

24 October 2018

**SDI Retail Services Limited v The Rangers Football Club Limited
[2018] EWHC 2772 (Comm)**

Before: Mr Justice Teare

CASE SUMMARY

The parties entered into a Retail Agreement, pursuant to which the Defendant granted the Claimant certain exclusive and non-exclusive rights to manufacture, sell and distribute replica football kits and other Rangers-branded products. That Agreement contained a disputed ‘Matching Right’ provision.

The Court held that, on a proper construction of the Matching Right provision, the Defendant was obliged to give the Claimant the opportunity to match any offer by a third party to exercise the rights granted to the Claimant. That was so even if the Claimant had already matched an offer from that same third party in respect of the same rights. The Defendant had already entered into an agreement with a third party granting non-exclusive rights to that third party, without giving the Claimant the opportunity to match the third party’s offer. It had therefore been in breach of the Matching Right provision.

The Court then had to determine the appropriate relief. Teare J held that in the case of final injunctions restraining a breach of restrictive covenant, the applicable test for granting an injunction does not differ depending on whether the injunction is mandatory or prohibitory in form. Instead, the Claimant is entitled to enforce its contractual rights, and is entitled to an injunction unless its effect would be oppressive or unjust. That is a question of substance rather than form. Teare J granted prohibitory injunctions requiring the Defendant to comply with the matching right. He also granted a mandatory injunction requiring the Defendant not to perform the third-party agreement (or assist in its performance) and to announce its intention not to perform that agreement.

The Defendant football club (“Rangers”) entered into a Retail Agreement with the Claimant sports retailer (“Sports Direct”) in June 2017. Under that Agreement, Rangers granted Sports Direct the exclusive right to sell Rangers replica kit and branded products from the ‘megastore’ at Rangers’ home ground and on Rangers’ website, and non-exclusive rights to manufacture, sell and distribute Rangers products in other venues.

The Agreement contained a lengthy ‘matching right’ clause, which applied for two years beyond the expiry of the Agreement. This clause provided that Rangers may only ‘*approach, solicit, tender for or enter into negotiations or any agreement with any third party in relation to any of the Offered Rights*’ in accordance with the matching right, and at any rate only within 6 months of the end of the Agreement (being 31 July 2018). The matching right clause contained (amongst others) the following provisions:

- If SDIR is so willing [to match the Third Party Offer], Rangers and SDIR shall enter into a further agreement on the same terms as this Agreement, save only as to any variation required to effect the Material Terms [of that Offer].

- *Should SDIR exercise its matching right in accordance with this paragraph, Rangers shall not approach, solicit, tender for, negotiate with or enter into any agreement with that third party or any other third party in respect of the Third Party Offer and/or the [sic.] any of the Offered Rights (and, in each case, any connected commercial arrangements if applicable) in respect of which the matching right is exercised. [...]*
- *Subject to [the paragraph above], 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.*

The definition of ‘Offered Right’ referred (broadly) to each of the rights granted to Sports Direct, with no distinction between exclusive and non-exclusive rights.

On 25 July 2018, Sports Direct exercised its matching right over a Third Party Offer made to Rangers by the Elite Group (“Elite”). The parties have, since that time, sought to reach an agreement in respect of the matched offer, though such agreement has not been forthcoming. On 11 September 2018, Rangers entered into a new agreement with Elite (the “**Elite Agreement**”), duplicating several of the rights matched by Sports Direct in July. Rangers did not, before entering into that agreement, notify Sports Direct in accordance with the matching right provisions. Sports Direct only learned of the Elite Agreement on 25 September, after having seen a statement on Rangers’ website describing Elite as “our new non-exclusive partners”. It contained a warranty by Rangers that it has “all necessary rights to grant [Elite] the rights in this Agreement” and granted Elite an indemnity against suit by SDIR (which is specifically named) in relation to the agreement.

Interpreting the matching right provisions, Teare J emphasised that, though the Court will seek to give effect to the commercial purpose of a contract viewed as a whole, it must also give effect to the specific words used in the relevant provisions. He held that *‘the circumstance that the prohibition applies to “any other third party” and is “in respect of any of the Offered Rights ... in respect of which the matching right is exercised” indicates that the prohibition is of wide not narrow compass. I am unable to discern in [the relevant paragraph], read as part of and in the context of the Retail Agreement as a whole, any words which have the effect that there is no prohibition of the grant of a non-exclusive right to a third party which has the same content as an Offered Right [already] acquired by Sports Direct [as the Defendant had contended].’*

That did not erode the non-exclusive nature of the relevant rights, since *‘if Sports Direct elected not to exercise its matching right then Rangers is, on the terms of [the relevant paragraph], at liberty to grant a further non-exclusive right to a third party.’* That construction granted Sports Direct a very valuable right, but was by no means unworkable or commercially absurd. Indeed, *‘[b]y matching an offer, Sports Direct is agreeing to trade on the same terms as a potential competitor. If that potential competitor then offers to trade on more favourable terms, it does not appear to me uncommercial to allow Sports Direct to trade on those same terms.’*

It followed that Rangers had been in breach of the matching right provisions by entering into the Elite Agreement without first giving Sports Direct the chance to match Elite’s offer. The Court was therefore called upon to determine the appropriate relief.

Sports Direct sought three injunctions. The first two were ‘prohibitory’ in form, restraining Rangers from further breaches of the matching right provisions. The last was ‘mandatory’ in form, requiring some undoing of the Elite Agreement by Rangers. However, Teare J emphasised that the *‘court should*

look to the substance of the injunction sought rather than its form’ (citing *National Commercial Bank Jamaica Limited v Olint Corpn Ltd* [2009] UKPC 16, at [20]). The relevant question is the potential hardship to the respondent by the grant of an injunction, and whether such prejudice ‘heavily outweighs’ the claimant’s interests. *‘If it does so then the grant of the injunction may be oppressive or unjust. It may well be easier to establish that in the case of a mandatory injunction than in the case of a prohibitory injunction. But one must be careful not to place too much weight on the formal distinction between mandatory and prohibitory injunctions.’*

Teare J expressed the applicable principle in this way: *‘When a court is called upon to grant a final injunction to enforce a contractual prohibition, it has ex hypothesi already determined the dispute in the applicant’s favour. In those circumstances, in my judgment, an injunction – whether mandatory or prohibitory in form – will usually be granted but may be refused where it would be unjust or unconscionable.’*

Applying that test, the Court granted the first and second injunctions sought. The third injunction raised some additional difficulty, since it would affect the rights of Elite, a third party. However, the Court could make such an injunction in the exercise of its discretion. In *Araci v Fallon* [2011] EWCA Civ 668, the defendant jockey had agreed not to ride a rival horse in the Epsom Derby, having been asked by the claimant horse-owner to ride the claimant’s horse. In breach of that covenant, the defendant agreed to ride a third party’s horse. The Court of Appeal granted the claimant an injunction restraining the defendant from so doing.

In the present case, an injunction affecting the Elite Agreement was appropriate. Teare J noted that *‘the terms of the Elite Agreement make clear that both Rangers and Elite entered into that contract fully aware of the risk that Sports Direct would object to it. Moreover, by the warranties contained in it, the Elite Agreement provides a clear mechanism for protecting Elite in these circumstances.’* As to the terms of the injunction, the draft proposed by Sports Direct was insufficiently clear and precise for an injunction requiring positive action by Rangers. The judge provisionally made an Order that: *‘Rangers shall: (1) not perform the Elite Agreement; (2) not assist Elite to perform the Elite Agreement; and (3) inform Elite that it will not perform the Elite Agreement’*. He invited further submissions on the precise terms of the injunction, to be heard at a later date. At a later hearing, he added to those terms that the link on Rangers’ website to Elite’s online store be taken down.

At a later hearing, Teare J heard submissions from Counsel for each party and for Elite. Elite submitted that the Court should not grant the third injunction, which interfered with its rights as a third party. Elite had *‘Elite was not aware until after [the earlier] hearing that the Court had heard submissions on the question of relief.’* Sports Direct submitted that Elite had indeed been aware of the relief being sought and had chosen not to intervene until after judgment had been handed down. The Court was shown correspondence between the parties from the months preceding the earlier hearing, to that effect. Teare J ordered the injunctions to take effect on their terms.

NOTE: This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments of the Commercial Court are public documents and are available at: <https://www.bailii.org/ew/cases/EWHC/Comm/>