



Neutral Citation Number: [2019] EWHC 2837 (Comm)

Case No: CL 2019 000565

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/10/2019

Before :

MR. JUSTICE TEARE

Between :

New Balance Athletics, Inc	<u>Claimant</u>
- and -	
The Liverpool Football Club and Athletic Grounds Limited	<u>Defendant</u>

Daniel Oudkerk QC and Edward Brown (instructed by **Hausfeld & Co LLP**) for the **Claimant**
Guy Morpuss QC and Theo Barclay (instructed by **Stobbs IP**) for the **Defendant**

Hearing dates: 18, 21 and 22 October 2019

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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.

.....

Approved Judgment**Mr. Justice Teare :**

1. This is (another) dispute about football shirts. A manufacturer of sportswear is keen to retain the right to sponsor a famous and successful football club and to manufacture and sell replica football shirts of the club's players. The football club would prefer to give that right to another sportswear manufacturer. So beneficial is such sponsorship to both manufacturer and club that this court is now familiar with disputes in this aspect of commercial life; see for example *SDI Retail Services v Rangers Football Club Ltd.* [2018] EWHC 2772 (Comm).
2. The Claimant, New Balance Athletics, Inc., presently has the right to sponsor Liverpool FC and to manufacture and sell the replica shirts of its players. Its right ends in 2020. In circumstances where Liverpool FC won the Champions League in 2019 New Balance is particularly keen to retain that right. Its contract enables it to match any offer by a competitor. Nike has made an offer to manufacture and sell Liverpool FC's replica shirts from 2020. New Balance claims that it has matched that offer but Liverpool FC says that it has not. The sole or principal question is whether New Balance has indeed matched Nike's offer.

The matching right

3. The Sponsorship Agreement between New Balance and Liverpool FC was concluded in 2011 and amended in 2012 and 2014. The Sponsorship Agreement, by clause 16, addressed the question of renewal and provided that during the "first dealing period" the parties shall negotiate in good faith the renewal of the agreement. If agreement is not reached Liverpool FC may enter into negotiations with a third party competitor of New Balance. If an acceptable offer is received from a third party Liverpool FC must submit the specific terms of such offer to New Balance. New Balance

"shall then have thirty (30) business days from the date of receipt of such third-party offer to Notify the Club in writing if it will enter into a new agreement with the Club on terms no less favourable to the Club that (i) the terms of this Agreement and/or (ii) the material, measureable and matchable terms of such third-party offer."

4. If New Balance so notifies Liverpool FC

"the Club shall be obliged to enter into a new agreement containing such terms with the Sponsor".

Nike's offer

5. In December 2018 New Balance agreed that Liverpool FC could seek third party offers before the expiry of the First Dealing Period.
6. On 11 July 2019 Liverpool FC sent Nike's offer to New Balance. What was sent was in fact a signed contract which was stated to be a legally binding contract subject to a condition precedent. The condition precedent acknowledged that New Balance had the "opportunity to review and match all the material, measurable and matchable terms" of

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the contract and that the contract would “automatically terminate” if Nike received notification of “a Valid Match”.

7. Nike’s offer was to pay Liverpool FC £30 million per season plus 20% of net sales of all licensed products except footwear and 5% of net sales of licensed footwear. Of particular importance to the dispute in this case is the Marketing and Distribution clause which provided as follows:

“Nike will produce/sell (including as to SKU range and distribution Licensed Products, and market LFC, in a manner that is consistent with Nike’s other top tier UK football clubs eg Tottenham, Chelsea (subject to similar performance). Without limiting the foregoing Nike will:

. produce Licensed Products under at least 2 global Nike-controlled brands (eg Nike and Converse);

. produce Licensed Products in collaboration with third party brand(s), including in association with a major US sports team located in a major US market;

. market LFC and/or Licensed Products through marketing initiatives featuring not less than three (3) non-football global superstar athletes and influencers of the calibre of LeBron James, Serena Williams, Drake, etc with such initiatives being used to market certain Licensed Products produced for the start of Season 2020/2021 in Year 1 and for certain Licensed Product produced for each Season as applicable thereafter;

. sell Licensed Product throughout the Term (including, for the avoidance of doubt, Licensed Products produced for the start of the Season 2020/21 as follows: (i) in not less than 6000 stores worldwide, 500 of which shall be NIKE owned or controlled with the potential for sale of Licensed Product in as many as 13000 stores worldwide, and (ii) within not less than 51 countries online through NIKE.com. Nike warrants that, as of the date of this Contract, it can distribute Licensed Product in at least 6000 stores worldwide, 500 of which are Nike owned or controlled.”

New Balance’s response

8. On 16 August 2019 the Claimant replied by letter to Liverpool FC as follows:

“New Balance Athletics, Inc is happy to Notify the Club that it will enter into a new agreement with the Club as enclosed herewith on terms no less favourable to the Club than the material, measurable and matchable terms of the Nike Offer.”

9. Enclosed with the letter was a signed offer which, with regard to the Marketing and Distribution clause said as follows:

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“NB will produce/sell (including as to SKU range and distribution Licensed Products, and market LFC, in a manner that is consistent with other top tier football clubs (subject to similar performance). Without limiting the foregoing NB will:

- . produce Licensed Products under at least 2 global NB-controlled brands (eg New Balance and Warrior);
- . produce Licensed Products in collaboration with third party brand(s), including in association with a major US sports team located in a major US market;
- . market LFC and/or Licensed Products through marketing initiatives featuring not less than three (3) non-football global superstar athletes and influencers with such initiatives being used to market certain Licensed Products produced for the start of Season 2020/2021 in Year 1 and for certain Licensed Product produced for each Season as applicable thereafter;
- . sell Licensed Product throughout the Term (including, for the avoidance of doubt, Licensed Products produced for the start of the Season 2020/21 as follows: (i) in not less than 6000 stores worldwide, 500 of which shall be NB owned or controlled with the potential for sale of Licensed Product in as many as 13000 stores worldwide, and (ii) within not less than 51 countries online through New Balance.com websites. NB warrants that, as of the date of this Contract, it can distribute Licensed Product in at least 6000 stores worldwide, 500 of which are NB owned or controlled.”.....

10. It is to be noted that whilst the distribution term was matched in terms, the marketing term was not. No reference was made to LeBron James, Serena Williams or Drake.

Liverpool FC’s reply

11. On 22 August 2019 Liverpool FC replied. The Club noted certain omissions and changes in the signed offer and then said:

“The Club does not consider the NB offer to be a genuine one. This is both because of the contrived and unconsidered replication of the warranties and terms in the Nike offer, and because NB cannot deliver on those warranties and terms.”

12. Particulars of New Balance’s inability to deliver were given. It was said that New Balance could not distribute the products in 500 owner-operated stores and that New Balance could not distribute the products in 6000 stores. It was further said that New Balance could not match Nike’s offer in terms of marketing. The letter concluded:

“As a result of the above matters, the Club does not consider the NB offer to be a bona fide attempt to match the terms of the Nike

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offer. It therefore does not meet the requirements of Clause 16.2 of the Agreement.”

13. Thus there is an impasse between New Balance and Liverpool FC. The Club wishes to give the sponsorship contract to Nike. New Balance claims that it is entitled as a matter of contract to remain the sponsor of Liverpool FC. In view of a requirement that New Balance make substantial payments by 25 October to ensure that the shirts for the next season are available for sale at the end of the present season the Commercial Court agreed to try this issue on an expedited basis.
14. There are two principal issues. First, with regard to the distribution term Liverpool FC said that New Balance’s offer to match Nike’s distribution term was not made in good faith. New Balance accepted that it had a duty to make its offer in good faith but said that its offer had been made in good faith. Second, with regard to the marketing term Liverpool FC said that New Balance had not matched it. New Balance said that it did not have to because the marketing term was not a “material, measurable and matchable” term. But if it was New Balance said that it had matched the marketing term.

The oral evidence

15. New Balance called two witnesses. The first was Mr. Christopher Davis, the son of the company’s chairman and Vice-President – Global Marketing and Sports Marketing. His family owns most of the shares in New Balance. He is based in Boston, USA. He gave his evidence in a clear manner. But, unsurprisingly, he was aware of which side he was on and so, for example, when asked about the marketing term, sought to argue the case that it was not measurable by stressing that the valuation of marketing initiatives using sporting stars was subjective. He was also a little defensive about a reference in the documentary record to the CEO of the company, Mr. Preston, being critical of an email sent by Mr. Davis to the company’s regional representatives seeking information as to whether Nike’s distribution offer could be matched. Nevertheless I considered that he gave his evidence on factual matters within his own knowledge honestly and fairly. Indeed, very little of his factual account in his witness statement was challenged in cross-examination.
16. The second witness was Mr. Kenny McCallum, the General Manager – Global Football at New Balance. He is based in this country. As with Mr. Davis I considered that he sought to give his honest answers to the questions put to him. Although the events took place no more than 3-4 months ago there were some events in respect of which he did not have a full or clear recollection. Where that was so the contemporaneous documents were a better guide to what in fact happened. Even when he did have a recollection his recollection had to be tested against the contemporaneous documents.
17. The Defendant also called two witnesses. Mr. William Hogan IV is the Managing Director and Chief Commercial Officer of Liverpool FC. He answered the questions put to him in a clear manner. I consider that he also sought to answer the questions put to him honestly. Little if any of his factual evidence was challenged. Mr. Michael Cox is the Senior Vice President of Merchandising at Liverpool FC. He gave a very full statement about the licensed sportswear market about which very few questions were asked. There was no reason to doubt his evidence but it had little if any relevance to the resolution of the issue between the parties.

Approved JudgmentThe events leading up to Nike's offer

18. There is no dispute that, although the Sponsorship Agreement did not impose any contractual obligations upon New Balance with regard to the extent to which Liverpool FC's shirts and other "licensed products" were distributed throughout the world, distribution was a matter which concerned Liverpool FC and which the Club raised with New Balance at various times. On occasion (January 2015, June 2015, May 2018 and late 2018) figures given by New Balance to Liverpool FC as to the number of stores through which Liverpool FC shirts and other products were sold were found to be inaccurate. It is not necessary to recount the history of these concerns, discussions and erroneous figures between 2011 and 2018. But to put Nike's July 2019 offer in context it is necessary to recount the discussions about distribution in June and July 2019.
19. On 14 June there was a telephone discussion between Mr. Davis of New Balance and Mr. Hogan of Liverpool Club in the context of renewal of the Sponsorship Agreement. It is common ground that distribution was discussed. Mr. Davis has a manuscript note of the call which records a question: "Is Distribution the Lynch Pin?" Mr. Hogan also has a manuscript note which states: "Doors – Distribution – Impossible to Match". His recollection is that this comment was made by Mr. Davis. Since Mr. Davis accepts that Nike has a larger distribution network than New Balance, Mr. Hogan's recollection is likely to be correct. Mr. Hogan accepts that the discussion was of a general nature and that there was no discussion of a particular number of doors. "Doors" is the term used by the parties to describe stores in which sportswear is sold.
20. On 27 June there was a meeting between Mr. Davis and Mr. Hogan. It appears to have taken place over breakfast in Concord, Massachusetts. Mr. Hogan showed Mr. Davis a copy of a draft offer by Nike on his computer. Mr. Hogan was able to identify the draft in his evidence. It provided for an annual fee of £30 million and with regard to distribution it provided: "Nike willcommit to sell Licensed Products in not less than 6000 stores worldwide with the potential for sale of Licensed Products in as many as approximately 13000 stores worldwide in Year One of the Contract". Mr. Davis recollected the figure of 6000 stores and gave evidence that he thought that it related to 6000 stores owned or controlled by Nike. That evidence was not challenged. Mr. Hogan has a note which reads: "Distribution – Not Something they can match". It seems likely that this referred to something said by Mr. Davis. Mr. Davis accepted in his evidence that New Balance could not stock the Club's products in 6000 stores owned or controlled by New Balance. Mr. Hogan's email of the same date recounting the discussion makes clear that Mr. Davis wanted to see the competing offer from Nike before making an offer, that he knew they could not "match up on scale" and recognised that he would have to put forward a higher base fee. Mr. Hogan told him that "the base fee needs to compensate for lack of distribution."
21. On 1 July there was a further telephone call between Mr. Davis and Mr. Hogan. Mr. Hogan's note of the call states: "we have an offer you can't match." Mr. Davis recalled that Mr. Hogan said that signing with Nike would put New Balance out of contention because of its inability to comply with the distribution obligations in the offer.
22. On 2 July Mr. Hogan emailed Mr. Davis. He said:

"As you know, addressing the issues regarding distribution of our product has always been critical to us and indeed has been

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an issue for us during our partnership to date. We have received various proposals that offer guarantee on a dramatic increase in the worldwide distribution of LFC licensed product.”

23. Mr. Hogan’s email attached terms which he said would be acceptable to the Club. He did this instead of providing New Balance with the third party terms and going through the matching process
- “.....as if we are forced to do so we fear you will not be in a position to match each of the material, measurable and matchable terms of the same.”
24. The terms attached provided for an annual fee of £60 million and with regard to distribution provided that a particular % (varying from 65% in year one to 80% in year four) of New Balance stores should stock the Club’s products. Mr. Hogan gave evidence that the higher annual fee was to compensate for New Balance’s lesser distribution capability. This is likely to be correct.
25. New Balance preferred to see Nike’s offer and on 3 July Mr. Davis informed Mr. Hogan by WhatsApp:
- “I think at this point we will take the signed agreement and look to exceed the package during the matching period.”
26. Thus it was that on 11 July Liverpool FC provided New Balance with a copy of the Nike offer (or contract). The marketing and distribution terms have already been quoted in this judgment. It is to be noted that the distribution obligation was to sell the licensed product “in not less than 6000 stores worldwide, 500 of which shall be NIKE owned or controlled, with the potential for sale of licensed product in as many as 13,000 stores worldwide.” The reference to only 500 stores being owned or controlled by Nike had not been heralded before this. Mr. Davis gave evidence that that this was “less onerous” than he had understood the distribution obligation to be. This appears to be correct because the figure of 500 owned or controlled stores was new, at least to Mr. Davis.

The actions taken by New Balance after 11 July

27. Mr. McCallum was instructed by Mr. Davis to carry out a due diligence process to validate New Balance’s ability to match the Nike distribution obligation and to determine whether it was commercially viable to do. Mr. McCallum’s initial reaction was, he said, that New Balance would be more than capable of matching it if New Balance wanted to do so. If this was his initial view it did not remain his view for long. For within a few days he regarded it as a challenge. On 15 July he sent an email to his colleagues, Mr. Evans and Mr. Thomson, to which he attached information collected in the past about the number of doors through which New Balance had sold. That showed that in the three years from 2016 to 2019 the number of doors owned or controlled by New Balance through which Liverpool FC products had been sold were 130, 172 and 178 and that the number of other (or “wholesale”) doors through which Liverpool FC products had been sold were 2869, 2709 and 2797. (In fact, as appeared when Mr. McCallum was cross-examined the figures for 2018/2019 were not actual figures but estimates or forecasts produced in May 2018). Mr. McCallum said in the email that that information “helps illustrate the challenges in respect of NB doors and wider

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wholesale.” Mr. McCallum said in his oral evidence that the “challenges” related to the time frame in which New Balance had to collect the necessary data. But in my judgment the obvious meaning of his contemporaneous email was that it might prove difficult to match the distribution term in the Nike offer. Consistent with that understanding is Mr. Evans’ email of 18 July to Mr. Davis in which he said that New Balance “would have to really step up to the plate.”

28. The first stage of the due diligence exercise was to model three profit and loss scenarios, a “low” model, a “mid” model and a “high” model. The “mid” model assumed an “accelerated business driven by increased disto (6k doors), incremental kit sales, lifestyle apparel and ftw opportunity, sustained on-pitch success”.
29. The mid model was preferred. It resulted in an anticipated loss for the 20/21 season of over £10 million. However, New Balance hoped to expand its other businesses because of the exposure given by sponsoring Liverpool FC.
30. On 31 July Mr. Davis sent to the regional managers an email in respect of “LFC Renewal”. It said as follows:

“We are in the process of matching the LFC negotiation, which is something that you have all expressed interest in renewing. A major point in the matching of the deal is distributing the LFC kit/product into 6000 doors globally and 500 New Balance stores. **If we cannot reach 6000 doors globally, we cannot get the deal.** Simply put this will be audited and under a microscope throughout the entirety of the contract.

In order to renew, we will need all of the regions to step up to the plate here and maximise the commercial value of this asset to propel the organisation forward in a lucrative, brand accretive manner.

What we need from you:

1. A distribution plan mapping out the maximum number of doors in your respective regions where we can place and sell LFC product/kit.
2. Aggressive volume growth by region with increased forecast of dollars and units to maximise the asset at hand.

Hope all that makes sense. This is pretty timely, so if we can return to Kenny with the number in the next few days that would be ideal. We will then put you plans into a singular document to provide visibility, opportunity and way forward.”

31. It appears from an email dated Thursday 1 August from Mr. Thomson that Mr. Preston, the CEO of New Balance, wanted evidence that Liverpool FC products could be

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distributed through the required number of doors. His email referred to Mr. Davis' email to the regional managers and said:

“This is a result of Joe P requesting that we get commitment from the regions upfront prior to committing to the renewal.

Essentially he wants our top down (mid model) plan validating/level of comfort that markets will step up – which is sensible, although comes with risks of keeping renewal process tight !”

32. Mr. Thomson then noted:

“Door distribution: we are currently @ circa 2800 doors today, so need to get commitment on a further 3200 doors, which I see mainly coming from China/LATAM/NA/Japan.”

33. Mr. Thomson then made suggestions as to how the required data could be obtained from the regions (by the use of a template, using the forecast for 2019/2020 as a starting point for forecasting from 2020/2021 onwards). In line with that suggestion (and in the absence of Mr. McCallum who was on holiday) he sent his own email to the regional managers in which he asked for their replies by Tuesday 6 August showing

“1. A distribution plan mapping out the maximum number of doors in your respective regions where we can place and sell LFC product/kit.”

34. Mr. Thomson said that it was “critical for us to get to a minimum 6000 doors as a contractual requirement”. He added that the “directive is for LFC to be placed in:

“ . Every NB/NBL door globally

. An accelerated and wider wholesale distribution plan across: 3 tiers of Category Speciality/Athletic Speciality/Sporting Goods.”

35. He further requested:

“2. Aggressive volume growth by region with increased forecast of dollars and units to maximise the asset at hand.”

36. He added:

“Whilst we will continue to drive our LFC performance line growth (kit + training) we also have new incremental growth opportunities in Licensed Lifestyle apparel and Footwear. The latter of which we have seen great success on to date. The lifestyle opportunity is particularly relevant in ROW regions. ”

37. On the same day John Evans, the General Manager, Sports Marketing, Running and Global Football, emailed Mr. Davis saying:

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“I don’t think we can get to 6000 doors (especially in the short term) without a full commitment to be in all China NB doors. I think you said that you already had this discussion with Joe.”

38. Also on 1 August Mr. McCallum reported to Mr. Thomson that that there had been “carnage in Boston due to Ray and CD going off piste versus the plan and seemingly Joe not reacting well”. It is unclear to what this related but there must have been some disagreement of approach between Mr. Davis and Mr. Preston. Mr. Davis was unable to recall what the dispute was but suggested that it may have related to the use of a template. That is unlikely. Counsel for Liverpool FC suggested that it related to the fact that Mr. Preston did not agree with the plan to renew. Counsel relied upon a reference in the email to “Joe P’s counter argument”. That suggestion is further supported by Mr. Thomson’s reply to Mr. McCallum in which he said:

“As you say looks like Joe P is looking for some validation on our proposed model in order for him to support!”

39. If Mr. Preston was initially reluctant to support the renewal it would appear that he later supported the renewal because, as I have noted above, an offer seeking to match Nike’s offer was in fact made.
40. The regional managers responded on 6 August and New Balance was able to produce a report entitled “Renewal Proposal”. Section 1 summarised the recommended mid model scenario which assumed increased distribution of 6000 doors. Section 2 summarised the forecast from the regional managers. The proposed increases in “doors” in each of the UK and Europe, Latin America, Asia and Pacific, North America, China and Japan were set out. Overall, the number of doors through which Liverpool FC product was to be distributed was to increase by 105% from 3063 to 6300. The number of doors owned or controlled by New Balance was to increase from 166 to 1302. (To put those figures in context it is to be noted that New Balance traded through some 40,000 stores, of which some 3,775 were owned or controlled by it.) Under “Key Notes” it was observed that the 6000 doors requirement was matched as was the requirement for 500 New Balance owned or controlled doors. The third section concerned profit and loss submissions. The fourth section concerned brand value and the fifth section evaluated the proposed offer which was expected to make an operating loss. The sixth section concerned “key next steps”. Management was to review the matter by 12 August and reach a decision by 15 August. The offer was to be made to Liverpool FC by 19 August latest. There was then an appendix of some 40 pages, which included summaries of each region’s submissions on doors, showing the current doors (2018-2019) and planned future doors (from 2020-2021 onwards).
41. On 14 August there was a discussion between Mr. Preston of New Balance and Mr. Hogan of Liverpool FC. Mr. Preston informed Mr. Hogan that New Balance were going to try and match the number of doors Nike had offered. Mr. Hogan was sceptical.
42. As already noted New Balance provided its offer purporting to match that of Nike on 16 August. The decision was made by the Senior Leadership Team (“SLT”) which, I was told, comprised Mr. Preston and Mr. Davis.

The implied obligation of good faith

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43. Although good faith is not mentioned in the contract it is common ground there is an implied obligation of good faith. There is however a dispute as to what that means. On behalf of New Balance it was submitted that there can only be a breach of the implied term of good faith if New Balance did not in fact intend to meet or knew that it could not meet the distribution obligation. On behalf of Liverpool FC it has been pleaded that there can be a breach of the implied term if New Balance did not reasonably believe that it could perform the terms of its offer. In their closing submissions counsel for Liverpool FC put the matter this way. New Balance “either knew or did not care that it could not match 6000 doors; or it had no reasonable grounds for such belief.”
44. It is now clear from a number of decisions that the duty of good faith (or fair dealing) can be breached not only by dishonesty but also by conduct which lacks fidelity to the parties’ bargain. In judging whether a party has not been faithful to the parties’ bargain it is of course necessary to bear in mind the nature of the bargain, the terms of the contract and the context in which the matter arises. Ultimately, the question for the court is whether reasonable and honest people would regard the challenged conduct as commercially unacceptable; see the review of this area of the law by Fraser J. in *Alan Bates and others v Post Office* [2019] EWHC 606 (QB) at paragraphs 706-711.

The distribution obligation

45. There is a cogent case that when the Senior Leadership Team (consisting of Mr. Preston and Mr. Davis) took the decision to match the Nike offer on or about 14 August it acted in good faith. It appears that Mr. Preston, the CEO, was initially doubtful as to whether the Nike offer could be matched and required a due diligence exercise to be conducted. He wanted a “commitment from the regions upfront prior to committing to the renewal”. Mr. Davis appreciated that any offer by New Balance “will be audited and under a microscope throughout the entirety of the contract.” The due diligence exercise was carried out. The estimates provided by the regional managers were to the effect that Liverpool FC licensed product could be distributed through 6300 stores, of which 1302 were stores owned or controlled by New Balance. These estimates must have persuaded the SLT and in particular Mr. Preston that it was prudent to match Nike’s offer.
46. When New Balance made their matching offer Mr. Hogan was “incredulous”. That evidence was not challenged. It seems likely that, although Mr. Hogan had had well in mind that Mr. Davis had told him more than once that New Balance could not match Nike’s distribution network, he had not appreciated that Mr. Davis had thought that the reference to 6000 stores over breakfast on 27 June was to stores owned or controlled by Nike. When Mr. Davis learnt on 11 July that Nike was to distribute through only 500 of its owned or controlled stores the distribution was term was less onerous than he had anticipated.
47. At trial counsel for Liverpool FC sought to make good the case that New Balance had acted in bad faith by saying that there were five serious errors with the returns from the regional managers “which were known to someone in senior management at New Balance or those entrusted with the task of doing this audit” and that any one of those errors would take the number of stores below 6000. Counsel said that knowledge of any error by those carrying out the due diligence exercise was to be attributed to New Balance, even if the SLT was unaware of the error.

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48. It is first necessary to consider the five alleged errors. They were investigated with both Mr. Davis and Mr. McCallum when they were cross-examined. Counsel complained that Mr. Thomson, who reported to Mr. McCallum and was involved in obtaining the estimates from the regional managers, ought also to have given evidence. Whilst there probably were matters in respect of which Mr. Thomson had a more detailed knowledge than Mr. McCallum, I was not persuaded that it was appropriate to criticise New Balance for not having called Mr. Thomson. New Balance called Mr. Davis, who was a member of the SLT who took the decision to match, and Mr. McCallum, who had been instructed to obtain the necessary data from the regional managers and to whom Mr. Thomson reported. In circumstances where this was an expedited trial to be conducted over three days and the five alleged errors were not articulated until trial there was no obvious reason for calling Mr. Thomson in addition to Mr. McCallum.

The first suggested error: Japan (250 doors)

49. It appears from the notes to the submission from Japan that 250 of the predicted 400 doors sold footwear only. Liverpool FC licensed products included footwear carrying the initials LFC and the name of Bob Paisley (a former, and very successful manager of Liverpool FC). Thus the regional manager had included stores which sold footwear. This must have been apparent to Mr. McCallum and to Mr. Davis since it was stated in the Renewal Proposal which collated the figures provided by the regional managers.
50. Counsel said that that was paying no more than lip service to the Sponsorship Agreement and was a breach of the duty of good faith because in reality the Sponsorship Agreement was about selling replica shirts which accounted for 90% of all sales.
51. Mr. Davis explained that in Japan New Balance had 23% of the lifestyle footwear market. “We believed in a creative opportunity within the Japanese market to create co-branded high price Liverpool footwear products and distribute it. If we needed to we would add home kit to that assortment with those stores.” But these stores were not owned or controlled by New Balance and so Mr. Davis would be dependent upon the agreement of the wholesalers to order replica kit.
52. However, whilst it might be said that footwear stores were not at the heart of the Sponsorship Agreement the use of such stores for the purpose of showing that New Balance could “sell Licensed Product...in not less than 6000 stores” was within the meaning of the Sponsorship Agreement and the Nike offer. The products were defined in the Sponsorship Agreement as including “running shoes” (see Schedule 5) and “licensed product” was defined in the Nike offer as including “running shoes” or “trainers “on which the Club IP is affixed”. Consistently with that, Mr. Thomson, in his email to the regional managers, expressly contemplated that, in addition to growth with regard to “kit + training”, there were growth opportunities in “Licensed Lifestyle apparel and Footwear.” In those circumstances I am unable to accept that using footwear stores in Japan was in breach of the implied duty of good faith. The scope of any such implied duty must take into account the express terms of the agreement. Had Liverpool FC wished to ensure that the only doors or stores which were to count for the purposes of Nike’s offer were those which sold a certain proportion of replica kit the Club should have so stipulated. It did not. There was therefore no “error” with regard to Japan.

The second suggested error: China (616 stores)

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53. Mr. Ang, the China regional manager, in an email to Mr. McCallum dated 1 August, said that “we see entry into lifestyle licensed apparel as a strong opportunity for China market.” On 2 August Mr. Thomson said in an email to Mr. Ang that he appreciated that “competitor brands are far more established in the football category than NB China to date, as you deal with re-setting the business in running + lifestyle (per conversations with Kenny), however strong distribution of LFC product in China is critical to us being successful in renewing the deal”. It appears that Mr. Ang responded with door figures which counsel submitted were only achieved by “putting lifestyle products in stores instead of replica and training kit.” It is said that the additional Chinese stores (from 22 to 638) ought not to have been included in the door count. This was certainly a remarkable increase though Mr. Davis did not regard it as extraordinary. “The Chinese consumer loves winners and Liverpool is a brand that has been winning”.
54. The argument advanced was not that Mr. Davis’ view was unrealistically optimistic but that the stores in which lifestyle products were to be sold should not have been included in the door count in China for the same reason that the stores in which footwear was to be sold in Japan should not have been included in the door count in Japan. In my judgment this argument fails for the same reason that the argument in relation to Japan failed. I do not consider that making use of stores or doors which sell or are predicted to sell LFC lifestyle products is in breach of the implied duty of good faith because it is permitted by the express terms of the Sponsorship Agreement and Nike offer. There is therefore no “error” with regard to China.

The third suggested error: Brazil (221 doors)

55. Mr. Cullen, the regional manager for Latin America, when making his submission on 6 August, drew attention to Brazil. He said it raised “the biggest question at this stage”. He was concerned at the number of “pieces” which could be sold. He assumed a “slight drop” in the first year, followed by a “slow increase”. Nevertheless, the number of estimated sales was 10 times the historical average which he described as an “aggressive figure”. Mr. Cullen was obviously being open and fair about his estimate. Mr. Davis was asked about this. He accepted that the estimate was aggressive but “not out of bounds.” He explained that the aggressive forecast was justified by the fact that there were three Brazilian players in Liverpool FC’s team which had had such success. There was no reason for suggesting that Mr. Davis acted in bad faith in forming this view.
56. Mr. Cullen raised a further point with Mr. McCallum on 8 August. It concerned a doubt which had arisen as to whether a local manufacturer’s sample was up to the required standard. He told New Balance that “if we cannot produce LFC replica kits locally in Brazil, then we will need to remove the doors and the units from our upcoming projections for the contract renewal.” Mr. McCallum decided that the matter should not be raised with Liverpool FC and added: “I’m confident we can get close enough to proceed but now is not the time to engage in that conversation.” He explained when cross-examined that he thought that local sourcing would be possible for the 20/21 season and so there was no need to remove the doors from the forecast. The reference in his email to “close enough to proceed” was a reference to “the potential to get the factory to resample and try to improve upon the product quality, in order for use to take the conversation forward.” I accept that evidence.

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57. The criticism advanced of Mr. McCallum was that he could not have known that the manufacturing problems would have been overcome by the start of 20/21. However, he expressed himself as “confident” of that at the time. I do not understand why that was a view which he could not have honestly held at the time. I do not consider that he acted in bad faith by failing to remove the Brazilian doors from the Latin America figures or by not reporting the manufacturing issue to Liverpool FC.

The fourth suggested error: North America (634 doors)

58. Miss Katie Howard was a senior financial analyst at New Balance who consolidated the regional managers’ returns. When she presented her work on 6 August she did not express any doubt as to the figures presented.
59. On 19 September Mr. Thomson, who was concerned to update the current status on door distribution for the 2019/20 season, noted that the last count for 18/19 was 275 and also that the forecast for 20/21 was 634. He asked Miss Howard if there had been an increase in the door count for 19/20. In reply Miss Howard asked for the “declared NA 275 door count which would enable her to confirm the accuracy of 19/20 season.” She then said: “According to my original submission, the GMs sent back door count of 436 for 18/19 so I’m assuming that the future years will come down.”
60. It was submitted that Miss Howard’s assumption was that the estimated doors of 634 for 20/21 “will come down.” That is possible though she had not been asked about 20/21 and Mr. Thomson, when he replied on 20 September, said he was not sure to what she was referring when making that comment. On 22 September he repeated his question about 19/20 but added: “You have already provided future plan kicking off in 20/21 with 634 doors – does this still hold good as well?” On 23 September Miss Howard replied with an updated door count for 19/20 showing that the doors for 19/20 were 419 (as opposed to the figure of 436 which she had mentioned on 19 September). Mr. Thomson did not make any further request with regard to 20/21.
61. The criticism of Miss Howard is that whatever reason she had in September for thinking that “future years” will come down must have been known to her in August when consolidating the results and yet she did not mention it. This is possible. However, since the fall in figures for 19/20 had been slight (from 436 to 419) it is also possible that there had been no significant fall in the estimate of 634 for 20/21. Counsel said that in the absence of evidence from Miss Howard an adverse inference should be drawn against New Balance. But in circumstances where this point had not been raised before this (expedited) trial took place I do not consider that it would be appropriate to draw an adverse inference from the absence of evidence from Miss Howard. There was no evidence from Mr. Thomson either but then he could not have assisted as to what, if any, assumption was in Miss Howard’s mind in August when she consolidated the figures sent in by the regional managers.
62. I do not consider that it has been established (as more likely than not) that in August Miss Howard was aware of some matter which invalidated the estimate of 634 doors for North America. Even if she had been aware of such a matter there is no basis upon which the court could find that she had acted in bad faith.

The fifth suggested error: Unit/doors ratio (575 doors)

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63. On 10 September Mr. Thomson noted that the doors reported for South Africa and India, when compared with the number of units expected to be sold seemed “high” and he wished to know if they were correct. He was told by Mr Willis (who I assume was the relevant regional manager) that the figure for India of 140 doors was wrong, as result of a “keying error” on his part. He said “realistically we have 8 doors in India”. He said that the figures for South Africa were correct (although the accompanying table suggests that the correct figure should have been 918 rather than 937).
64. Although it appears that the figures for India and South Africa had been overstated this appears to have been the result of a keying error and an arithmetical error. This does not evidence any breach of the duty of good faith.
65. However, counsel (prompted by Mr. Thomson’s concern in September with the doors/unit ratio) noted that in relation to Argentina it was predicted that only 12 units would be stocked, on average, in 83 stores, that in relation to Chile it was predicted that only 23 units would be stocked, on average, in 43 stores and that in relation to Ecuador it was predicted that no units would be stocked in 6 doors. The figures for Ecuador were so striking that when they were put to Mr. McCallum and it was suggested that they were a myth he replied “in principle, it would appear so.”
66. Counsel submitted that such anomalies demonstrated that “the entire door count exercise is unreliable” and were “indicative of the shambolic state of New Balance’s door count.” In the light of Mr. McCallum’s response to counsel’s question there appears to be reason to question at least some of the figures (though it is to be noted that Mr. Willis did not appear to see anything odd about the unit/door ratio for South Africa). However, the relevant question is whether the inclusion of these figures and their acceptance by New Balance in August evidences a breach of the implied duty of good faith. Counsel submitted that the anomalies were “blindingly obvious” and ought to have been noted by Mr. McCallum or Mr. Thomson in August.
67. Careful study of both the unit figures and door figures (and the ratio between them) would, I accept, have brought the low (or nil) number of units in some countries’ stores to the attention of Mr. McCallum or Mr. Thomson in August. There is no evidence that they were aware of a problem in this regard in August and I therefore infer that there was no such careful study in August. However, time was short (the matching exercise had to be done in 30 business days and by 6 August time was very short) and it is, in those circumstances, perhaps understandable that the exercise was not done. But even if it is assumed that, notwithstanding the shortness of time, the exercise ought to have been done as a matter of prudent business practice, an imprudent failure to carry out the exercise does not amount to a breach of the implied duty of good faith.
68. Having reviewed the five alleged errors I can complete my assessment of the bad faith allegation. The SLT’s request for a due diligence exercise was obviously prudent. The SLT’s decision to match Nike’s offer was supported by the estimates of doors provided by the regional managers. The use of footwear and lifestyle stores in Japan and China was contractually permissible and did not evidence a lack of bad faith by the SLT. The use of such stores would not in my judgment be regarded by honest and reasonable persons as unfaithful to the parties’ bargain or commercially unacceptable. The estimate for Brazil was bold (or aggressive) but as Mr. Davis explained there were three Brazilian players in the Liverpool team and so he did not regard the estimate as out of bounds. The use of that estimate did not evidence a lack of bad faith, conduct which

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not faithful to the parties' bargain or conduct which was commercially unacceptable. Mr. McCallum's response to Mr. Cullen's suggestion that the doors estimated for Brazil should be removed was an honest response and not indicative of bad faith. The estimate for North America has not been shown to be erroneous. Finally, the failure by Mr. McCallum or Mr. Thomson to examine the unit/doors ratio may have been imprudent but was not indicative of bad faith.

69. In my judgment counsel for New Balance rightly accepted that if New Balance did not in fact intend to meet or knew that it could not meet the distribution obligation then it would be acting dishonestly, which would be in breach of the implied duty of good faith. However, if New Balance honestly believed that it could meet the distribution obligation but its grounds for so believing were unreasonable then I do not consider that it would be acting in breach of the implied duty of good faith. Its conduct would be innocent, albeit careless or unwise. I do not consider that reasonable and honest people would regard such conduct as lacking fidelity to the parties' bargain or "commercially unacceptable" though they would no doubt regard it as imprudent. I did not understand counsel for Liverpool FC to dispute that approach because they submitted that New Balance's failures went "beyond mere incompetence". They submitted that what would be in breach of the implied duty of good faith would be to be reckless, or not to care, as to whether or not New Balance could meet the distribution obligation. I accept that submission for in that state of mind there is in truth no belief that New Balance could meet the distribution obligation. Reasonable and honest people would, in my judgment, regard such conduct as commercially unacceptable and not faithful to the parties' bargain.
70. I do not find that the SLT was reckless as to whether New Balance could meet the distribution obligation. On the contrary the SLT wanted a due diligence exercise carried out before deciding to match Nike's offer.
71. Assuming, as submitted by counsel for Liverpool FC, that the state of mind of Mr. McCallum, Mr. Thomson, Miss Howard or the regional managers is to be attributed to New Balance (even though they were not on the SLT which took the decision to match), I do not consider that I can find that any of them were reckless as to whether or not New Balance could meet the distribution obligation. The regional managers were no doubt bold in their estimates, or "aggressive" as they were requested to be, but there is no evidence that they made estimates not caring whether they were feasible or not.
72. My conclusion therefore is that New Balance matched the distribution obligation in the Nike offer in good faith. Whether New Balance would in fact succeed in meeting the distribution obligation in the 2020/2021 season is another matter.

The marketing obligation

73. This is a much shorter point. When matching the Nike offer New Balance offered to:
- "market LFC and/or Licensed Products through marketing initiatives featuring not less than three (3) non-football global superstar athletes and influencers with such initiatives being used to market certain Licensed Products produced for the start of Season 2020/2021 in Year 1 and for certain Licensed Product produced for each Season as applicable thereafter"

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74. The offer omitted the words, after global superstar athletes and influencers
“of the calibre of Lebron James, Serena Williams, Drake, etc”
75. The reason why these words were omitted was not made clear. It is possible that they were omitted because New Balance did not have contracts with the named persons though since the term did not commit the offeror to use the named persons (as Mr. Davis accepted) that would not be a reason for not including those words. It is possible that the athletes or influencers with whom New Balance had a contract were not comparable to the named persons. If this was the reason then New Balance observed the duty of good faith.
76. The issue, however, is whether this omission has the effect that New Balance has not matched Nike’s offer. The case for Liverpool FC is that the omission means that Nike’s offer has not been matched.
77. The case for New Balance is that the marketing term as a whole is not measurable because it is too vague. The opening words of the marketing obligation (quoted above in paragraph 7) refer to marketing “in a manner that is consistent with other top tier football clubs (subject to similar performance)”. Those words were said to be too vague to be measurable. But those words have been matched and the relevant marketing obligation is not that in the opening words but the specific marketing obligation set out after the opening words. As to that specific obligation it was said that the phrase “marketing initiatives” is too vague to be measurable. But again that phrase has been matched and in any event, whilst there may be many forms of marketing initiatives, there is no doubt as to the meaning of the phrase. Finally it was said that the offer to market LFC through marketing initiatives “featuring no less than three (3) non-football global superstar athletes and influencers” was, in the language of clause 16.2 of the Sponsorship Agreement, “no less favourable to the Club” than the material, measurable and matchable terms of the Nike offer. The omission of the words in question was therefore irrelevant.
78. It can be argued that an offer to use “global superstar” athletes and influencers is an offer to use athletes and influencers of the highest calibre and that therefore the New Balance offer is “no less favourable” to Liverpool FC. However, the missing words must have been agreed for a purpose. That purpose must have been to indicate that Nike’s obligation was to use those athletes or influencers who were not only global superstars but were of the calibre of the mentioned global superstars. For that reason New Balance’s offer was less favourable to Liverpool FC.
79. The remaining question is whether global superstars “of the calibre of Lebron James, Serena Williams, Drake etc” is a measurable calibre. Mr. Hogan told me that Lebron James is the world’s most famous basketball player, that Serena Williams, having dominated women’s tennis for twenty years, is one of the most famous athletes in the world and that Drake was the world’s top selling recording artist in 2016 and 2018. The evidence is clear that the calibre of such athletes or influencers can be measured in a variety of ways. Thus a document within New Balance’s Renewal Proposal gave a value to Liverpool FC and to certain of the club’s players. The value was measured by their social media exposure that is, when they are seen wearing a New Balance logo. Values can be attributed to each exposure by reference to, as explained by Mr. Davis in

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his evidence, a wide variety of values such as “max add value, share of voice value or promotional quality score”.

80. In my judgment the calibre of the named athletes or influencers can be measured. Mr. Davis said the exercise of measurement was “very subjective”. I am not sure what he meant by that because a calculation based upon social media exposure is based on appearances which can be counted. It may be that different people have different views as to the most relevant way in which such appearances can be valued but some of those methods used (for example “max add value” or “share of voice value”) will have a repeatable methodology. I accept that the calibre of the named athletes can be valued in a number of ways but it would be unrealistic (and contrary to the evidence in this case) to say that their calibre cannot be measured.
81. I have therefore concluded that the New Balance offer on marketing was less favourable to Liverpool FC than the Nike offer because Liverpool FC cannot require New Balance, on the terms of its offer, to use global superstar athletes “of the calibre of Lebron James, Serena Williams, Drake etc.”
82. It must follow that Liverpool FC is not obliged to enter into a new agreement with New Balance upon the terms of the latter’s offer.
83. That being so there is no purpose in considering whether, had the court reached a different conclusion, the court should, in the exercise of its discretion, order specific performance of Liverpool FC’s obligation to enter into a new agreement with New Balance.

Two further points

84. It was suggested on behalf of New Balance that Nike is in fact offering to deal with Liverpool FC on materially different terms from those in the Nike offer which New Balance has not been given the opportunity to match. This was based upon a document known as the Nike Long Form. But this appears to be no more than a draft. Since its terms are less favourable to Liverpool FC than the Nike offer it is unlikely that they are acceptable to the Club. Indeed Mr. Hogan had not seen the Nike Long Form until this trial. If they are not acceptable to the Club (as is more likely than not) then the Club has no obligation to submit them to New Balance.
85. It was further suggested that under the renewal clause Liverpool had a 90 day period from 22 August to 9 October to “conclude” or “enter into an agreement” with Nike. It had not done so because the contract with Nike was made on 11 July. It is therefore said that the renewal process must be repeated as required by clause 16.3 of the Sponsorship Agreement. It is true that the contract with Nike was made on 11 July. However, it was subject to a condition precedent relating to the renewal process in the Sponsorship Agreement. If a “notification of a Valid Match” is given the contract “will automatically terminate effective immediately”. If a “notification of No Match” is given the contract “will continue to be legally binding”. I assume that such notification of a No Match was given on or after 22 August (and before 9 October). There is no suggestion that such notification was not given. In my judgment that is sufficient, in the particular circumstances of this case, to amount to the Club and Nike concluding or entering into an agreement in the relevant 90 period.

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Conclusion

86. For the reasons which I have endeavoured to set out in the short time available to me I must dismiss the claim of New Balance.