Neutral Citation Number: [2019] EWHC 1419 (Comm)

Case No: CL-2018-000726

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**COMMERCIAL COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 June 2019

**Before**:

**Lionel Persey QC sitting as a Judge of the High Court**

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**Between:**

**SDI RETAIL SERVICES LIMITED**

**Claimant**

**- and –**

**THE RANGERS FOOTBALL CLUB LIMITED**

**Defendant**

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**Sa'ad Hossain QC** and **Joyce Arnold** (instructed by **Reynolds Porter Chamberlain LLP**) for the **Claimant**
**Ben Quiney QC, Jason Evans-Tovey and Michael Ryan** (instructed by **Mills & Reeve LLP**) for the **Defendants**

Hearing date: 22 May 2019

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# Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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## Lionel Persey QC:

### Introduction

**1.** On 13 March 2019 Sir Ross Cranston gave judgment ("**the Judgment**") in these Part 8 proceedings. The background to the proceedings and all relevant facts are fully set out in the Judgment and I will not repeat them here.

**2.** Sir Ross Cranston held in Judgment/§84 that:

(1) The Claimant ("**SDIR**"), in its 25 July 2018 notice, expressly matched the material terms in the Defendant's ("**Rangers**") offer dated 12 July 2018.

(2) A further agreement came into existence at that point, to take effect immediately on the Agreement dated 21 June 2017 coming to an end.

(3) The precise wording of that further agreement needed to be determined.

**3.** In Judgment/§85 Sir Ross Cranston held that the parties should agree the wording of the further agreement and said that he was not persuaded that the Court should have any involvement in this process. On 3 April 2019 (sealed on 10 April) the Court ordered ("**the Order**") as follows:

> "... 1. Of the terms contained in the 12 July 2018 Notice of Offer
>
> (1) In relation to Offered Right 1, the only Material Terms were:
>
> (a) term 1;
>
> (b) term 5, save in relation to pop up stores (but the final sentence of this term provides no basis for the termination provisions in Term 7, 10 and 11 or similar being read into the further agreement); and
>
> (c) the duration of the contract commencing on 11 August 2018 and ending on 31 July 2020 contained the first sentence of term 10 as subsequently clarified by Ranger), but not, for the avoidance of doubt, the rest of term 10.
>
> (2) In relation to Offered Rights 2 and 3, the only Material Terms were:
>
> (a) term 1; and
>
> (b) the duration of the contract commencing on 11 August 2018 and ending on 31 July 2020 contained in the first sentence of term 8 (as subsequently clarified by Rangers), but not, for avoidance of doubt, the rest of term 8.
>
> 2. The only variations to the Agreement necessary to produce the further agreement under paragraph 5.7 of Schedule 3 of the Agreement are those to effect the Material Terms specified in paragraphs 1(1) and 1(2) above and to make it clear that the further agreement relates to all of the Offered Rights.
>
> 3. By operation of paragraph 5.7 of Schedule 3 of the Agreement, a further agreement came into existence on 25 July 2018, to take effect on 11 August 2018 ..."

The Order further required the parties to seek to agree the precise wording of the further agreement to reflect the declarations made at paragraphs 1, 2 and 3 above and set out a timetable for the agreement of a draft.

### The dispute

**4.** The parties were unfortunately unable to agree the terms of the further agreement and SDIR therefore applied to the Court to determine those terms. Following the hearing on 22 May 2019 I ruled on 23 May that the further agreement which came into existence on 25 July 2018 pursuant to the Judgment/§84 is on the terms of the draft agreement that was provided by SDIR to the

Court during the course of the hearing and without any of the deletions or additions proposed by Rangers. In this judgment I give my brief reasons for ruling as I did.

**5.** There were six principal categories of term in respect of which the parties had been unable to agree:-

(1) Whether Rangers was right to remove SDIR's right under the Agreement to manufacture Branded Products (or have them manufactured).
(2) Whether Rangers was right to remove SDIR's Ancillary Rights under the Agreement.
(3) Whether Rangers was right to remove SDIR's matching rights under the Agreement.
(4) Whether the changes proposed by Rangers should be made to the payment terms.
(5) Whether SDIR was right to include terms to reflect the fact that Offered Right 3 includes the right to perform the Permitted Activities in relation to the Official Rangers Kit.
(6) Whether terms should be included to the effect that the further agreement was only to become operative on the date of its execution, and was subject to Rangers' pending application for permission to appeal the Judgment and Order.

## Discussion

**6.** The proper meaning to be given to paragraph 5.7 of Schedule 3 of the Agreement lies at the heart of the parties' disagreement. It provides as follows:-

> "... 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) ... (*emphasis supplied*)"

**7.** SDIR contends that this clause means what it says: i.e. that as and when the parties enter into a further agreement after SDIR has matched some of or all of the Offered Rights this further agreement is to be on the same terms as the Agreement save insofar as it is necessary to amend it in order give effect to the Material Terms and such change as is required to effect whether the further agreement relates to an Offered Right.

**8.** Rangers submits that any changes made to the Agreement should reflect the narrow meaning of the Material Terms found by Sir Ross Cranston and should seek to remove those rights or obligations that are inconsistent with the Offered Rights. The task for the parties, Rangers argued, was to rework the Retail Agreement to fit the matched rights. In practice this involved the removal of all of those contractual provisions relevant to Categories 1 to 5 above which had not been included by the third party offeror in the Offered Rights and which could not therefore be matched if they were not Material Terms.

**9.** I have no hesitation in rejecting Rangers' approach to the proper construction of Schedule 3, paragraph 5.7:

(1) First, it is inconsistent with the Judgment. Sir Ross Cranston held at Judgment/§54 that

> "... matching these specific [ie material] terms was chosen as a more certain commercial course than requiring SDIR to match all the terms in the third party offer ... the contractual scheme of limiting matching to material terms ... means that the parties are able to continue largely on the detailed legal terms previously negotiated. The overall commercial purpose of paragraph 5 of Schedule 3 was that Rangers could go to the market to try to achieve the best available payment, revenue share and royalty terms, but the objective intention behind paragraph 5.7 was that the further agreement should be as close as possible to the existing Agreement, subject to variations to reflect any matching ..."

Rangers is bound by these findings (with which I respectfully agree).

(2) Secondly, there is in my view no sensibly arguable alternative to Sir Ross Cranston's reasoning. The parties could have, but did not, stipulate that SDIR would have to match all of the proposed terms of any third party offer and then conclude a further agreement on those terms. They instead agreed that only the Material Terms (as defined) would be bolted into the existing Agreement, together with any necessary consequential amendments. The original framework of, and contractual mechanisms created by, the Agreement would otherwise remain unaffected.

(3) Thirdly, it follows from the above that any term in the Agreement which was not a Material Term (as defined) would be included in the further agreement. If such terms were to be excised then the further agreement would not be on the same terms as the Agreement. As SDIR submitted, the removal of a right which does not fall within the definition of an Offered Right is not a variation required to effect whether the further agreement shall relate to any of the Offered Rights or any combination of the Offered Rights. A right outside the definition of Offered Rights is outside the scope of the variations required by paragraph 5.7.

(4) Fourthly, it made considerable commercial sense for the parties to agree that any further agreement would follow the terms and structure of the Agreement. This gave certainty and was no doubt intended to facilitate and simplify the drafting of the further agreement.

**10.** I now turn to the six disputed categories of term:-

(1) **The right to manufacture Branded Products.** The right to manufacture Branded Products is a Rangers Right which, pursuant to clause 3.1.3 of the Agreement, was granted to SDIR for the Term. It was not an Offered Right and its removal is not required to effect the Material Terms. SDIR further relied upon the fact that Rangers had failed before trial to raise the arguments upon which they sought to rely before me. I do not set much store by this because the issue is one of construction.

(2) **The right to Ancillary Rights.** The Ancillary Rights are also Rangers Rights within the definition of clause 3.1.4. Once again, it was not an Offered Right and falls outside the scope of the variations required by paragraph 5.7.

(3) **Matching rights.** Rangers wishes to delete the Matching Rights conferred in paragraph 5 of Schedule 3. It does so on the basis that SDIR matched the 2 year term that had been offered by the third party offeror. Sir Ross Cranston found that the only operative Material Term was the duration of the Contract: i.e. 2 years commencing on 1 August 2018: Judgment/§70, and that a term dealing with the extension in the third party offeror's Notice of Offer was not a Material Term as to duration. The same is true of the Matching Right provisions. These are not terms as to the duration of the original Agreement. Nor are they Material Terms. They provide a mechanism for the making of a further, different, agreement if certain requirements are met. Rangers submitted that one effect of the inclusion of the matching rights would be to give SDIR a rolling right to a contract in perpetuity and that this cannot have been the intention of the parties. I do not need to consider whether there is any merit in this characterisation of the nature of the matching rights. It is sufficient for present purposes to note that the parties agreed to the matching right provisions as part of the original Agreement and that it is not for the Court to rewrite their bargain.

(4) **Payment terms.** Rangers wishes to rewrite or amend some of the payment terms in the original Agreement. There is no basis for it to do so unless SDIR agrees. The key payment provisions in the Agreement were found by Sir Ross Cranston to be Material Terms. Rangers argues that all other payment terms that are inconsistent with the Material Terms must be excised and that it is appropriate to introduce a new payment structure. I disagree. The terms that Rangers wishes to excise are terms in the Agreement which provide a mechanism for the process and timing of payments. They are not inconsistent with the Material Terms.

(5) **Official Rangers Kit.** The parties are agreed that SDIR does have the right to distribute, market, advertise, promote, offer for sale or sell the Official Rangers Kit under the further agreement. Rangers has agreed to a number of changes to the Agreement to reflect this understanding but has objected to three of SDIR's proposed amendments. I do not consider there to be any substance in these objections. The disputed amendments are consistent with the agreed amendments.

(6) **The proposed further terms.**

(a) Rangers argues that the further agreement should only become effective upon the date that it is executed. This is contrary to Sir Ross Cranston's finding that the further agreement came into existence on 25 July 2018 (Judgment/§84) and paragraph 3 of the Order stamped on 10 April 2019. Rangers has proposed this amendment to avoid placing the parties in breach in the period up until execution. This is not a relevant consideration. The extent to which, if at all, Rangers has been in breach of the further agreement is an issue that remains to be determined (if not agreed) by the Court.

(b) Rangers wishes to record the fact that it has sought permission to appeal from the Court of Appeal. This is not a change required by paragraph 5.7 of Schedule 3. Should permission to appeal be granted and any subsequent appeal be successful then Rangers will have an opportunity to address the Court of Appeal.

## Conclusion

**11.** For the reasons given above the further agreement which came into existence on 25 July 2018 pursuant to Judgment/§84 and Order/§3 is on the terms of the draft agreement provided by SDIR to the Court during the course of the hearing on 22 May 2019 without any of the deletions or additions proposed by Rangers. That further agreement took effect on 11 August 2018 pursuant to Order/§3.