is represented by Mr Nicholas Caddick KC. I am grateful to them all for the clarity of their submissions and their candour with the Court.

B. THE ISSUES

9. The issues for determination at trial were identified by His Honour Judge Hacon at a case management conference on 28 January 2022 ("**the CMC**") and are found in a Schedule to the CMC order.

10. The CMC order also contains a recital noting that the Defendant accepts that the documents set out in Part A of Appendix 1 to the Amended Particulars of Claim fall within the ambit of clause 5 of the RDA. However, there remains a dispute about whether the 'Requested Documents' set out in Part B of Appendix 1 to the Amended Particulars of Claim (as that Part B was amended by the Claimant after a hearing before HHJ Hacon on 28 January 2022) ("**Part B Requested Documents**") fall within the scope of clause 5 of the RDA.

11. The identified issues are as follows:

    1. Whether the Defendant must permit Lawler Consulting Limited to conduct the Third Audit, even if Lawler Consulting Limited does not enter into the draft non-disclosure agreement that the Defendant provided on 7 July 2021.
    2. Whether the Defendant must provide (a) the Claimant and/or (b) the auditor appointed to conduct an audit inspection under Clause 5 with copies, including electronic copies, of all documents inspected as part of such an audit, and whether the Defendant's refusal to provide such copies is a breach of Clause 5.

3. Whether the Part B Requested Documents are agreements or other records which may be the subject of an audit inspection under Clause 5.
4. Whether an audit inspection under Clause 5 is limited to a physical on-site inspection of documents in the Defendant's offices during normal working hours.
5. Does Clause 5 allow the third party auditor to carry out an audit inspection as regards a period that has already been inspected and, if so, on what basis?
6. Does Clause 5 entitle the third party auditor to provide the Claimant with information derived from the audit inspection (including confidential information belonging to (a) the Defendant and/or (b) third parties) other than the third party auditor's conclusions as to whether or not the Defendant has complied with its obligations under the Agreement and the basis of that conclusion (including the amount of any over- or under-payment but without otherwise disclosing any confidential information)?
7. To what extent is the Defendant entitled to redact documents seen by (a) the third party auditor, (b) Suttons Solicitors and any other professional advisors of the Claimant, and (c) the Claimant?
8. Should the Court order specific performance of the Defendant's obligations under Clause 5?
9. Should the Court make the declarations set out in paragraphs 43(3) to (5) and (7) of the Particulars of Claim? The Defendant has admitted paragraphs 43(1), (2), (6) and part of paragraph 43(7).
10. Should the Court make the declarations set out in paragraphs 35(6) to (11) of the Defence and Counterclaim? The Claimant has admitted paragraphs 35(1) to (5).

12. This is a surprisingly large number of issues to come out of one short and simple audit clause. The reason for that is that the parties do not trust each other. As Mr Roberts KC put it in his oral submissions for Pixdene, *"the milk of human kindness has long since evaporated between them"*. Both he and Mr Caddick KC for Paddington ask the Court, in resolving these disputes, to give as much guidance as possible about what clause 5 obliges or entitles them to do and what it does not, without leaving anything to the common-sense of the parties to sort out between them, since, they believe, they will not.

13. Issue 1 is no longer in dispute. Paddington accepted in its Defence that it cannot require a third party auditor to enter into a non-disclosure agreement,

and that Pixdene's rights provided by clause 5 are not dependent on it doing so. It does not object to the declaration sought by Pixdene to this effect.

C. THE RELEVANT LAW

Contractual construction

14. The leading authority on the issue of contractual construction remains *Arnold v Britton & Ors* [2015] UKSC 36. Lord Neuberger approved and expanded on the guidance given in the earlier Supreme Court case *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900, at [14] – [23] of his judgment, with which Lord Sumption, Lord Hughes and Lord Hodge agreed. Lord Carnwath produced a dissenting judgment, but did not take issue with Lord Neuberger's discussion of the law. Lord Neuberger said at [15] to [22]:

> "[15] When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see *Prenn* [1971] 1 WLR 1381, 1384—1386; *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen)* [1976] 1 WLR 989, 995—997, per Lord Wilberforce; *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251, para 8, per Lord Bingham of Cornhill; and the survey of more recent authorities in *Rainy Sky* [2011].
>
> [16] For present purposes, I think it is important to emphasise seven factors.

[17] First, the reliance placed in some cases on commercial common sense and surrounding circumstances (e.g. in *Chartbrook* [2009] AC 1101, paras 16—26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.

[18] Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.

[19] The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made. Judicial observations such as those of Lord Reid in *Wickman Machine Tools Sales Ltd v L Schuler AG* [1974] AC 235, 251 and Lord Diplock in *Antaios Cia Naviera SA v Salen Rederierna AB (The Antaios)* [1985] AC 191, 201, quoted by Lord Carnwath JSC at para 110, have to be read and applied bearing that important point in mind.

[20] Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct

> simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.
>
> [21] The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties. Given that a contract is a bilateral, or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties.
>
> [22] Sixthly, in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention. An example of such a case is *Aberdeen City Council v Stewart Milne Group Ltd* 2012 SC (UKSC) 240, where the court concluded that "any . . . approach" other than that which was adopted "would defeat the parties' clear objectives", but the conclusion was based on what the parties "had in mind when they entered into the contract": see paras 21 and 22."

15. Mr Caddick KC for Paddington relies upon and draws my attention to some helpful guidance contained in Chapter 1 of *Lewison's The Interpretation of Contracts* (7th ed), which he has set out in his skeleton argument, which seeks to draw together the relevant guidance of the higher courts. I have read that but in the interests of space will not set it out here.

The implication of terms

16. Similarly, I do not understand there to be any dispute about the law as regards the implication of terms in a contract. The leading authority remains *Marks*

& Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2015] UKSC 72, [2016] AC 742. However, a comprehensive and helpful summary of the principles deriving from this and other authorities was recently provided by Carr LJ (with whom Coulson LJ and King LJ agreed) in *Yoo Design Services Limited v Iliv Realty Pte Limited* [2021] EWCA Civ 560 at [47]-[52]. After cautioning at [47] that:

> "The implication of contractual terms involves a "different and altogether more ambitious undertaking" than the exercise of contractual interpretation which identifies the true meaning of the language in which the parties have expressed themselves: the interpolation of terms to deal with matters for which, ex hypothesi, the parties have themselves made no provision. It is because the implication of terms is so potentially intrusive that the law imposes strict constraints on the exercise of the "extraordinary" power so to intervene…",

Carr LJ provided the following guidance at [51]:

> "[51] In summary, the relevant principles can be drawn together as follows:
>
> i) A term will not be implied unless, on an objective assessment of the terms of the contract, it is necessary to give business efficacy to the contract and/or on the basis of the obviousness test;
>
> ii) The business efficacy and the obviousness tests are alternative tests. However, it will be a rare (or unusual) case where one, but not the other, is satisfied;
>
> iii) The business efficacy test will only be satisfied if, without the term, the contract would lack commercial or practical coherence. Its application involves a value judgment;
>
> iv) The obviousness test will only be met when the implied term is so obvious that it goes without saying. It needs to be obvious not only that a term is to be implied, but precisely what that term (which must be capable of clear expression) is. It is vital to formulate the question to be posed by the officious bystander with the utmost care;
>
> v) A term will not be implied if it is inconsistent with an express term of the contract;

vi) The implication of a term is not critically dependent on proof of an actual intention of the parties. If one is approaching the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time;

vii) The question is to be assessed at the time that the contract was made: it is wrong to approach the question with the benefit of hindsight in the light of the particular issue that has in fact arisen. Nor is it enough to show that, had the parties foreseen the eventuality which in fact occurred, they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred;

viii) The equity of a suggested implied term is an essential but not sufficient pre-condition for inclusion. A term should not be implied into a detailed commercial contract merely because it appears fair or merely because the court considers the parties would have agreed it if it had been suggested to them. The test is one of necessity, not reasonableness. That is a stringent test."

D. THE RDA

17. The only evidence I have of the purpose and intention of the parties at the time the RDA was executed is the RDA itself. That provides in the first recital that the RDA *"sets out the terms of an unwritten agreement dating back to the 1970's between Paddington and Pixdene regarding the net merchandising income from the worldwide exploitation of the Paddington merchandising rights. This Agreement is intended to formalise into writing and therefore replace that unwritten agreement."*

18. The second recital provides that *"For the sake of clarity, Paddington maintains the right to vary the computation of the net payment to Pixdene, for example, but not limited to, it's* [sic] *right to deduct further payments prior to payment to Pixdene such as for example, Paddington's approved legal expenses, trademark expenses, marketing expenses or participation granted to third parties for services judged by Paddington to be of commercial advantage to Paddington, including but not limited to its,*

merchandising income. At no point however, shall such deductions be limited solely to the net income being paid to Pixdene." This gives a very wide scope to Paddington to instruct the Agent to make deductions, so reducing the final share of the net Paddington Bear worldwide merchandising income paid by the Agent to Paddington.

19. I have already summarised the third recital and clause 1 of the RDA. It is important to keep in mind that Paddington's obligation under clause 1 is to pay to Pixdene a defined share (10%) of that final share of the net Paddington Bear worldwide merchandising income paid by the Agent to Paddington**.**

20. Clause 2 provides for quarterly payments to Pixdene no later than 30 days after the last day of defined quarters in each calendar year.

21. Clause 3 provides that the RDA *"constitutes a valid and binding obligation on each party, enforceable in accordance with its terms and shall bind and inure to the benefit of the parties' successors and assigns"*.

22. Clause 4 provides that the RDA is governed by the law of England and Wales with a submission to the exclusive jurisdiction of the Courts of England.

23. Clause 5 is the Audit clause with which we are concerned.

24. Clause 6 provides that the RDA may be amended only in writing as mutually agreed by the parties. It also provides that it may not be assigned by Pixdene without Paddington's prior consent in writing, not to be unreasonably withheld, but that Paddington *"shall be entitled to freely assign this Agreement"*. Related to this is Clause 9, a wide-ranging survival clause. It is clear from these provisions that it was intended by the parties that (i) Paddington should not be constrained from selling, licensing, leasing, transferring or assigning its rights in the merchandising of Paddington Bear, nor from changes in its own ownership, share allocation or name; and (ii) nor should Pixdene's rights under the RDA be defeated by such actions.

25. Clause 7 provides Paddington with a *"Right of First Refusal"* and a *"Right of Last Refusal"*. The former applies if Pixdene has a third party offer to

acquire its participation rights in the Paddington merchandising. It provides that if Pixdene wishes to dispose of such rights, then it shall give written notice to Paddington *"and immediately thereafter negotiate with Paddington with respect to such disposal. If after the expiration of fifteen (15) business days following notice from Pixdene to Paddington, no agreement has been reached then Pixdene shall be free to negotiate elsewhere subject to Paddington's Right of Last Refusal set out in clause 7(b) below".*

26. The Right of Last Refusal is expressed in clause 7(b) to mean *"if Pixdene and Paddington fail to reach an agreement pursuant to Paddington's Right of First Refusal and Pixdene receives any bona fide offer for its participation rights in the Paddington Merchandising, Pixdene shall notify Paddington in writing of such offer specifying the particulars thereof, including the name of the offeror, the proposed financial terms and all other terms of such offer. During the period of fifteen (15) business days after said notice, Paddington shall have the exclusive option to acquire the participation rights upon the same financial terms and such other terms as are set forth in such notice… otherwise Pixdene shall be free to accept said bona fide offer, provided that if such offer is not consummated within thirty (30) calendar days following the expiration of said fifteen (15) day period, Paddington's option shall revive and shall apply to such proposed offer again and to each and every further offer or offers at any time received by Pixdene".*

27. Clause 7(c) amounts to a call option by Paddington: *"Pixdene shall, if requested by Paddington to do so in writing, sell its participation rights in the Paddington Merchandising… to Paddington in the event that the shares in Paddington and/or the Paddington Merchandising is sold to a third party (unrelated to the Bond family).*"

28. I have set out those details of Clause 7 not because they have any direct relevance to the matters that I must determine, but because they are non-standard provisions of some complexity and sophistication, which appear to have been carefully and professionally drafted and closely negotiated. This provides me with some information about the context of the drafting and

agreement of the RDA, which otherwise is a relatively short and simple agreement. I will come back to this.

29. Clause 8 provides that the RDA is the *"final, complete and exclusive"* statement of the terms of the Agreement. Neither party rely on it as both seek the Court to imply terms.

E. DETERMINATION OF ISSUES

30. Paddington makes the general submission that Pixdene is asking the court to construe clause 5 in a way that gives rise to additional rights and obligations which are *"legally, logically and linguistically different"* to the plain meaning of the words of clause 5, without any justification. It asks me to carry out my task of construing the clause with the context in mind, which includes that:

    i) The RDA was a professionally drafted agreement between two legally represented parties;

    ii) It expressly says that it is intended to *"formalise"* the parties' rights and obligations; and

    iii) In the absence of any ambiguity, the words chosen by the parties should be given their natural meaning.

31. I accept (ii) which is clear on the face of the RDA, and (iii) which I have already identified as a relevant principle in my section on the relevant law. In relation to (i), I have no direct evidence on the point, but am satisfied on the balance of probabilities that Pixdene, at least, was legally represented at the time, for the following reasons: (a) as I have set out, the RDA, although short, contains some sophisticated and non-standard provisions which strongly suggest they have been professionally drafted and negotiated, particularly in relation to rights of first refusal etc; (b) the copy of the RDA in the bundle discloses that on 13 March 2013, the day after execution of the RDA, it was faxed from Suttons Solicitors, who act for Pixdene in these proceedings and I infer were also advising Pixdene on the RDA; and (c) the

RDA gives Pixdene's address as "c/o 15 Thayer Street, W1U 3JX" which was the address of Suttons Solicitors at the time.

32. However also part of the context is that, as Pixdene submits, clause 5 is drafted for Pixdene's benefit. Without this audit right, Pixdene would have no way of verifying whether Paddington had complied with its obligation to pay Pixdene royalties under clause 1 of the RDA.

33. I will deal with the issues out of order, as I find it convenient to address them this way.

Who can inspect?

34. There is no dispute that a third party auditor can inspect pursuant to clause 5. The question of whether Pixdene also has such a right is not identified as an issue in the case and Pixdene does not explicitly argue that it does. However, as I will go on to consider, Pixdene argues that clause 5 should be construed to require Paddington to send to Pixdene in advance of inspection all the documents which it is required to make available for inspection, which is tantamount to inspection itself (or some hitherto unknown concept of "pre-inspection", perhaps), so there is a blurring of the lines there which, given the difficult relationship between the parties, I consider should be drawn sharply. Accordingly I will deal with it.

35. The language of Clause 5 specifies only a right for a third party auditor to inspect Paddington's documents. It does not specify that Pixdene may inspect those documents, although it would be easy to do so. There must be a reason for that drafting choice, and the most obvious reason which presents itself is that the parties agreed that Pixdene should not have direct access to Paddington's documents. I agree with Paddington that it is relevant that the parties agreed the wording of clause 5 not only to exclude reference to Pixdene, but also to specify that a *third party* auditor had right of inspection. In other words, not any auditor (such as, for example, an internal auditor at Pixdene). *"Third party"* are therefore words of limitation which, in my judgment, must have been chosen to ensure that whoever was coming in to inspect those documents for the purposes of audit, was independent of

Pixdene (and, indeed, Paddington). The language is clear and, in my judgment, unambiguous in this respect, and I am satisfied it cannot be construed as providing Pixdene with a right of inspection.

36. Nonetheless should such a right be implied? The facts that Pixdene was not explicitly given a right to inspect, and that the parties agreed that any auditor must be a third party, militate against the implication of such a term in my judgment, because I agree with Paddington's submission that clause 5 appears to be deliberately constructed to keep Pixdene away from Paddington's documentation, whilst putting in place a mechanism for Pixdene to ensure that Paddington has complied with its obligations under the RDA. The implication of a term giving Pixdene a right of inspection is therefore neither obvious nor necessary but the opposite: it would, in fact, undermine the very purpose of the careful choice of language in clause 5.

Issue 2(a) – Does clause 5 require Paddington to provide Pixdene with copies of inspected documents?

37. Pixdene's position is that it is entitled to copies, including electronic copies, of all documents inspected as part of an audit under Clause 5. In relation to the provision of copies to Pixdene (as distinct from provision of copies to the auditor, which I will deal with shortly), it submits:

   i) Copies would assist Pixdene in taking legal advice as to whether it had sufficient basis to bring a claim in relation to underpayments identified by the auditor. It makes commercial sense for Pixdene to be provided with copies during the audit to reduce costs through the provision of advice at an early stage and by pleading claims by reference to supporting documents and facts drawn from such documents;

   ii) It is critical for Pixdene to receive copies of inspected documents to enforce its rights pursuant to the RDA.

38. Paddington's position is that:

i) Clause 5 means what it says. It gives no right to inspect to Pixdene itself (as I have found); and

ii) Pixdene's right for a third party auditor to inspect does not require and cannot be construed as requiring Paddington to provide Pixdene with copies of the relevant documents either during or in advance of an inspection, as it is silent on the point, and should not be implied.

Discussion and determination

39. I have already held that clause 5 gives Pixdene no right to inspect, no such right should be implied, and I have found that the parties' purpose in agreeing clause 5 in the form it is in, is to keep Pixdene away from Paddington's information whilst putting in place a mechanism for Pixdene to ensure Paddington's compliance with its obligations under the RDA.

40. Clause 5 is silent on the issue of whether Paddington is obliged to provide copies of documents for inspection to Pixdene. I agree that the wording cannot be construed to contain such an obligation, and that it should not be implied, for the same reasons that I have found no right of Pixdene to inspect: because it would thwart the purpose of clause 5.

41. Whether it might be convenient, or cost-effective, or of assistance for Pixdene to have copies of Paddington's inspected documents, as Pixdene submits, is not the point. That is not what the parties agreed in the RDA, and it would fatally undermine the purpose for which clause 5 was constructed. It follows that I am satisfied that clause 5 does not require Paddington to provide Pixdene with any copies of documents made available for inspection by the third party auditor.

42. In relation to Pixdene's submission that it is *"critical"* for Pixdene to receive copies of inspected documents to enforce its rights pursuant to the RDA, I do not accept that submission. In my judgment, it is critical that Pixdene understands the auditor's conclusions and the basis upon which those have been reached, but that does not require disclosure of documents by Paddington to Pixdene. I am satisfied that it is likely that initial legal advice

can be obtained on the basis of the auditor's report, which may be sufficient to produce a letter of claim or to particularise a claim. If copies of certain of the inspected documents are necessary to enable Pixdene properly to consider or bring proceedings for enforcement, then Pixdene can seek copy documents from Paddington or make an application for pre-action disclosure or obtain them in disclosure in enforcement proceedings.

Issue 4 – Is an audit inspection under clause 5 limited to a physical on-site inspection of documents in Paddington's offices, during normal working hours?

43. Pixdene submits that Paddington should provide it and/or the third party auditor with copy documents before attending at Paddington's offices for inspection *"with any questions to be answered",* otherwise it might necessitate several visits to the data room, increasing the costs and logistical burden of an audit.

44. Paddington submits that the notice is necessary so that Paddington has time to assemble the relevant documentation ready for inspection by the third party auditor, and that the only possible interpretation of the reference to *"normal working hours"* in clause 5 is that Pixdene can only insist on an inspection in the presence of Paddington's representatives and/or under Paddington's control. It submits there would be no need to refer to *"normal working hours"* if the inspection could take place without such representatives being present.

45. Paddington also submits that although there is no reference to the venue being 'Paddington's offices' or otherwise being specified, it is obvious that the inspection is to take place at a venue of Paddington's choosing. In particular, it submits, there is nothing to suggest that Paddington would have to transport all its records to some other location (such as the third party auditor's offices) to enable the auditor to carry out the inspection.

Discussion and determination

46. I accept Paddington's submission that the fact that clause 5 provides that inspection requires prior written notice, and is to be carried out *"during*

normal working hours", shows that the parties at the time of agreeing the clause, were envisaging (i) a physical inspection of documents by the third party auditor (ii) at a place under Paddington's control. If inspection of documents was envisaged by setting up a data room at the auditor's offices, for example, then it would not be necessary to specify that inspection could take place only *"during normal working hours"* as there would be nothing to stop the auditor from working late or at weekends, for example. I am also satisfied that is what the reasonable person with all the relevant knowledge at the time of the RDA would have understood the parties to mean by the language. These are Paddington's documents to which access is being strictly controlled by Paddington, as agreed by the parties in clause 5.

47. Clause 5 does not specify the venue for inspection, but I do not have difficulty in construing the clause as meaning any premises under Paddington's control which Paddington may reasonably choose. The RDA is governed by the laws of England and Wales so I doubt that setting up the data room outside of the jurisdiction was envisaged or would be so understood by the reasonable man.

48. I do not agree with Paddington's submission that clause 5 can properly be construed as obliging the third party auditor to inspect only in the presence of Paddington's representatives: I am satisfied that the fact that the parties specified an independent, third party auditor, with his own professional obligations, would be understood by that reasonable person to mean that such a person can be trusted to carry out the inspection professionally without requiring further supervision. Nor do I think such a provision should be implied as it is neither necessary (for the reasons I have given) nor is it obvious. To the contrary, it would be quite usual to usher such an auditor into the data room and let him get on with it without supervision, to be ushered out again at the end of normal working hours.

49. Nor can I understand how clause 5 can possibly be construed to mean that Paddington is obliged to send the documents to the third party auditor (in some sort of pre-inspection?) in advance of making the documents available for inspection, thereby rendering the actual inspection (and notice, and

requirement for normal working hours) pointless. That drives a coach and horses through the purpose of this carefully chosen language of clause 5, as the reasonable man would identify. I reject Pixdene's submission on this point.

Issue 6 – What information is the third party auditor entitled to share with Pixdene?

50. Pixdene's position is that the auditor may share with Pixdene all information obtained during the audit. It submits that:

i) there is no distinction drawn in clause 5 between information which the auditor may share and the auditor may not share;

ii) there is no need to prevent Pixdene from being provided with confidential information as Pixdene has no interest in disclosing that information to third parties, and Paddington is adequately protected by the law in relation to breach of confidence;

iii) without the right to share documents with its client, the clause is unworkable as the auditor may require instructions from Pixdene in relation to information and documents being audited: to contextualise that information; to understand Pixdene's rights and to focus the auditor's efforts on the issues of the greatest importance to Pixdene; and

iv) an interpretation which does not allow the auditor to share information gained during the audit is open to abuse by Paddington by *"incentivis[ing] it to over-designate information as confidential"*.

51. Paddington accepts that it is implicit in the entitlement for a third party auditor to inspect documents for the purposes of auditing compliance, that it is also entitled to report to Pixdene whether or not Paddington has complied with the RDA, the amount of any underpayment by Paddington, and the basis for such a conclusion. However, it submits there is nothing to suggest that the auditor can go further and share with Pixdene any other information, and in particular confidential or privileged information, derived from the

inspection. It submits, as I have accepted, that the intention in imposing a requirement for a *"third party"* auditor must have been to keep Paddington's documents and confidential information away from Pixdene.

Discussion and determination

52. If the parties at the time of entry into the RDA considered that Pixdene should have full access to the information that the auditor was given the right to inspect, there seems to be no reason why it would not have given Pixdene a right to inspect those documents itself. I have explained why I am satisfied that clause 5 should not be construed as giving such a right and nor should such a right be implied.

53. Whether or not there is a ***need*** to keep Pixdene away from Paddington's information, as Pixdene submits there is not, is not relevant in my judgment. It is enough that the parties have, as I have found, agreed clause 5 ***in order to*** keep Pixdene away from Paddington's information and allow inspection only by a third party auditor. That was their intention and the reason they agreed the language of clause 5 as they did.

54. For the same reason, nor do I accept Pixdene's submission that clause 5 is unworkable, commercially incoherent or inefficacious without implying a right for Pixdene to receive copies of the documents from the auditor. Pixdene has all the information it needs to instruct the auditor, and the context for the audit is found in the RDA. The auditor's job is well-defined in clause 5 – to verify Paddington's compliance with the RDA. The focus of that is, of course, to verify that Paddington has paid to Pixdene, pursuant to clause 1, 10% of the final share of the net Paddington Bear worldwide merchandising income paid by the Agent to Paddington, after payment by the Agent of all prior participations in Paddington Bear worldwide merchandising revenue and all other deductions. Accordingly, I do not understand Pixdene's submission that it needs access to documents to ensure that the auditor *"understands Pixdene's rights"* and so Pixdene can *"focus the auditor's efforts on the issues of the greatest importance to Pixdene"*. Pixdene's rights flow from the RDA, not from any other of the inspected

documents, and whatever issues may be of the greatest importance to Pixdene, clause 5 only provides for inspection of Paddington's documents pursuant to an audit right *"to verify Paddington's compliance with the RDA"*.

55. For those reasons, I do not consider that clause 5 provides a blanket right to Pixdene to copies of inspected documents from the auditor.

56. However clause 5 is not, in my view, entirely silent on the question of disclosure of information from the third party auditor. I am satisfied that the parties must have intended that the third party auditor permitted to inspect under clause 5 would be entitled to share with Pixdene:

i) the conclusion reached on the audit (i.e. whether or not Paddington has complied with its obligations under the RDA);

ii) the basis of that conclusion, and if an underpayment is found;

iii) what further sums are due from Paddington; and

iv) the basis of calculation of such sums;

as this is implicit, in my view, in a common sense understanding of the meaning and purpose of an audit.

57. As Paddington accepts, permitting a third party auditor to inspect for the purposes of assessing compliance of its obligations to Pixdene must carry with it the intention that the auditor will report his findings. Accordingly, I am satisfied either that the reasonable person with all the background knowledge at the time would have understood the language of clause 5 to mean that the auditor would be permitted to disclose to Pixdene only ***such information gained from the inspection of documents as is necessary to report on these matters*** ("**limited disclosure right**"), or that such a limited disclosure right should be implied, as it is necessary to give effect to the purpose for which inspection was given, i.e. to audit Paddington's compliance with the RDA. Without the ability to share information to that limited extent, clause 5 has no commercial efficacy, in my judgment, as the purpose of permitting inspection would be thwarted.

58. Paddington submits that the limited disclosure right that I have identified should in fact be narrower, so that the auditor is not permitted to disclose any confidential or privileged information on which the auditor's conclusions are based. So far as confidential information is concerned, I disagree. If it is *necessary* to disclose confidential information obtained from the inspection of documents in order to share the matters upon which the parties intended the auditor to report to Pixdene, then in my judgment the auditor may disclose that information whether it is confidential or not, as otherwise, again, the purpose of the inspection clause would be undermined at best or thwarted at worst. That should also give Pixdene some comfort in relation to its fear that Paddington will over-designate documents as confidential.

59. So far as legally privileged information is concerned, I agree with Paddington. I consider that if the parties were asked at the time of agreeing the RDA, "Can Paddington withhold from inspection business records to the extent they are legally privileged?", then they would have said, "Yes, that goes without saying." Accordingly, I am satisfied that such a term should be implied, for reasons of obviousness.

Issue 2(b) – Does clause 5 require Paddington to provide the third party auditor with copies of inspected documents?

60. Pixdene's position is that the auditor is entitled to copies, including electronic copies, of all documents inspected as part of an audit under Clause 5. It submits:

i) The taking of copies is a standard and conventional incident of audit. It is necessary to give business efficacy to Clause 5, otherwise it could delay the audit; and

ii) Copies would make an audit more efficient and reduce disruption to Paddington's business as the auditor could review copies and liaise with Pixdene and its advisors at their convenience rather than having to visit Paddington's offices each time the auditor wanted to work on the audit.

61. Paddington's position is that:

i) Clause 5 means what it says. It simply provides that the third party auditor may *inspect* the agreements and other business records of Paddington;

ii) This right of inspection does not require it to provide the auditor with copies of the relevant documents either during or in advance of an inspection. Paddington provides the dictionary definition of 'inspection' from the Shorter Oxford English Dictionary which it submits cannot be read as encompassing anything relating to the taking or provision of copies; and

iii) If the right to copies was intended by the parties they would have made provision for matters such as who would be responsible for making the copies and bearing the costs of such copies, but they have not.

62. Paddington softened this position in its trial skeleton, Mr Caddick KC submitting that there is nothing in the RDA to prevent the auditor making such notes as he/she wishes *"or even using a smartphone to take a photograph of relevant materials with a view to preparing his report on the issue of Paddington's compliance",* subject to the usual issues of privilege and confidentiality. However, he was more equivocal in closing, saying that he would need to take further instructions.

Discussion and determination

63. Paddington appears to concede by its second submission that, as Pixdene submits, it is usual for an auditor to take copies of documents inspected which are relevant to his compilation of the audit report, and it is difficult to see much difference between taking a photocopy of a document and photographing it or scanning it onto a smartphone. I agree with Pixdene that without the right to take copies, the auditor would be forced to write his auditor's report from Paddington's data room. Nor would the auditor have any records of the documents it has audited and relied upon in the making of his audit report, to which professional obligations attach. Accordingly, although clause 5 is silent on the point, I think if the parties at the time they agreed clause 5 had been asked *"Can the third party auditor take such copies*

as he considers necessary to enable efficient and timely production of his audit report, and for the purposes of maintaining appropriate records of his work?", they would have considered the third party auditor's professional duties, including his duty of confidentiality, and said *"Of course, that goes without saying."* For that reason, I am satisfied that such a term should be implied into clause 5 as it is obvious that it should be. In addition it appears to me to be necessary to give commercial and practical efficacy to clause 5, for the reasons I have given above.

64. As to the point of who should be responsible for taking and paying for such copies, it also seems obvious that any request by the auditor for Paddington to produce copies should be reasonable (i.e. not unduly onerous), and that Paddington should be indemnified of the costs of that by Pixdene as part of the costs of the audit; alternatively that the auditor should be permitted by Paddington to take copies himself with his own portable equipment brought into the data room, again at Pixdene's expense.

Issue 3 – Do the Part B Requested Documents fall within the scope of clause 5?

65. I remind myself of the wording of clause 5:

> **During the term of this Agreement a third party auditor may, upon prior written notice to Paddington and not more than once per every two year period, inspect the agreements and any other business records of Paddington with respect to the relevant records or associated matters during normal working hours to verify Paddington's compliance with this Agreement.**

66. The Part B Requested Documents are:

i) Royalty audits carried out on behalf of Copyrights since 1 July 2017 in relation to Paddington Bear;

ii) Quarterly reports produced by Edwin Coe LLP for Copyrights in respect of worldwide trademark applications and brand protection in relation to Paddington Bear for the period 1 July 2017 to the end of the period subject to the Third Audit.

67. It is noted at paragraph 4 of Part A of Appendix 1 to the Particulars of Claim, that Paddington has already agreed that *"Royalty audits carried out by*

[Paddington] since 1 July 2017 including those carried out by Copyrights on the Defendant's behalf" are within the scope of clause 5.

68. Pixdene's position is that these documents, which it accepts are Copyrights' documents, are records *"relating to"* Copyrights' agency and to Paddington Bear and as such are within the scope of clause 4.6 of an agency agreement entered into between Copyrights and Paddington on 5 October 2012 (the "**Copyrights Agreement**"). Clause 4.6 reads:

> "Copyrights shall keep full and proper books of accounts and records showing clearly all receipts, payments and transactions relating to this agency and to the Property. Copyrights shall allow you *[Paddington]* or your representative at all reasonable times to have access to such books of accounts and records for the purpose of auditing and inspecting them and taking copies thereof." *(my explanatory note).*

69. Pixdene submits that pursuant to that clause 4.6 of the Copyrights Agreement Paddington has an entitlement to access, audit, inspect and take copies of the Part B Requested Documents. Accordingly, it argues, they are within the scope of clause 5 of the RDA because there is no basis to restrict clause 5 to documents which Paddington owns, rather it encompasses documents to which Paddington has a right to inspect or take copies.

70. Pixdene relies upon the definition of *"control"* in CPR 31.8 as a *"helpful guide"* when interpreting clause 5. CPR 31.8 deals with a party's duty of disclosure being limited to documents which are or have been in a party's control. CPR 31.8 (2) defines a document as being in a party's control if: (a) it is or was in his physical possession; (b) he has or has had a right to possession of it; or (c) he has or has had a right to inspect or take copies of it. On that definition, Pixdene submits, the Part B Requested Documents are within Paddington's control whether it has copies of them in its possession or not, as it has a right to inspect or take copies of them pursuant to Clause 4.6 of the Copyrights Agreement.

71. Paddington submits that the question is whether the Part B Requested Documents fall within *"any other business records of Paddington"* which are *also* relevant to the verification of Paddington's compliance with the

RDA, since that is the purpose for which inspection is being provided. It argues that clause 5 would not apply to an agreement or business record of Paddington that did not relate to merchandising income but, for example, income from film rights, as that would be irrelevant to Pixdene's rights under the RDA.

Discussion and determination

72. There is no definition of "business records" in the RDA and that phrase is not a term of art with a particular legal meaning. I do not think that CPR 31.8 is of particular assistance as there is no reference to that rule in clause 5 of the RDA, and it is not clear why a reasonable person having all the background knowledge of the parties at the time of the RDA would have understood the parties to have meant that clause 5 should be construed with reference to the definition of control in CPR 31.8, particularly as there is no use of the word "control" in clause 5 of the RDA. In my judgment we must give "business records" the ordinary English meaning of documents (electronic or otherwise) which are kept for the purposes of running a business, and I consider that it is generally understood that encompasses documents which the business keeps in its possession or which are otherwise in its control, including its documents held by third parties which it has the right to call for.

73. I agree with Paddington that its obligation to provide for inspection of *"the agreements and any other business records of Paddington with respect to the relevant records or associated matters"* is limited by the purpose of the inspection: to enable the third party auditor *"to verify Paddington's compliance with the RDA"*. I am satisfied that the reasonable person with all the background knowledge of the parties at the time of the RDA would have understood that to mean that Paddington was only obliged to provide for inspection its agreements and any other business records which are relevant to the calculation of merchandising royalties relating to Paddington Bear.

74. Without that limitation: (i) the references to *"relevant"* records and *"associated"* matters would be meaningless, and the court is slow to ignore

deliberately chosen language particularly by professionally advised commercial parties; and (ii) Paddington would be obliged to disclose all its business records, including matters which have no conceivable relevance to Pixdene's entitlement to a share of merchandising royalties, such as employee sickness records, health & safety records etc., as well as more obviously related (but equally irrelevant) documentation including agreements dealing solely with film and television royalties. I am satisfied the reasonable person with the relevant knowledge of the parties at the time would not understand the parties to mean that clause 5 should open all business records of Paddington, including those irrelevant to the question of whether Paddington had complied with the RDA, up to the third party auditor.

75. Dealing first with the Royalty audits carried out on behalf of Copyrights relating to Paddington Bear (as distinct from Royalty audits carried out by Paddington or by Copyrights on behalf of Paddington, which the Claimant has accepted are within the scope of clause 5 by para 4 of Part A to Appendix 1 of the Amended Particulars of Claim): I am satisfied that such audits, if they exist, are part of Paddington's own business records because Paddington has a right to obtain them under clause 4.6 of the Copyrights Agreement. I am not persuaded by Paddington's argument that they are not, because they are Copyrights' records not Paddington's; a business may have many business records where they do not have ownership of the underlying document. Nonetheless if the document is in their possession or control, including having the right to call for the document, it is a business record. However, Paddington is only obliged to make them available for inspection pursuant to clause 5 of the RDA if they are relevant to the calculation of merchandising royalties relating to Paddington Bear. If they are not, Paddington does not.

76. In relation to the Edwin Coe LLP quarterly reports for Copyrights in respect of worldwide trade mark applications, however, I do not consider that these are part of Paddington's own business records which Paddington is obliged to disclose because:

i) Pixdene has not explained why it considers that these fall within Clause 4.6 of the Copyrights Agreement (which allows inspection and copying by Paddington of Copyrights' *"full and proper books of accounts and records showing clearing all receipts, payments, and transactions relating to this agency and to the Property",* but do not appear to cover trade mark reports) and so it is not clear to me that Paddington may call for them. If it cannot, they are not within its control;

ii) Pixdene has provided no other satisfactory reason why they would form part of Paddington's *"business records"* for the purposes of verifying Pixdene's entitlement to a share of merchandising royalties. Paddington distinguishes between these reports and Edwin Coe LLP's invoices for the work done in producing the reports, which it accepts would be part of Paddington's business records relevant to the calculation of deductions (because Paddington has a right to the invoices under Clause 4.6 of the Copyrights Agreement), and as such within clause 5 – as both parties have agreed at item 6 in Part A of Appendix 1 to the Particulars of Claim. Pixdene submits that the quarterly reports will enable the auditor to understand the nature of such expenditure evidenced by the invoices, and check that they are correctly applied, but if Paddington has no right to obtain them then they cannot form part of its business records, in my judgment.

77. I further accept Paddington's submission that to the extent that such reports contain legal advice, they would be legally privileged. For reasons I have given earlier, Paddington is not obliged to make legally privileged documents available for inspection pursuant to clause 5.

Issue 5 – Does clause 5 allow an inspection for a period that has already been inspected?

78. Pixdene's position is that, provided there is no more than one audit within a two-year period, the auditor may audit periods which have already been the subject of an audit.

79. Paddington says it cannot. It submits that it is implied into clause 5 that:

i) An audit inspection cannot cover a period that has already been the subject of an audit inspection

ii) Pixdene's prior written notice exercising its right to an audit must be given a reasonable time before the proposed inspection, and identify the relevant period for the inspection.

80. Pixdene submits that the RDA is silent on the point; Paddington is therefore arguing for an implied term; such a term is neither obvious nor necessary to give business efficacy to the RDA; in fact it would assist Paddington in avoiding liability for historic underpayments, as if an audit revealed issues in relation to a period that had previously been audited, then reasonable commercial parties would expect that prior period could be revisited.

81. Paddington argues that without some limitation, Pixdene could make repeated demands to inspect documents for periods that it has previously audited, which would "make a mockery" of clause 5; there must be some sensible limit on Pixdene's rights in this regard; what if it sought to reopen an audit for a period that was beyond the limitation period?

Discussion and determination

82. I do not agree with Pixdene that the RDA is silent on the issue of whether an inspection under clause 5 can cover a period which has already been the subject of an audit inspection. The wording of clause 5 giving the right of inspection is *"upon prior written notice to Paddington* ***and not more than once per every two year period****"* (my emphasis). It seems to me that the words *"once per every two year period"* mean what they say: that the right to inspect is a right to inspect once per every two year period, i.e. once a two year period has been inspected, there is no further right of inspection. That is different to saying, for example 'and not more than once every two years' which limits the time period between inspections rather than the number of times that a two year period can be inspected. Accordingly, I do not consider that this wording is ambiguous, and the authorities make clear that if wording is unambiguous, the court must apply it.

83. In case I am wrong about that and the wording is ambiguous, I consider that it is carefully drafted and deliberately chosen language, which the reasonable person with the relevant knowledge of the parties, including that the parties

were professionally advised and that the purpose of the inspection right was to keep Pixdene away from Paddington's documents while putting in place a mechanism to allow a third party auditor to verify compliance, would understand it to mean the way I have explained it.

84. That seems to be to be entirely commercially coherent for the reasons that Paddington gives, as otherwise the risk is that Pixdene could make repeated demands to inspect previously inspected documents, making compliance with clause 5 unduly onerous. As Hoffman LJ said at p99 of *Co-operative Wholesale Society Ltd v National Westminster Bank plc* [1995] 1 EGLR:

> *"… language is a very flexible instrument, and, if it is capable of more than one construction, one chooses that which seems most likely to give effect to the commercial purpose of the agreement*"

85. The construction that I have sought to give clause 5 seems most likely to give effect to the commercial purpose of the RDA, in my judgment, as I agree with Paddington's submission that the inspection of previously inspected documents would not be *"to verify Paddington's compliance"* with the RDA, as clause 5 requires. If the previous inspection had resulted in an audit report opining that Paddington was compliant, then any second inspection would be a re-verification process, as verification would already have been completed. If the previous inspection had resulted in an audit report opining that Paddington was not compliant, then it would already be known that there was a failure to comply and enforcement proceedings could be brought if Paddington did not rectify the non-compliance. If information arose in a later audit which disclosed an error in a previous audit, then that information would enable Pixdene to bring an enforcement action if Paddington refused to correct the error.

86. It follows that it is obvious, in my judgment, that the notice to inspect given by Pixdene will need to specify the two year period to which the inspection relates, for two reasons: (i) so Paddington knows what documents to gather for inspection; and (ii) so Paddington can ensure that Pixdene is complying with the limitation that it may inspect *"not more than once per every two*

year period". It is obvious that Pixdene will have to provide reasonable notice to enable Paddington to gather such documents in a data room to enable the auditor to inspect. I am satisfied that both terms are implied in clause 5.

87. What is reasonable in terms of notice depends on all the circumstances including, for example, the number of documents, any constraints caused by the COVID-19 pandemic and the time of year: but for the purpose of providing some guidance (rather than making a finding) I doubt less than ten clear business days' notice would be reasonable, and longer if that period falls over the Christmas and New Year period.

Issue 7 – To what extent is Paddington entitled to redact documents seen by (a) the third party auditor; (b) Suttons Solicitors [who act for Pixdene] and any other professional advisors of Pixdene and (c) Pixdene?

88. I have found that Paddington is obliged to provide inspection only to the third party auditor and not to Pixdene (or its advisers), so I will limit my consideration to Issue 7(a).

89. Paddington seeks a declaration that it is *"entitled to redact those parts of the said agreements and other business records which do not relate to the Claimant's entitlement under the Agreement to a share of Paddington Bear Worldwide merchandising revenue"*. It submits that this is linked to what it is that clause 5 permits the third party auditor to inspect. Since clause 5 only permits inspection of documents which are relevant for the purpose of verifying Paddington's compliance with the RDA, it submits there is no entitlement to inspect other documents, and Paddington must be entitled to redact material which is not relevant for that purpose.

90. It further submits that Paddington must be entitled to redact material which is legally privileged, and material which is confidential, whether to Paddington or to third parties with whom Paddington is dealing, save to the extent that it is required for the third party auditor to verify Paddington's compliance.

91. Paddington submits that assistance can be derived from CPR PD 51U which, for the purposes of disclosure in litigation, provides at paragraph 16.1 that a party *"may redact a part or parts of a document on the ground that the redacted data comprises data that is - (1) irrelevant to any issue in the proceedings, and confidential; or (2) privileged…"*.

92. Pixdene's position is that such a declaration should not be granted, as:

i) The RDA does not provide for the redactions sought or redaction at all

ii) Redactions are likely to be further source of contention and cause additional costs, given the parties' evident mistrust of each other. The declaration sought will provide more opportunity for satellite disputes;

iii) Paddington has previously redacted documents liberally and without justification. What it seeks is very wide – that it is entitled to redact everything other than those parts which it considers relate to Pixdene's entitlement under the RDA, and it has taken a very narrow view of that. It provides an example of Paddington redacting the details of work done in invoices charged to Copyrights, even though the invoices were deducted from Pixdene's entitlement to merchandising revenue. That meant that it could not be known whether the work done was properly attributable to merchandising revenue or to revenue other than merchandising revenue (such as revenue from books, tv and films) which should not have been charged to Pixdene.

iv) There is no need for Paddington to be entitled to redact documents inspected by the auditor, who is a Chartered Accountant with professional obligations. To the extent they contain genuinely confidential information, Paddington is adequately protected by the law in relation to breach of confidence.

Discussion and determination

93. I accept Pixdene's submission that the third party auditor will be a professional with professional obligations to treat confidential information confidentially.

94. I have also found that the third party auditor under clause 5 has only a limited disclosure right in relation to such information obtained from inspected documents: that it may disclose only such information gained from the inspection of documents as is necessary to report on the matters I set out in paragraph 56 above. That means that a copy of a document can only be disclosed by the auditor to Pixdene if and to the extent it is *necessary* to do so. This is a high threshold. It will usually only be necessary for the auditor to describe the document and summarise those parts of the document which relate to the question of whether Paddington has complied with its obligations under the RDA, not to copy the document itself.

95. This should provide significant comfort to Paddington that clause 5 will do what the parties intended, which is in part to keep Pixdene away from Paddington's documents.

96. I have also found that Paddington is only obliged to provide for inspection under clause 5 its agreements and any other business records which are relevant to the calculation of merchandising royalties relating to Paddington Bear.

97. However, clause 5 is silent about redaction. I consider that, given the protections which have been put in place in the drafting of clause 5, including: providing the inspection right only to a third party auditor with professional obligations; and limiting what that auditor can report to verifying compliance by Paddington; it is neither obvious that the relevant agreements and business records disclosed for inspection by the auditor should be further redacted, nor is it necessary, save that I am satisfied it is both obvious and necessary in respect of legally privileged information.

98. In respect of confidential information, whether that information is confidential to Paddington or to a third party, if it is relevant to the question of Paddington's compliance with the RDA then it is required to be disclosed

for inspection to the third party auditor, otherwise the purpose of the inspection is undermined. The auditor may look at a single contract or report which deals with both merchandising royalties and film royalties, for example, but he is only able to disclose to Pixdene that which is necessary to report on Paddington's compliance with the RDA i.e. relating to the calculation and payment of merchandising royalties. The risk that confidential information about film royalties will pass to Pixdene through the third party auditor is adequately mitigated by the auditor's professional obligations including his obligations of confidentiality.

99. For those reasons I am not satisfied that a right to redact should be implied save in respect of legally privileged information which Paddington is not obliged to make available for inspection. I will make a limited declaration accordingly.

F. SUMMARY AND FORM OF ORDER

100. I will make the following declarations sought in the pleadings (but will hear submissions about the specific wording):

i) Pixdene is entitled to choose a third party auditor to carry out each audit under clause 5, who must be an entity that is distinct from and independent of either party (save for being instructed by Pixdene) and with no commercial interest in the outcome of the audit;

ii) Pixdene must give Paddington prior written notice of an audit under Clause 5 which must be given a reasonable time (which shall not be less than 10 clear business days) before the proposed audit and must identify the relevant period for the audit inspection;

iii) An audit under clause 5 may involve a period of more than two years, however there cannot be more than one audit per two year period and there cannot be an audit inspection in respect of a period that has already been the subject of an audit inspection pursuant to clause 5;

iv) An audit inspection must take place at a venue to be reasonably determined by Paddington within Paddington's control and within normal working hours;

v) Paddington shall be obliged to make such copies of the inspected documents as the third party auditor reasonably requests, and to permit the third party auditor to take copies himself, provided that the cost of such copies is met by Pixdene and that the third party auditor keeps such copies confidential;

vi) Pixdene is not entitled to inspect documents pursuant to clause 5 or, to be provided with copies of the same by Paddington;

vii) The third party auditor is only permitted to disclose to Pixdene such information gained from the audit inspection as is necessary to report on the following matters, and shall keep all other information confidential:

a) the conclusion reached on the audit (i.e. whether or not Paddington has complied with its obligations under the RDA);

b) the basis of that conclusion, and if an underpayment is found;

c) what further sums are due from Paddington; and

d) the basis of calculation of such sums;

viii) Paddington is only entitled to redact documents for inspection to the extent that they are legally privileged;

ix) The Requested Documents set out in Part A and at paragraph 9 of Part B of the Amended Appendix 1 to the Amended Particulars of Claim are agreements or other business records within the scope of Clause 5

101. I will hear submissions about the form of order, including the scope and wording of declarations sought, at the handing down of the judgment on 2 November 2022.