Neutral Citation Number: [2019] EWHC 591 (Comm)

Case No: CL-2018-000726

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/03/2019

Before:

SIR ROSS CRANSTON
(Sitting as a High Court Judge)

- -

Between:

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

- -
- -

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

Hearing dates: 18-19 February 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.

....

SIR ROSS CRANSTON

Sir Ross Cranston:

INTRODUCTION

1. This is a Part 8 claim concerning a contract granting the claimant certain rights to sell products, including replica football kit, of the defendant. The claimant, SDI Retail Services Limited ("SDIR"), is part of the Sports Direct group. The defendant is The Rangers Football Club Limited ("Rangers"), whose home ground is the Ibrox Stadium in Glasgow. The contract is entitled "Retail Operations, Distribution and IP Licence Agreement" ("the Agreement") and was entered into by SDIR and Rangers on 21 June 2017. Following a short extension it expired on 10 August 2018.

2. In broad terms the issue in the current proceedings is whether and how the contractual mechanism in the Agreement resulted in an amended contract regarding certain defined rights, called offered rights in the Agreement. Essentially the offered rights are threefold, relating to (i) the sale of Rangers branded products and replica kit at the Ibrox Stadium and the Rangers webstore (offered right 1); (ii) the sale, distribution and promotion of Rangers branded products other than replica kit (offered right 2); and (iii) the sale, distribution and promotion of replica kit and official rangers kit (offered right 3).

3. In outline, on 12 July 2018 Rangers sent a notice of offer to SDIR. That was in accordance with the mechanism in the Agreement following an offer from a third party, a competitor of Sports Direct. On 25 July 2018, SDIR sought to match and take on those offered rights on termination of the Agreement. Rangers contends that SDIR was not entitled to accept the offered rights in the narrow way it claims to have done but rather was subject to the material terms and related commercial arrangements, which it claims were contained in the notice of offer.

4. In this application SDIR seeks declarations from the court as to the meaning of relevant parts of the Agreement. In particular it seeks declarations as to the meaning of the terms "material terms" and "connected commercial arrangement" which feature in the contractual mechanism.

BACKGROUND

5. The present application is made against a background of ongoing disputes between SDIR and Rangers as to SDIR's role in supplying Rangers' brands to its fans and the public. In May 2016 Rangers sought to terminate an IP licence between it and a joint venture company it had with Sports Direct, known as Rangers Retail Limited ("RRL"). SDIR litigated by means of a derivative claim relating to RRL. It was given permission to proceed: *SDI Retail Services Ltd v King* [2017] EWHC 737 (Ch). If the derivative claim had been successful the licence would have continued for a further five and a half years until early 2023.

6. However, SDIR and Rangers reached a settlement. RRL's trading activities would cease and the parties would enter a contract governing their future relationship. This led to the 21 June 2017 Agreement, which was to run until 31 July 2018. One aspect of the Agreement was that SDIR took over RRL's various rights including those in respect of replica kit and Rangers branded merchandise. In the Agreement these are

called "Rangers Rights". There are detailed provisions for the licence fee to be paid and the obligations in relation to providing the kit. There is no need to say anything more about these aspects of the Agreement.

7. Another aspect of the Agreement was its matching right provisions, which are the subject of the present Part 8 claim. In summary, the Agreement allowed Rangers to negotiate with third parties after 31 January 2018 so that they, not SDIR, provided the offered rights. If a third party made what the Agreement termed a third party offer in relation to the offered rights, SDIR had to be notified by means of a so-called notice of offer. SDIR could then choose to match what the third party was offering. If it successfully matched the notice of offer, the parties then entered into a further agreement on the same terms as the Agreement in respect of the offered rights and, if applicable, any connected commercial arrangements.

8. The matching right provisions had given rise to earlier litigation in July 2018. On 4 June 2018 Rangers had written to SDIR stating that it had received a third party offer. Later it was revealed that that offer was from LBJ Sports Apparel Limited, trading as the Elite Group, a competitor with the Sports Direct group. The letter enclosed a notice of offer and inquired whether SDIR was willing to match it. The notice of offer had a section entitled "Connected commercial arrangements", with six paragraphs.

9. SDIR considered that the notice of offer did not comply with the requirements of the Agreement. In a letter to Rangers of 15 June 2018 it stated that the notice of offer sought to redefine material terms in a way inconsistent with the Agreement and did not set them out for each of the three offered rights separately.

10. On 20 June 2018 Rangers rejected the interpretation which SDIR placed on material terms. Rangers then indicated that it intended to accept the offer from the third party. SDIR applied to this court for an urgent interim injunction. SDIR's particulars of claim (later amended) set out its case about what the notice of offer should contain; why the notice of 4 June 2018 did not comply; and how the material terms as defined in the Agreement did not include some of what the notice had identified as such (the appointment of a retail director, working to maximise sales, sourcing of goods and treatment of employees, compliance with brand standards, corporate governance and independent assessment).

11. In his witness statement for that hearing SDIR's solicitor, Mr David Cran, referred *en passant* to the dispute about the interpretation of material terms in the Agreement. In his witness statement Mr Cran set out how, in his view, there were no practical difficulties for Rangers specifying in its third party offer the separate elements of each offered right. Rangers' solicitor, Mr James Blair, asserted in his first witness statement that SDIR was wrong as to the definition of material terms in the Agreement.

12. At a hearing on 2 July 2018 Bryan J granted interim injunctive relief. A few days later, on 4 July 2018, Mr Blair said in a second witness statement that Rangers did not believe that SDIR was right about the meaning of material terms. However, Rangers had provided it with the whole terms of the third party offer. It had told SDIR all the rights available for it and revealed all connected commercial arrangements.

13. On the return date of 10 July 2018 Phillips J continued interim relief until an adjourned return date at the end of the month. Until that time, his order read, Rangers should not

enter any agreement with a third party unless first, it "set out the details, including the Material Terms (as defined in the Agreement) and the connected commercial arrangements, of the third party offer separately for each of the three Offered Rights", and secondly, SDIR had given written notice as to whether it was willing to match the material terms of the third party offer in all material respects in relation to the offered rights.

14. Schedule 3 of the Phillips J's order then set out the preliminary issues of construction of the Agreement which were to be determined at the hearing on the adjourned return date. Among these were the meaning of connected commercial arrangements in the Agreement, what the Agreement meant by the requirement that the third party offer/notice of offer should set out the details including the material terms of each element separately, and how the Agreement operated to continue the relevant provisions for two years.

15. Before that adjourned hearing took place, on 12 July 2018 Rangers sent a further notice of offer to SDIR. It stated in the covering letter that it was in accordance with the expedited procedure in Phillips J's Order. The notice consisted of three separate offers, stated as "In respect of Offered Rights" 1, 2 and 3. There was no separate section about or mention of connected commercial arrangements.

16. In relation to offered right 1, there were thirteen paragraphs:

> "In respect of Offered Right 1, we offer to provide to you the following:
>
> 1. We shall pay Rangers 20% of all receipts (excluding VAT) from the retail and online sale of kit and other products with a guaranteed minimum payment of £350,000 per annum. Payment shall be quarterly in arrears with the first payment due on 1 November 2018. If the sum due would not otherwise reach the guaranteed minimum with the 4th payment, it shall be increased to reach that minimum.
>
> 2. Rangers shall retain all royalties or other payments payable to it from its kit manufacturer. We shall have no claim in respect of any payments to be made to Rangers from third parties.
>
> 3. We shall be appointed the official retail partner of Rangers. There shall be no free sponsorship or advertising rights provided to us in respect of our appointment but we shall be invited to take out paid advertisements in all Rangers matchday programmes, on Rangers website, trackside at Ibrox Stadium and on interview backdrops, LED perimeter advertising, Ibrox screen advertising and other advertising at Ibrox Stadium at the normal commercial rates advertised by Rangers for such advertisements.
>
> 4. We shall not be entitled to set off or withhold any sums due to Rangers against any other sums due to us by Rangers.

5. We shall meet the cost of £500,000 of works on a new shop fit for the Rangers Megastore and the cost of developing an enhanced Webstore. All costs on these works will be evidenced to Rangers on an open book basis. Shop fit to be complete within 4 weeks of the commencement of this Agreement with the Webstore to be available for the placing and acceptance of orders by 1 August 2018 or such later date as we agree and pop up stores at Ibrox Stadium also to be open on that date. In the event that our appointment is terminated for reasons other than our contractual breach or insolvency, you shall reimburse to us up to 40% of the costs of the Megastore fit out subject that the amount to be repaid shall not exceed the amount of our spend less £300,000.

6. We shall assume responsibility for the employment of all employees and staff employed in respect of the Rangers Megastore. We shall introduce pop up retail spaces within and around Ibrox Stadium on matchdays with 4 within the Stadium and 4 external.

7. We shall provide Rangers with monthly written reports itemising the level of stock of all Rangers products at the end of each month, the stock sold in the preceding month, the prices at which stock was sold and the gross and net profits on such sales. EPOS till data from the Rangers Megastore shall be shared with Rangers. We shall adopt a RSS till system with 8 fixed tills and 4 handheld devices. We shall attend monthly meetings at Ibrox to discuss our reports and Rangers shall have the right to audit all information provided by us, including full rights of access to our financial systems and data, so far as relating to the appointment.

8. We shall consult with Rangers on the pricing of products and the timing of promotional activities and other sales initiatives (including flash sales and combined discounts across Rangers products and other Rangers offers). We shall market Rangers products at prices that are consistent with establishing Rangers products as a high quality-sporting brand. There shall be no deep discounting of Rangers products without Rangers' prior approval, which shall not be unreasonably withheld or delayed.

9. The RRP for the sale of adult's retails shirts adopted by us shall be benchmarked against the RRP adopted by Celtic FC.

10. Duration of Contract – 2 years commencing on 1 August 2018. You shall have the ability to terminate the appointment forthwith without penalty or compensation to us if we fail to comply with our contractual obligations (including the sharing of financial information and the timeous payment of sums due to Rangers). We shall agree key performance indicators with you to allow you to assess our delivery of services pursuant to the

> appointment and implement improvement programmes in respect of any area where you assess our services as deficient. In the event that we consistently satisfy the key performance indicators agreed with you, our appointment will be extended for an additional period of 12 months.
>
> 11. We shall appoint a Retail Director to operate the Rangers business. The person to be appointed shall have experience in a senior retail role with an English Premiership club or equivalent and shall be dedicated to Rangers. We shall work with Rangers, its kit manufacturer and other licensors of Rangers products to maximise sales of those products and to establish Rangers Products as a high quality-sporting brand. We shall ensure the ethical sourcing of goods and that both we and our suppliers treat our workers well, pay fair wages and work legal working hours. We shall comply with Rangers' brand standards when selling Rangers products with agreed launch dates and other marketing initiatives for the sale of new Rangers replica kit and training clothing. We are committed to high standards of corporate governance and to restoring Rangers' status as Scotland's number one football brand. We shall, if required, submit to independent assessment and monitoring of these material terms and agree that, in the event we shall fail to comply, Rangers may terminate our appointment without penalty or compensation to us.
>
> 12. We shall co-ordinate all kit and other product launches with Rangers and its appointed technical kit partner to ensure that the launch of products for sale is, so far as practicable, consistent across all outlets, instore and online.
>
> 13. We shall accept gift vouchers and other promotional incentives both instore and online."

17. On 17 July 2018 SDIR replied seeking clarification pursuant to the Agreement of various matters. For example, in relation to paragraph 5 under offered right 1 - work to the value of £500,000 on the megastore and enhancement of the webstore – it inquired as to the breakdown of that amount between the two projects, what work was entailed, and what enhancement of the webstore meant. There were similar questions about what other paragraphs meant. Clarification was requested as to what paragraph 12 meant, since SDIR understood that the Agreement would continue to apply. Rangers replied on 20 July 2018, stating that SDIR's letter was a request for further information. It addressed the questions raised.

18. On 25 July 2018 SDIR wrote in relation to Rangers' letters of 12 and 20 July 2018 that in accordance with the Agreement, it was willing "to match the Material Terms of the Third Party Offer in all material respects" in relation to offered rights 1, 2 and 3.

19. The following day, 26 July 2018, Rangers replied to confirm that, as provided under the Agreement, "Rangers and SDIR shall now enter into a further agreement on the same terms as the Retail Agreement, save only as to any variation required to effect the

Material Terms…" Rangers stated for the avoidance of doubt that it would not enter an agreement with the third party which had made the third party offer. It added that it would be useful to discuss the new arrangements, including work on the megastore and webstore.

20. Correspondence between the parties' respective solicitors followed, Rangers' then solicitors taking the view in their letter of 26 July 2018 that the legal proceedings in which the interim injunction had been obtained were rendered academic. Regardless of whether the proceedings should continue on matters of construction of the Agreement, the letter added, there was no need for injunctive relief given that Rangers accepted that they were bound.

21. SDIR's solicitors responded the next day, 27 July 2018, that the proceedings had not been rendered academic since issues of construction remained highly relevant, not least because the matching exercise had not been finalised and a further agreement pursuant to paragraph 5.7 would include a matching right on the same terms as required by the Agreement.

22. In anticipation of the adjourned return date at the end of July, Rangers' skeleton argument explained the subsequent events following the earlier hearing. It said that in its letter of 26 July 2018 Rangers acknowledged SDIR's willingness to match and that the parties were now obliged to enter into a further agreement on the same terms as the Agreement, varied only as required to effect the material terms and connected commercial arrangements (if any) for the matched third party offer. There was no need for any injunction since Rangers accepted that SDIR had exercised its right to match and was obliged to enter a contract with SDIR. Construction issues were no longer live.

23. SDIR's skeleton for the hearing took the opposite tack: for the same reasons set out in the letter from SDIR's solicitors on 27 July 2018, it asserted that construction issues were still relevant. In particular "material terms" was a closely defined term in the Agreement, narrower than what might normally be thought of as material in ordinary contractual usage. The skeleton also contained submissions about the meaning of connected commercial arrangements and the meaning of the details of material terms. These arguments were broadly along the lines advanced at the current hearing. For SDIR's protection injunctive relief should remain until the matching process, still going on, was completed.

24. The matter came before Phillips J on 30 July 2018. In argument he expressed the view that since matching had occurred the need for the injunction had fallen away. For SDIR Mr Hossain QC stated that it did not seek further injunctive relief, Phillips J commenting that Rangers accepted that they were contractually bound. Mr Hossain raised the point about what "material terms" in the Agreement meant and flagged it as the one issue which remained to be decided on the pleadings. Phillips J stated that Rangers had effectively conceded all SDIR's claim, and that matching having occurred the parties were now to proceed to negotiate an agreement.

25. In an extempore judgment at the hearing on an issue of disclosure, Phillips J stated that there were no longer any live issues in the action: [2018] EWHC 2039 (Ch). Phillips J's order reflected the determination of preliminary issues by consent in SDIR's favour as to what should be in the notice of offer, granted the final declaration it sought, and made no order as to final injunctive relief.

26. After the hearing the parties corresponded until September 2018 about the terms of the further agreement but could not agree what was required. In particular, the parties could not agree as to what were the material terms.

27. On 11 September 2018 Rangers entered a "non-exclusive" agreement with the Elite Group which opened a website selling replica kit and Rangers merchandise. When SDIR discovered this on 25 September 2018, it alleged that Rangers was in breach of the Agreement.

28. The matter came before Teare J: *SDI Retail Services Limited v The Rangers Football Club Limited* [2018] EWHC 2772 (Comm). He held that although SDIR had matched an offer from the third party competitor, Elite, if Elite then offered to trade on more favourable terms it would not be uncommercial to interpret the Agreement so as to allow SDIR to trade on those same terms by being able to match the new offer. Under the Agreement there was express provision for multiple matching rights. Thus Rangers was in breach of the Agreement by failing to offer SDIR the possibility to match Elite's new offer. Teare J granted injunctive relief.

29. In the course of his judgment Teare J stated at paragraph 12 that Rangers had served the new notice of offer on 12 July 2018 and that "Sports Direct exercised its matching right in respect of this offer on 25 July 2018." At paragraph 15 he noted that the parties had unsuccessfully sought to reach agreement in respect of the matched offer in accordance with paragraph 5.7 of Schedule 3 of the Agreement. Teare J also observed at paragraph 27 that in relation to a submission by Rangers' counsel, it appeared to be the case "that it was a condition of the matching right that Sports Direct must match the terms of the third party offer so that Rangers was in no worse a position than it would have been had it accepted the third party's offer."

30. During the course of the proceedings, Elite provided SDIR with additional agreements between itself and Rangers, which SDIR contends also breach the Agreement. There is to be a trial of issues of liability and final relief in April 2019.

THE AGREEMENT

31. Clause 1 of the Agreement contains various definitions. Relevant to the current proceedings are the following:

> "Additional Products" means "such Rangers branded products or products dealing with Rangers content (not including the Products or any Replica Kit) which are supplied by or on behalf of Rangers to SDIR which may include DVDs, videos (and other multi-media items), books and other publications, i-pods and other electronic devices, non-alcoholic beverages and alcoholic beverages (including whisky)";
>
> "Branded Products" means "the Products bearing any Rangers-related brands (including the Rangers Brands)";
>
> "Permitted Activities" means "distributing, marketing, advertising, promoting, offering for sale and/or selling all products which are or could be sold in a retail outlet or online or

> via any other medium together with the right to retail (whether bricks and mortar, online or via any other medium)"
>
> "Replica Kit" means "the replica kit of the Official Rangers Kit manufactured by or on behalf of Rangers during the Term"
>
> "Retail Operations" means "the retail sale of Branded Products, Replica Kit and Additional Products at the Ground (including at the Rangers Megastore) and on the Rangers Webstore."

Under clause 2 the Agreement was to continue in force until 31 July 2018, the so-called "initial term". The Agreement could be renewed in accordance with paragraph 5.10 of Schedule 3.

32. Clause 3 of the Agreement sets out the "Rangers Rights", referred to earlier in the judgment. These include the exclusive right to operate and manage the retail operations; the non-exclusive right to perform the permitted activities in relation to the branded products, replica kit and additional products; the non-exclusive right to manufacture the branded products, and ancillary rights. Schedule 4 sets out ancillary rights under the Agreement, which include limited rights to free advertising.

33. Clause 5 provides that Rangers should supply or procure the supply to SDIR of Replica Kits in such quantities as it may order from time to time.

34. Under clause 6 the parties agreed the commercial terms in Schedule 3 in consideration of the rights granted by Rangers to SDIR pursuant to the Agreement.

35. Clause 14 prohibits termination of the Agreement for repudiatory breach.

36. Schedule 3 is entitled "Commercial Terms". Of particular importance to these proceedings is the definition of "Offered Right" in paragraph 1.1.4 of the Schedule.

> "Offered Right means each of the following rights (in whole or in part):
>
> (i) The right to operate and manage the Retail Operations;
>
> (ii) The right to perform the Permitted Activities in relation to the Branded Products and/or Additional Products; and/or
>
> (iii) The right to perform the Permitted Activities in relation to the Official Kit and/or Replica Kit."

There is an overlap with the definition of "Rangers Rights" earlier, but the definitions are not identical.

37. Paragraph 2 of Schedule 3 provides for payment of a licence fee. There is a no set off clause in paragraph 2.6. Paragraphs 3 and 4 address cooperation between the parties and sub-licences respectively.

38. Paragraph 5 of Schedule 3 is entitled "Matching Right". In broad terms it provides that SDIR is entitled to match what are called third party offers made to Rangers for offered rights.

39. Third party offers and notices of offer are identified in the opening sentence of paragraph 5.2 of Schedule 3.

> "In the event that Rangers receives an offer from such third party (Third Party Offer) to enter into an agreement with Rangers for any of the Offered Rights or all or any combination of the Offered Rights, Rangers shall provide SDIR with written notice (Notice of Offer) of the terms of the Third Party Offer (and a copy of any written Third Party Offer that is not subject to restrictions on its disclosure) within 5 days of receipt by Rangers of the Third Party Offer. Rangers shall reject any Third Party Offer that does not permit it to disclose the information required under this clause 5.2 and/or the Material Terms (as hereinafter defined)."

40. Paragraph 5.3 of Schedule 3 provides for the content of the notice of offer:

> "The Notice of Offer shall include whether the Third Party Offer is made for any of the Offered Rights or all or any combination of the Offered Rights (identifying which Offered Rights as applicable), in each case together with any connected commercial arrangements, and full details of:
>
> 5.3.1 any payments to be made by the third party to Rangers;
>
> 5.3.2 any revenue share or royalties to be paid between Rangers and the third party; and
>
> 5.3.3 the duration of the agreement between Rangers and the third party,
>
> (together the Material Terms)."

41. The first sentence of paragraph 5.4 of Schedule 3 provides further as to the third party offer/notice of offer:

> "5.4 Where a Third Party Offer/Notice of Offer relates to all or any combination of the Offered Rights, or where there are any connected commercial arrangements, the Third Party Offer/Notice of Offer shall set out the details (including the Material Terms) of each element separately..."

42. The second sentence of paragraph 5.4 of Schedule 3 enables SDIR to obtain further information concerning a third party offer/notice of offer:

> "5.4…SDIR may request further information concerning or clarification of any Third Party Offer/Notice of Offer within 10 Business Days of receipt and Rangers shall respond in writing

> within 5 days of such request. SDIR's request shall be in writing (which for these purposes shall include email)."

43. The process of matching and the further agreement which follows from it are dealt with in paragraphs 5.6 and 5.7 of Schedule 3.

> "5.6 Within 10 Business Days of SDIR's receipt of the Notice of Offer (or further information/clarification from Rangers if requested), SDIR shall provide written notice to Rangers as to whether it is willing to match the Material Terms of the Third Party Offer in all material respects in relation to any of the Offered Rights or in relation to relation to all or any combination of the Offered Rights (and, in each case, any connected commercial arrangements, if applicable).
>
> 5.7 If SDIR is so willing, Rangers and SDIR shall enter into a further agreement on the same terms as [the Retail 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)."

44. Paragraphs 5.8 and 5.9 dealt with the aftermath of matching and what happens if SDIR does not exercise its matching rights.

> "5.8 Should SDIR exercise its matching right in accordance with this paragraph, Rangers shall not approach, solicit, tender for, negotiate with or enter into any agreement with that third party or any other third party in respect of the Third Party Offer and/or the any of the Offered Rights (and, in each case, any connected commercial arrangements if applicable) in respect of which the matching right is exercised. Should SDIR exercise its matching right in respect of some but not all of the Offered Rights, Rangers may enter into an agreement with that third party on the Material Terms set out in the Notice of Offer only in respect of the Offered Rights over which SDIR has not exercised its matching right only. Should SDIR not exercise its matching right over any of the Offered Rights, Rangers may enter into an agreement with that third party on the Material Terms set out in the Notice of Offer. If a new offer is received or the third party offer is amended, under paragraph 5.9 this constitutes a separate Third Party Offer and the procedure and timetable for notification and matching must begin again.
>
> 5.9 Subject to paragraph 5.8, any new or amended offer or indication of interest from a third party in respect of any of the Offered Rights shall be a separate Third Party Offer and the terms of this paragraph 5 shall apply."

45. Paragraph 5.10 provides for SDIR to have a right to renew the Agreement in circumstances where Rangers has not received a Third Party Offer. Paragraph 5.12 prevents Rangers or a connected person providing the Offered Rights. There is a general anti-avoidance provision in paragraph 5.13 limiting Rangers' dealings with third parties.

THE ISSUES

Meaning and Scope of "Material Terms"

46. The first issue for determination is the meaning and scope of the phrase "material terms" in paragraph 5.3 of Schedule 3. Rangers' contention is that it has a wide scope. Emphasis is placed by Rangers on paragraph 5.3, requiring that the notice of offer contain "full details" of the three terms which follow in paragraphs 5.3.1-5.3.3. It contends that those words indicate not merely the essentials of the facts and matters identified in those three sub-paragraphs. By reason of the comma, it continues, the words "full details of" are within the group of words defined by the bracketed words "(together, the Material Terms)" which conclude paragraph 5.3. Thus "full details of" are part of the definition of the material terms within that paragraph.

47. Further, Rangers points to paragraph 5.4 indicating, it submits, the wide scope of the material terms in the Agreement. If they were as limited as SDIR suggested, there would be no need for the power of inquiry. Further, Rangers submits, to make commercial sense of paragraph 5.4 the further information concerning a third party offer/notice of offer SDIR obtained under that paragraph should also be included as part of the material terms.

48. Rangers justifies its approach with the argument that as a matter of commercial reality the parties recognised that no third party offer could neatly identify the three matters in paragraph 5.3. It would be likely that there would be details that were material to, for example, how payments were to be made by the third-party to Rangers under the third party offer. Such details are material to the understanding of "the Material Terms", and must be included if they are to function commercially and sensibly.

49. In Rangers' submission it made business sense that there was no limit as to the granular level of the details capable of falling within the term "full details of" in circumstances where the "details" were stipulated by a third party, where SDIR was informed of those details, where paragraph 5 was concerned with "matching", and where in respect of an offered right SDIR had a binary choice about whether or not to match. Rangers also invoked Teare J's observation at [27] of *SDI Retail Services Limited v The Rangers Football Club Limited* [2018] EWHC 2772 (Comm), but he reached no final conclusion on the matter and the observation was made in a particular context. It is no authority for any general proposition that Rangers was to be in no worse position that it would have been had it accepted the third party's offer.

50. The law of contractual interpretation is well known: see for example *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173, [10]-[13], per Lord Hodge; *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619, [13]-[14], per Lord Neuberger. The aim is to ascertain the objective meaning of the parties' language by considering the contract as a whole in its wider context. Where there are rival meanings, the court can consider which one is consistent with business common sense. There is the

possibility that one side may have agreed to something which with hindsight is not to its advantage, and the terms may be a compromise or something where more precise agreement could not be reached. Interpretation is an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences investigated.

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

52. The reference to "full details" does not in my view take the matter further. It simply means that when, say, a notice of offer refers to a payment it must give a comprehensive description of it. So, too, with revenue share and royalties. Nor do I consider that the ability of SDIR to obtain further information throws light on the interpretation of the phrase "material terms". It would be strange if SDIR did not have the possibility to seek clarification of a material term contained in a notice of offer so that it might make a commercial decision to match it or one of the other terms in the notice of offer.

53. The question of whether a term of a notice of offer is a material term is simply whether it is one of the terms in paragraphs 5.3.1-5.3.3, namely a payment term, a revenue or royalty share term, or a duration term. That is what the paragraph says and the context suggests that its objective meaning is nothing more. The Agreement did not provide that SDIR should match all the terms in a third party offer. It could have, but it does not say that. Rather, the Agreement was drafted with only specific terms needing to be matched, the so-called material terms.

54. I accept SDIR's submission that matching these specific terms was chosen as a more certain commercial course than requiring it to match all the terms in the third party offer. I also accept SDIR's submission that the contractual scheme of limiting matching to material terms (and any connected commercial arrangements if applicable) 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.

Analysis of the third party offer

55. Both sides made detailed submissions as to whether the terms of the 12 July 2018 notice of offer were material terms, in other words, were terms within paragraph 5.3.1, any payments to be made by the third party to Rangers; paragraph 5.3.2 any revenue share or royalties to be paid between Rangers and the third party; or paragraph 5.3.3 for the

duration of the agreement. Important in the drafting is that the material terms are not defined as being those relating to these matters (e.g., payment) or which may affect them. While full details of these matters must be given that does not change the nature of the material terms themselves.

56. My analysis follows for each of those terms for offered right 1 (the right to operate and manage the retail operations). Both sides set out their case about the terms for all three offered rights in a schedule and counter-schedule, but assumed in their oral submissions that the analysis for offered rights 2 and 3 would be along similar lines to that for offered right 1.

57. *Term 1*. Both sides accept that this is a material term. It specifies that the third party shall pay Rangers 20 percent of all receipts ex-VAT, with a guaranteed minimum payment in relation to each offered right.

58. *Term 2*. Rangers contends that this is one of the details from the "full details" of revenue share or royalties to be paid between the parties in relation to replica kit, since it may receive royalties and other payments from its kit manufacturer. In my view this is not a detail of a material term. It does not require anything to be paid to Rangers and is not caught by the definition of material terms.

59. *Term 3*. Rangers' argument is that this again covers part of the details of payments to be made: it makes clear that for the payments to be made by the third-party (including for the revenue shares or royalties) for the right to operate retail sales, the third-party does not receive free advertisements as any part of the quid pro quo and must pay at commercial rates.

60. I accept SDIR's submissions (i) that this term relates to the grant of advertising space, which is not an offered right and so cannot be a material term; (ii) is functionally a nullity since the third party would have been in the same position in any event, paying normal commercial rates; and (iii) is aimed, not at the third party, but at SDIR, in adversely affecting the so-called ancillary rights it has already under the Agreement.

61. *Term 4*. Rangers' submission is that this is a material term as a "full detail" of payments to be made by the third party in relation to sales, since it limits the third party's entitlement to set off and thereby prevents reductions in payments due for sale or delays in those payments. In my view this is not a material term since it is not a payment term; rather it requires the third party to give up the self-help rights it has. It does not affect the amount of payment, or the payment obligation of the third party, but like any set-off clause precludes unrelated payment obligations from being raised to reduce the amount of payment.

62. *Term 5*. SDIR contends that this does not concern a payment to Rangers. Rather it is an obligation to bear certain costs. The requirement that these costs be evidenced to Rangers means that the contemplated £500,000 must have been intended to be paid to contractors, suppliers and the like and not directly to Rangers. A benefit to Rangers is not a payment. The completed works will benefit both Rangers and SDIR, but it is unclear to what extent Rangers will benefit from the £500,000 spent. The four weeks' time limit for the works suggests that the third party will be undertaking them. The fact that in the last sentence a payment from Rangers is a possibility does not make this a

material term. The most that can be said is that the term would deliver a benefit to Rangers that might have some unstated monetary value.

63. In my view, this is a material term. The third party could "meet the cost" (the term used in the first sentence) of the £500,000 works by a direct payment to Rangers. It could also "meet the cost" by indirect payment, in other words by conducting the work itself or through contractors. An indirect payment is where the second sentence of the term becomes relevant: Rangers can check whether expenditure of £500,000 has been incurred with the works. The final sentence of the term refers to amounts being paid or reimbursed by Rangers, suggesting that in "meeting the costs" the third party has made a payment to Rangers. In some circumstances, a payment can include a payment in kind: *White v Elmdene Estates Ltd* [1960] QB 1, 16, per Lord Evershed MR. Because term 5 contemplates direct payments to Rangers, along with payments in kind, in my view it falls within para 5.3.1.

64. *Term 6.* Rangers submits that the first sentence is a material term. By assuming responsibility for employees and staff at the Rangers Megastore, the third party would be taking on responsibility for the payment of their wages and salaries. In its submission Term 6 does not stipulate whether the payment would be made directly to Rangers or to the employees on its behalf, or whether it would be in money or in kind. Thus, it is a material term because it is a further "detail" of payments to be made by the third party which could be made directly to Rangers or to the employees.

65. In my view, the first sentence of term 6 is not a material term. Unlike term 5 it does not contemplate the possibility of any direct payment to Rangers. It may confer a benefit in kind on Rangers but that is not through payment but rather performance, in other words by assuming responsibility for the employment of those working in the Megastore. Moreover, that benefit in kind is of an uncertain value, unlike the definitive amount provided for in term 5. Thus term 6 is a performance term; it does not have the character or contain the details of a payment term within paragraph 5.3.1 of the Agreement.

66. *Term 7.* On Rangers' case the term is a material term because it concerns duration, a material term under paragraph 5.3.3. If the third party breaches term 7, the argument runs, Rangers could terminate the Agreement. In effect the term is providing one part of the "full details" of the duration of the Agreement. Further, it is a material term because it enables Rangers to check the receipts from retail sales, which goes to payment and revenue share, paragraphs 7.3.1 and 7.3.2 respectively.

67. In my view term 7 is not a term which concerns the duration of the Agreement. If Rangers were correct, any term whose breach enabled it to terminate the Agreement would be a term about duration. I accept SDIR's submission that Rangers' approach fails to recognise the distinction between a primary obligation, the commitment to a term of a contract, and a secondary obligation, such as termination rights arising on its breach. The material terms are concerned with primary obligations. As to paragraphs 7.3.1 and 7.3.2, this term is far removed from payment, revenue share and royalties. At most it enables verification of the amounts. For the reasons already given that is insufficient.

68. *Terms 8 and 9.* On Rangers' case these terms are material terms since they are provisions about the pricing of products and thus affect the amount of payments it will

receive. They are an aspect of the "full details" of payments to be made by the third party to Rangers. Alternatively, Rangers submits, they are "full details" of any revenue share or royalties to be paid between Rangers and the third party as contemplated in paragraph 5.3.2 of the Agreement.

69. In my view, terms 8 and 9 are not material terms. They are not about payment by the third party to Rangers. Rather they specify the manner in which the third party will sell the products. They may affect what is to be paid to Rangers because of the impact on the third party's revenues, from what it paid to it by the fans and the public. But that does not make them a material term about payment, revenue share or royalties.

70. *Terms 10 and 11*. It is common ground that the first sentence of term 10 is a material term in providing that the duration of the contract is to be 2 years commencing on 1 August 2018. As with term 7, the remainder of it and term 8 cannot be material terms within para 5.2.3 simply because they enable Rangers to determinate the Agreement for breach. I accept SDIR's submission that in ordinary language references to the duration of a contract mean the agreed length of the contract on the assumption that the parties comply with its terms.

71. *Term 12.* Rangers did not argue that this term is a material term.

72. *Term 13.* Rangers' case that this is a material term suffers from the same defects as does its submissions on terms 8 and 9, that they may affect, but they do not prescribe, payment, revenue share or royalty.

Connected commercial arrangements

73. The phrase "commercial arrangement" in ordinary language denotes a relationship or understanding between parties about some commercial topic or matter. It is not necessarily contractual, but could be something less formal: see *In re British Slag Ltd's Application* [1963] 1 WLR 727, 739. Ordinarily, an "arrangement" is at a higher level of generality than a "term", although an arrangement could contain a number of terms. Connected means related; in this context the connection is to an offered right.

74. "Connected commercial arrangement" in paragraph 5.3 of Schedule 3 cannot be a detail or a term of an offered right. That is because in the Schedule "offered right" and "connected commercial arrangement" are distinct concepts. The first sentence of paragraph 5.4 requires that where the third party offer/notice of offer relates to (i) all of the offered rights, (ii) any combination of the offered rights or (iii) where there are any connected commercial arrangements, it must set out the details of each element separately. The setting out of the separate details required in the first sentence does not apply where the third party offer relates to only one offered right, without any connected commercial arrangement.

75. However, the requirement would apply where the third party offer relates to one offered right and there is a connected commercial arrangement. In this case the details of each element – the offered right and the connected commercial arrangement – need to be set out separately. The same must apply where the third party offer/notice of offer relates to all of the offered rights, or any combination of the offered rights, and there is a connected commercial arrangement.

76. Consequently, a commercial arrangement in Schedule 3 which is connected to an offered right is a relationship or understanding which forms part of the same overall deal. It cannot be a detail of an offered right. The concept of connection means that things are separate but related. A guarantee and the underlying loan agreement are separate, but connected contracts. The notice of offer must set out separately the details of the offered right and any connected commercial arrangement which is part of this overall deal. The rationale of this contractual scheme is straightforward: it enables SDIR to view the overall commercial deal of which both an offered right and any connected commercial arrangement are part.

77. I accept SDIR's submission that this contractual scheme reflects the need to ensure that the matching right scheme is not undermined, for example, by the payment for an offered right being artificially high because it is combined with a connected commercial arrangement at an artificially low price. To ensure the integrity of the scheme and the true offer Rangers has obtained from a third party, SDIR must be given the details of both the offered rights and any connected commercial arrangement, as well as the opportunity to match both.

78. Rangers' case at the hearing (contrary to its case until very recently) was that the paragraphs of the 12 July 2018 letter were either material terms (or details of material terms) but, if not, connected commercial arrangements. If I am correct in my analysis, as required by paragraph 5.4 of Schedule 3 of the Agreement Rangers' letter of 12 July 2018 needed to set out the details of the offered rights and the connected commercial arrangement separately. By contrast with the letter of 4 June 2018, containing a separate section entitled "Connected commercial arrangements", however, the letter of 12 July 2018 had no such section, indeed did not mention "connected commercial arrangements".

79. On the face of the letter of 12 July the paragraphs for each of the offered rights were terms, purporting to give effect to the offered rights, the headings for each of the three group of paragraphs having the heading, "In respect of Offered Rights [1, 2 or 3], we offer to provide to you the following…" On my reading these paragraphs purport to be material terms of the offered rights, not terms of any connected commercial arrangements, Terms, as I have said, are different in character from connected commercial arrangements.

80. I accept SDIR's submission that in contract law the notice of offer constituted an offer, and SDIR's written notice of willingness to match under paragraph 5.6 of Schedule 3 constituted an acceptance. In this case the form of the offer (i.e. the notice of offer) circumscribed what SDIR could accept, unless it explicitly waived a defect in the form. Since in the letter 12 July 2018 connected commercial arrangements were not identified and set out separately, they were not available to be matched within the scheme laid down.

81. That means that there is no need for a final decision on whether, under the scheme, SDIR must match a connected commercial arrangement, or whether it has a choice. It seems to me that SDIR has the better argument that it is not bound to accept any commercial arrangement connected to an offered right it seeks to match. The first part of SDIR's case revolves around the phrase "if applicable", which appears in paragraphs 5.6, 5.7 and 5.8. Its argument is that words "if applicable" cannot mean "if there are any" since that function is served by the introductory "any". To my mind Rangers is

correct that this places far too much weight on words, "if applicable", which simply mean, if relevant.

82. However, the more persuasive argument in SDIR's favour turns on paragraph 5.8, which provides that if SDIR does not exercise its matching right in respect of a particular offered right, "Rangers may enter into an agreement with that third party on the material terms set out in the Notice of Offer". In other words, there is no requirement that the agreement with the third party contain any connected commercial arrangements. Giving SDIR the choice of matching any connected commercial arrangements preserves the equivalence between the arrangement SDIR can match, and the arrangement between the third party and Rangers if there is no matching.

Matching/no matching

83. There were lengthy submissions before me about whether Rangers was precluded from advancing an argument that SDIR had not effectively exercised its matching right in response to the 12 July notice of offer. SDIR contended that if it did it was subject to an issue estoppel or there was an abuse of process in its so doing, given what Rangers had said during the July 2018 proceedings, it assurances to Phillips J at the time and the way those proceedings were concluded.

84. In light of my finding that the 12 July 2018 notice of offer did not contain connected commercial arrangements the issue does not arise. SDIR in its 25 July 2018 notice expressly matched the material terms in the notice of offer. There was a contractually-prescribed offer and acceptance. My interpretation of paragraph 5.7 in context is that a further agreement came into existence at that point, to take effect immediately on the Agreement coming to an end. The precise wording of that further agreement needs to be determined. To that extent the matching process has not been finalised, but that has no effect on the further agreement's existence.

CONCLUSION

85. The claimant is entitled to declarations along the lines it sought in the Part 8 claim form, but with modification in accordance with the rulings in the judgment. In light of the judgment the parties should agree the wording of the further agreement. At this stage I am not persuaded that in these proceedings the court should have any role in this.