Neutral Citation Number: [2021] EWCA Civ 790

Case No: A4/2020/0329

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
COMMERCIAL COURT (QBD)
LIONEL PERSEY QC SITTING AS A JUDGE OF THE HIGH COURT
[2020] EWHC 136 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 May 2021

Before:

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal, Civil Division)
LORD JUSTICE BAKER
and
LORD JUSTICE PHILLIPS

- -

Between:

SDI RETAIL SERVICES LIMITED	**Appellant**
- and -	
THE RANGERS FOOTBALL CLUB LIMITED	**Respondent**

- -
- -

Sa'ad Hossain QC and Joyce Arnold (instructed by **Reynolds Porter Chamberlain LLP**) for the **Appellant**
Akhil Shah QC and **Christopher Knowles** (instructed by **Allen & Overy LLP**) for the **Respondent**

Hearing date: 11 November 2020

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Approved Judgment

Lord Justice Phillips:

1. On 19 July 2019 Lionel Persey QC, sitting as a judge of the Commercial Court ("the Judge"), determined that the respondent ("Rangers") had breached a Retail Operations, Distribution, and IP Licence Agreement ("the Agreement") made between Rangers and the appellant ("SDIR") on 21 June 2017. The breach was Rangers' entry into a Technical Kit Supplier agreement with LBJ Sports Apparel Limited, trading as the Elite Group ("Elite"), and Hummel A/S ("Hummel") on 30 March 2018 ("the Elite/Hummel Agreement") without notifying SDIR of the offer it had received from Elite and Hummel and without giving SDIR the opportunity to "match" the terms of that offer, as required by the Agreement.

2. By an order of the same date, the Judge granted an injunction restraining Rangers from performing or assisting Elite or Hummel to perform the Elite/Hummel Agreement and requiring Rangers to inform Elite and Hummel that it would not perform the Elite/Hummel Agreement ("the Injunction").

3. On 20 December 2019 Rangers applied for a declaration that the Injunction did not prohibit Rangers from seeking to recover sums said to be due to it under the Elite/Hummel Agreement, including by taking proceedings in Scotland against Elite. SDI opposed the grant of the relief sought, maintaining that steps which facilitated, encouraged or promoted performance of Elite's payment obligations were caught by the terms of the Injunction.

4. On 29 January 2020 the Judge granted the declaration sought, determining that the act of requiring monies to be paid did not amount to "assisting" a counterparty to perform an agreement. SDIR now appeals that decision, permission having been granted by Flaux LJ on 27 May 2020.

The background

5. Rangers operates Glasgow Rangers Football Club ("the Club"), having acquired its business and assets on 14 June 2012 from the interim liquidators of the previous corporate owner. SDIR is part of the Sports Direct group of companies, of which Mike Ashley ("Mr Ashley") is the Chief Executive.

6. The parties have been involved in a bitter, highly litigious and continually evolving dispute since 2016, primarily arising from Rangers' persistent (and predominantly unlawful) attempts to replace SDIR with an alternative partner for the supply and sale of the Club's replica kits and other branded merchandise. It is necessary to summarise the history of the dispute, and the proceedings to which it has given rise, to place the Injunction in its proper context. The account below is largely drawn from the several first-instance judgments (identified below) which have been handed down in those proceedings.

(a) The initial joint venture

7. In July 2012 Rangers entered a joint venture with SDIR for the manufacture, supply and retailing of the Club's official replica kit and other merchandise. Pursuant to a shareholders' agreement, Rangers and SDIR became shareholders in a joint venture company, Rangers Retail Limited ("RRL"), Rangers granting the necessary rights to

RRL and SDIR (or the Sports Direct group on its behalf) running RRL's business. At about the same time Mr Ashley, through a corporate vehicle, acquired a minority interest in Rangers' holding company. RRL appointed Puma as the manufacturer and supplier of the official replica kit.

8. The Club's supporters were unhappy about Sports Direct's involvement in (and its perceived stranglehold over) Rangers' commercial operations, unhappiness perhaps exacerbated by Mr Ashley's ownership, through a corporate vehicle, of Newcastle United. In November 2014 a group of supporters began a boycott of Rangers' replica kit, which continued into 2016, having a significant negative effect on RRL's business. In May 2016 Rangers asserted that RRL was in repudiatory breach of its intellectual property licence and purported to terminate that licence.

9. In August 2016 SDIR, as the minority shareholder in RRL, issued derivative proceedings in the Chancery Division against Rangers and certain of Rangers' directors, seeking injunctive relief to maintain RRL's licence and claiming damages. On 6 April 2017 Richard Millett QC gave SDIR permission to continue the derivative claim, finding that it was strongly arguable that the continuation of the supporter boycott was being endorsed and encouraged by Rangers: *SDI Retail Services Ltd. v King* [2017] EWHC 737 (Ch).

(b) The Agreement

10. On 21 June 2017 the parties entered a settlement deed, compromising all the disputes and proceedings between them and their directors. Pursuant to that deed the licences granted by Rangers to RRL were terminated, the agreement with Puma was novated to Rangers and RRL was wound up. Further, and in place of the joint venture, the parties entered the Agreement, pursuant to which Rangers appointed SDIR to operate and manage its retail operations on an exclusive basis until 31 July 2018 ("the Initial Term").

11. The Agreement provided that, in the last six months of the Initial Term, Rangers was permitted to approach and enter negotiations with third parties for the grant of "Offered Rights" for the period after the expiry of the Initial Term, but granted SDIR the right to match any offer that might be received from any such third party ("the Matching Right"), the Matching Right continuing for 2 years after the expiry of the Initial Term. Offered Rights were defined (in paragraph 1.1.4 of Schedule 3 to the Agreement) as the right to operate and manage the Club's retail operations and the right to perform any of the following activities in relation to Branded Products, Additional Products, Official Rangers Kit and/or Replica Kit:

> "…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..."

12. The Agreement contained detailed provisions giving effect to the Matching Right, including a requirement that Rangers provide SDIR with written notice of the "Material Terms" (relating to payments, royalties and duration) of the Third Party Offer within 5 days of receipt (paragraph 5.2 of Schedule 3), SDIR then having 10 days to decide whether to match the offer in respect of some or all of the rights in question (and any "connected commercial arrangements"), either from receipt of the notice or the receipt

of further information or clarification if requested by SDIR (paragraphs 5.4 and 5.6). If SDIR agreed to match the offer, Rangers and SDIR were to enter a further agreement on the same terms as the Agreement, suitably altered so as to reflect the Offered Rights matched (and any connected commercial arrangements) and the Material Terms offered by the third party (paragraph 5.7).

(c) The Elite/Hummel Agreement

13. By the Elite/Hummel Agreement, executed on 30 March 2018, Rangers appointed Elite as the exclusive worldwide supplier of Technical Products and Hummel as the exclusive worldwide Technical Brand. In particular, Elite and Hummel were granted the rights to manufacture and supply official and replica kits for the 2018/2019, 2019/2020 and 2020/2021 Scottish football seasons (and for European competitions in those seasons).

14. Rangers had not given notice to SDIR of the offer from Elite and did not inform SDIR that the Elite/Hummel Agreement had been signed. On 20 April 2018 Rangers issued a press release announcing a new kit and manufacturing agreement with Hummel, but made no mention of Elite. When SDIR's solicitors pressed for a copy of the agreement with Hummel and asked for confirmation that Hummel had not been granted rights to market or sell official or replica kit, Rangers falsely gave such confirmation, stating that the rights granted to Hummel simply replaced those previously granted to Puma.

(d) Disputes as to the Matching Right and its exercise

15. On 4 June 2018 Rangers gave SDIR notice of an offer Rangers had received from a third party (later revealed as Elite). On 2 July 2018 SDIR, disputing the validity of the notice on the ground that it did not set out the Material Terms offered for each Offered Right, obtained urgent interim injunctive relief in the Commercial Court, restraining Rangers from entering an agreement with a third party. On 10 July 2018, the return date of the injunction was adjourned to 30 July 2018, at which six preliminary issues as to the interpretation of the terms of the Matching Right were to be determined. Rangers was restrained in the meantime from entering a contract with a third party unless it first complied with specified conditions as to notification to SDIR and the Matching Right.

16. On 12 July 2018 Rangers notified SDIR of the full terms of a third-party offer, setting out the Material Terms for three separate Offered Rights, seeking to comply with the requirements of the order of 10 July 2018. The offer was to be the official (but not the exclusive) retail partner of Rangers.

17. On 25 July 2018, having further sought and obtained clarification from Rangers, SDIR sent a letter agreeing to match the term of the third-party offer.

18. The following day Rangers accepted that it was bound to enter into a further agreement with SDIR on the same terms as the Agreement, subject to variation to reflect the Material Terms matched by SDIR. Rangers further accepted that it could not enter into an agreement with the Third Party. At the hearing of the return date on 30 July 2018 the preliminary issues were determined, by consent, in SDIR's favour and SDIR was granted declaratory relief. SDIR did not seek any final injunctive relief.

19. The parties were, however, unable to agree the terms of the further agreement resulting from SDIR's exercise of the matching right. Between July and September 2018, Rangers consistently refused to procure the supply of replica kit to SDIR, asserting, in particular, that it could not do so until a further agreement had been finalised. Rangers did not accept that an agreement had come into effect on 25 July 2018.

20. On 6 November 2018 SDIR commenced Part 8 proceedings against Rangers in the Commercial Court. On 13 March 2019 Sir Ross Cranston determined that a further agreement had indeed come into existence on 25 July 2018 ("the Further Agreement"). He found that SDIR had expressly matched the Material Terms in Rangers' notice of offer, there was "a contractually-prescribed offer and acceptance": *SDI Retail Services Ltd. v The Rangers Football Club Ltd* [2019] EWHC 591 (Comm) at [84].

21. Rangers was still not prepared to agree to the terms of the Further Agreement. The Part 8 claim came before the Judge on 22 May 2019, who determined the precise terms.

(e) Rangers' further agreements with Elite

22. In the meantime, on 11 September 2018, Rangers entered into two further agreements with Elite:

    i) the first granted non-exclusive rights from 15 September 2018 to the end of the 2019/2020 season to distribute, market and sell Rangers' brands and replica kit, to manufacture and/or have manufactured such products and to use Rangers' intellectual property in so doing ("the Elite Non-Exclusive Rights Agreement"). Rangers warranted to Elite that it had all necessary rights to grant the rights and granted Elite an indemnity against suit by SDIR;

    ii) the second provided that, in consideration for Elite entering leases for retail units in Belfast and Glasgow, Rangers granted Elite a non-exclusive licence to use Rangers' branding, logo and related intellectual property and to procure that Rangers' replica kit would be made available for sale in the retail units ("the Elite Retail Units Agreement").

23. Rangers did not inform SDIR of its intention to enter either of these agreements, let alone give SDIR the opportunity to match the terms offered by Elite. On 21 September 2018 Rangers notified SDIR that it considered that it was entitled to grant non-exclusive rights on the same or similar terms to third parties as would be granted to SDIR under the Further Agreement. Fifteen minutes later Rangers released a statement advising that a webstore run by Elite (but named "thegersstoreonline") had gone live and that Elite would be selling Rangers' replica kit and branded products. SDIR learned that Rangers had granted retail rights to Elite on 25 September 2018 when it saw an announcement describing Elite as Rangers' "new non-exclusive partner".

24. SDIR commenced these proceedings on 27 September 2018 and applied for an interim injunction in respect of the Elite Non-Exclusive Rights Agreement, but instead the application was heard as an expedited trial on liability and relief by Teare J on 10 October 2018. The existence of the Elite/Hummel Agreement and the Elite Retail Units Agreement remained undisclosed to SDIR and was not disclosed to Teare J.

(e) Teare J's judgment and order

25. On 24 October 2018 Teare J rejected Rangers' contention that, once SDIR had matched an offer in respect of non-exclusive rights, as it had done on 25 July 2018, the Matching Right had been exhausted, leaving Rangers free to grant similar non-exclusive rights to third parties[1]. Teare J therefore held that the Elite Non-Exclusive Rights Agreement was entered in breach of the Agreement: [18] and [41].

26. As for the appropriate remedy, Teare J held that he would not accept undertakings from Rangers but would grant an injunction in view of the assurance Rangers had given SDIR on 26 July 2018, only to enter the Elite Non-Exclusive Retail Agreement a few weeks later [54]. Teare J further determined that there was a cogent case for a mandatory "undoing" injunction, requiring Rangers not only not to perform the Elite Non-Exclusive Retail Agreement, but actively to repudiate it [58]. The potential adverse effect on a third party was unfortunate, but Rangers and Elite both went into their agreement with their eyes open. There was a risk that damages might not be an adequate remedy for SDIR because of the cap of £1m on damages in clause 16.3 of the Agreement and/or the exclusion of indirect or consequential losses in clause 16.2 of the Agreement, but more significantly, it could not be said that the injunction would be out of all proportion to the requirements of the case or that it would operate with extreme harshness on Rangers [58-60].

27. Teare J accordingly made an order that:

> "Rangers shall:
>
> (1) not perform the [Elite Non-Exclusive Rights Agreement];
>
> (2) not assist Elite to perform the [Elite Non-Exclusive Rights Agreement];
>
> (3) inform Elite that it will not perform the [Elite Non-Exclusive Rights Agreement]"

(f) Amendment of the claim to encompass the Elite/Hummel Agreement

28. On 25 October 2018, the day after Teare J handed down judgment, Elite provided SDIR with copies of the Elite/Hummel Agreement and the Elite Retail Units Agreement.

29. Rangers duly wrote to Elite to inform it (as required by the order of Teare J) that it would not perform the Elite Non-Exclusive Rights Agreement, making the same statement in relation to the Elite Retail Units Agreement. However, Rangers maintained that the Elite/Hummel Agreement was outside the scope of the Matching Right, being concerned with manufacturing and wholesale transactions rather than retail operations.

30. SDIR therefore applied to amend its claim in these proceedings to assert that Rangers' entry into the Elite/Hummel Agreement was also a breach of the Matching Right. The issue was tried before the Judge in April 2019.

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[1] [2018] EWHC 2772 (Comm).

(f) The Judge's 19 July 2019 judgments

31. On 19 July 2019 the Judge first handed down a reserved judgment, rejecting Rangers' contention that SDIR's matching rights under the Agreement related only to the grant by Rangers of retail rights, and so were not engaged by the Elite/Hummel Agreement, which concerned the grant of rights to manufacture and sell replica kit and other products ("the Reserved Judgment"). He therefore found that Rangers had breached the Agreement in entering the Elite/Hummel Agreement without first notifying SDIR of the offer and allowing SDIR to match it, further finding that SDIR would have done so had it been given the opportunity to which it was contractually entitled.

32. As for SDIR's remedies, the Judge recorded that the 2018/2019 season had been completed and that preparations for the 2019/2020 season were well underway by the time of the hearing before him, such that SDIR accepted that it was too late (not least in the interests of the Club's supporters) to prevent the kit manufactured by Hummel for the 2019/2020 season being supplied to and worn by the Club's teams. Subject to that exception, SDIR sought an "undoing" injunction in respect of the Elite/Hummel Agreement in terms to the same effect as those granted by Teare J in relation to the Elite Non-Exclusive Rights Agreement.

33. At [94] the Judge stated:

> "Rangers assert that an injunction should not be granted because:-
>
> (1) It will lose significant revenues and will be exposed to claims for damages from Elite.
>
> (2) The club, players and fans will be unable to secure kit and other products; and
>
> (3) Rangers' ability to function as a football club will be impaired."

34. The Judge explained at [95] why he did not regard those arguments as justifying the refusal of an injunction:

> "As to the first point, I am not satisfied that Rangers will lose significant revenues. It has already received the revenues due in respect of the 2018/2019 season and, given the limited nature of the injunctive relief now sought, will likely receive those due from Elite in the 2019/2020 season. It will also be entitled to receive revenues from SDIR in respect of the 2020/2021 season. In any event the potential loss of revenues and exposure to claims from Elite are both ordinary and natural consequences of Rangers' breaches of the Agreement. As to the second point, the limited nature of the injunctive relief sought means the supply of kit and other products will not be interrupted for the forthcoming season. There is in my judgment no sensible risk that fans will be deprived of the opportunity to spend their hard-earned money on purchasing the forthcoming season's kit. Nor do I consider that there is

> any risk that Rangers' ability to function as a football club will be impaired."

35. The Judge also recorded that Rangers did not dispute that the Elite Retail Units Agreement was entered in breach of the Agreement, stating at [96] that it was appropriate to grant an injunction in that regard also.

36. After argument on 19 July 2019 as to the relief to be granted, the Judge gave a further judgment, *ex tempore,* in which he rejected Rangers' contentions that there should be wider exceptions to the injunction relief sought by SDIR in respect of the 2019-2020 season. The Judge stated at [6]:

> "….in so far as it is possible to enforce the terms of the agreement by the grant of appropriate injunctive relief, it seems to me that I should do so provided that, and this is an important proviso, the continued supply of kit for the purchase by fans is not impeded for the 2019-2020 season..."

(g) The Injunction

37. The order made by the Judge, in the light of his judgments, recited that SDIR had agreed that:

> "…for the 2019/2020 season [the Rangers FC Teams] may wear any Official Rangers Kit…that had been approved by Rangers prior to 17 April 2019".

38. There followed a number of declarations, including that, by the Elite/Hummel Agreement, Rangers had granted Offered Rights to Elite and Hummel and that, in entering the Elite/Hummel Agreement Rangers had breached paragraphs 5.2 and 5.11 of Schedule 3 of the Agreement in failing to provide SDIR with a Notice of Offer in respect of Elite/Hummel's offer.

39. The order then injuncted Rangers in several respects, including as follows:

> "6. Rangers shall:
>
> (1) not perform the Elite/Hummel Agreement;
>
> (2) not assist Elite or Hummel to perform the Elite/Hummel Agreement; and shall
>
> (3) inform Elite and Hummel that it will not perform the Elite/Hummel Agreement.
>
> 7. Without prejudice to the generality of paragraph 6 above, Rangers shall:
>
> (1) not propose or agree sale dates in respect of Replica Away and Third playing kits (as those terms are defined in the Elite/Hummel Agreement);

(2) not advise Elite of sponsor's logotypes in respect of future football season 2020/2021;

(3) not propose and shall not agree kit designs in respect of future football season 2020/2021;

(4) not order any Official Rangers Technical Products (as that term is defined in the Elite/Hummel Agreement) from Elite or Hummel, or bearing the Hummel brand, for the future football season 2020/2021;

(5) during future football season 2020/2021, not permit the Rangers FC teams to wear any Official Rangers Technical Products (as that term is defined in the Elite/Hummel Agreement) designed by, supplied by, gifted by or manufactured by Elite or Hummel, or bearing the Hummel brand;

(6) not register an Official Rangers Home, Away or Third playing kit designed by Elite or Hummel, or bearing the Hummel brand, with the Scottish Football Association or UEFA, for the future football season 2020/2021;

(7) not create a Hummel branded area within the Rangers Megastore at Ibrox Stadium;

(8) not deliver (insofar as not already delivered) any of the items noted in points under "Sponsorship" on pages 5 and 6 of the Elite/Hummel Agreement for the football seasons 2019/2020 or 2020/2021; and shall

(9) not assist Elite in the co-ordination of any product launches, in particular, shall not respond to any requests for assistance and cooperation by Elite in relation to the same and shall not indicate to Elite that it may act unilaterally in relation to product launches."

(h) Rangers' claims against Elite

40. Pursuant to the Elite/Hummel Agreement, Elite was liable to pay Rangers a minimum annual fee of £2 million plus VAT in respect of the purchase by Rangers' retail partner (in the event, SDIR) of between 1 and 100,000 units, plus royalties of 10% on global sales, with a minimum of £100,000 per season. Such sums were due by way of four equal quarterly payments. Elite also agreed to pay £350,000 plus VAT per year by way of sponsorship of the Club's training ground and academy.

41. According to Rangers, as at 19 July 2019 (the date of the Injunction), Elite owed Rangers £960,236.75 (including VAT), although neither the Judge nor SDIR were informed of that fact. As appears from a draft summons for issue in the Court of Session in Scotland, by 1 November 2019 Rangers claimed that Elite owed £1,800,236.75 under the Elite/Hummel Agreement, but recognised that credit of about £430,000 was due to Elite in respect of products supplied to Rangers, arriving at a total principal claim of £1,370,236.75.

42. It should also be recognised, of course, that Rangers had repudiated the Elite/ Hummel Agreement as required by the Injunction, so there was and remains the possibility that

Elite will assert, and may claim or counterclaim, that Rangers is liable to Elite for damages for breach of contract.

43. On 20 December 2019 Rangers applied for a declaration that the Injunction does not prohibit Rangers from seeking to recover sums from Elite under the Elite/Hummel Agreement, including by way of proceedings against Elite. Alternatively, Rangers sought to vary the Injunction so as to permit such a course of action. The application came before the Judge on 15 January 2020.

The Judgment under appeal

44. The Judge handed down his reserved judgment on 29 January 2020. The relevant legal principles had been common ground before the Judge, as they were on this appeal, and were summarised by him by reference to the following authorities:

i) In *Sans Souci Ltd v VRL Services Ltd* [2012] UKPC 6 at [13] Lord Sumption described the correct approach to the construction of a judicial order as follows:

> "…the construction of a judicial order, like that of any other legal instrument, is a single coherent process. It depends on what the language of the order would convey, in the circumstances in which the Court made it, so far as these circumstances were before the Court and patent to the parties. The reasons for making the order which are given by the Court in its judgment are an overt and authoritative statement of the circumstances which it regarded as relevant. They are therefore always admissible to construe the order. In particular, the interpretation of an order may be critically affected by knowing what the Court considered to be the issue which its order was supposed to resolve."

ii) In *Pan Petroleum AJE Ltd v Yinka Folawiyo Petroleum Co Ltd* [2017] EWCA Civ 1525 Flaux LJ, with whom Gross and Lewison LJJ agreed) summarised the relevant principles as follows, drawing in particular on the judgment of Lord Clarke of Stone-cum-Ebony JSC in the Supreme Court in *JSC BTA Bank v Ablyazov (No. 10)* [2015] 1WLR 4754:

> "(1) The sole question for the Court is what the Order means, so that issues as to whether it should have been granted and if so in what terms are not relevant to construction;
>
> (2) In considering the meaning of an Order granting an injunction, the terms in which it was made are to be restrictively construed. Such are the penal consequences of breach that the Order must be clear and unequivocal and strictly construed before a party will be found to have broken the terms of the Order and thus to be in contempt of Court;
>
> (3) The words of the Order are to be given their natural and ordinary meaning and are to be construed in their context, including their historical context and with regard to the object of the Order."

45. In considering the context of the Injunction at [8], the Judge stated that paragraph 95 of his reserved judgment of 19 July 2019 "contemplated that Rangers would continue to

receive (and, therefore, be entitled to receive) revenues and royalties due from Elite under the Elite/Hummel Agreement for both the 2018/2019 season and also the 2019/2020 season...". He recognised that there was no discussion as to what would happen if Elite defaulted on its obligations, but expressed the view that if Rangers was prevented from seeking recovery from Elite, the "unattractive consequence" would be to permit Elite to breach with impunity its payment obligations to Rangers.

46. The Judge then identified at [9] that the argument before him was largely focused on the meaning of "assist" in sub-paragraph (2) of paragraph 6 of the Injunction. He defined the issue as "Can the act of one party demanding payment under a contract, or the commencement of proceedings by that party in order to enforce an obligation to make payment, properly be descried as "assisting" the counterparty in the performance of the contract".

47. At [10] the Judge rejected SDIR's contention that the Injunction, whilst not prohibiting Rangers from receiving monies from Elite passively, did prohibit Rangers from facilitating, encouraging or promoting payment, describing that as an unattractive distinction. He further stated that:

> "Nor does it seem to me to be an appropriate use of language to say that the act of requiring monies to be paid (whether by way of demand or legal action) amounts to assisting a counterparty to perform an agreement. The ordinary meaning of "assist" is "to help". Coercive action in the sense of requiring someone to perform cannot, in my view, sensibly be regarded as assisting that person to perform, Nor, in my judgment, does the wider definition of "assist" for which SDIR contends, namely to "promote" or "further", take matters any further".

48. The Judge therefore accepted Rangers' contention at [11] that there was a distinction between demanding that someone perform a contract on the one hand and providing assistance to them in order to perform the contract on the other: the Injunction catches the former but not the latter. The Judge continued:

> "This construction is consistent with the acknowledged fact that the Injunction did not prevent Rangers from continuing to receive payments that were due under the Elite/Hummel Agreement and also with the court's understanding, as reflected in paragraph 95 of the Judgment, that Rangers would be entitled to receive payments under the Elite/Hummel Agreement for the 2019/2020 season. The undoing effect of the Injunction did not extend to preventing the payment of the sums due from Elite to Rangers."

49. As he therefore concluded (and made an order declaring) that Rangers would not be in breach of the Injunction should it seek (by court action or otherwise) to recover sums from Elite, the Judge thought it unnecessary to consider the parties' arguments as to whether the Injunction should be varied.

Proceedings in Scotland

50. Following the Judge's Order of 29 July 2020, Rangers issued a summons in the Court of Session in Scotland, service of which was accepted on behalf of Elite on or about 10 February 2020.

51. On 27 May 2020, however, Flaux LJ, in granting SDIR permission to appeal, also ordered a stay of the declaration granted by the Judge. Rangers has therefore not proceeded with its claim against Elite in Scotland pending the outcome of this appeal.

The grounds of appeal

52. SDIR's overarching ground was that the Judge was wrong to interpret the Injunction (in particular, paragraph 6(2)) as permitting Rangers to seek to recover sums claimed under the Elite/Hummel Agreement, contending that the Judge had made specific errors in his reasoning as follows:

    i) in holding that taking action to require an obligor to perform does not constitute "assisting" performance (ground 1). In particular, the Judge failed to recognise that seeking specific performance of an obligation would constitute assisting performance of that obligation (ground 2);

    ii) in holding that his earlier finding that Rangers would "likely receive" payments from Elite suggested that Rangers was permitted to take active steps to compel such payments (ground 3);

    iii) in failing to give effect to the purpose of the injunction, which was to undo the Elite/Hummel Agreement as far as possible, subject to the constraint of Elite not being before the court (ground 4).

The parties' respective arguments on the appeal

53. Mr Hossain QC, on behalf of SDIR, argued that the Judge was wrong to confine the term "assist" to the narrow concept of "help". Such an approach ignored the context in which the word was used, namely, assisting the performance of obligations under a contract, not more general assistance for Elite as a business. The gist of the intended restriction was plainly directed at "furthering or promoting" such performance, one of the meanings of "assist" to be found in the Oxford English Dictionary, not merely acts which would be welcomed by Elite as helpful. Mr Hossain pointed out that the term "assist" was commonly used where coercion was involved, such as "assisting" a reluctant teenager to complete their homework by refusing to allow them to go out until the homework was finished.

54. Mr Hossain further submitted that if the Injunction permitted Rangers to require performance by Elite through coercion, Rangers could not only enforce payment obligations but could, in theory, seek specific performance of other obligations. This would be entirely contrary to the purpose of the Injunction, which was to undo the Elite/Hummel Agreement as far as possible, given that Elite was not a party to the proceedings, the purpose identified by Teare J when granting an injunction in the same form, referred to and adopted by the Judge in relation to the Injunction. Contrary to that purpose (and assuming that Elite did not accept Rangers' repudiation), the Judge's

interpretation would permit Rangers to keep the Elite/Hummel agreement alive and enforce performance for the remainder of its term.

55. Mr Shah QC, on behalf of Rangers, submitted that the Judge was right to give the word "assist" its ordinary meaning (and the primary conventional meaning according to the Shorter Oxford English Dictionary), namely, "help", a meaning which made complete sense in the context of the sub-paragraph in question. The wider meaning proposed by SDIR was strained and inappropriate, particularly in the context of an order which was to be read restrictively. The coercive action of suing for money was not readily described as "assistance" and was, Mr Shah submitted, more analogous to a street mugging than a parent encouraging a child to do their homework.

56. As for the suggestion that Rangers could obtain specific performance of Elite's obligations, that was a point without substance as SDIR had not identified a single obligation of Elite under the Elite/Hummel Agreement which Rangers could seek to enforce in that way, not least because most of the obligations required cooperation from Rangers which would be prohibited by the Injunction. I would add that there would be no requisite mutuality, as Rangers could not perform its own obligations.

57. Mr Shah further endorsed the Judge's reliance on paragraph 95 of his reserved judgment of 19 July 2019. The fact that the Judge viewed it as "likely" that Rangers would receive monies from Elite demonstrated that the intention was that Rangers should be entitled not only to receive that money but to recover it if it was not paid. It was difficult to see why a party who is entitled to receive money should not be entitled to recover it; making a distinction between those two entitlements was unattractive, as the Judge held. Further, an inability to sue for the money would potentially falsify the Judge's assumption that Rangers would receive the monies (which was in itself one of the reasons why he was prepared to grant the Injunction) as a party in Elite's position was unlikely to pay a debt that could not be enforced against it.

58. Mr Shah emphasised that the consequence of SDIR's interpretation would be that Elite would be able to make profits from using Rangers' valuable brands for two years without having to pay anything to Rangers. That was a startling conclusion and, furthermore, would simply penalise Rangers whilst providing no benefit to SDIR. That result would be even starker if Rangers could not even set-off and counterclaim sums due from Elite against any claim Elite may bring for a damages breach of the Elite/Hummel Agreement. On the other hand, if Rangers were entitled to exercise such a set-off, it would be strange if it could effectively enforce Elite's debt by court proceedings in that way, but not by way of itself commencing proceedings.

59. Mr Shah also highlighted that SDIR had accepted before the Judge (and continued to accept on this appeal) that Rangers would not be in breach of the Injunction by issuing invoices to Elite for monies due under the Elite/Hummel Agreement. He submitted that, if SDIR was right, and "assist" meant "furthering or promoting", invoicing for such monies would be a breach of the Injunction. SDIR was forced to accept that invoicing was not a breach because that was a step in the process of receiving payment, which was permitted by the Injunction, but failed to recognise suing for payment was equally an aspect of being entitled to receive payment.

The proper interpretation

60. As the authorities cited by the Judge make plain, the interpretation of the Injunction is an objective exercise, determining what the language used conveys in the context in which the order was made. That context includes, in particular, the Judge's reserved and *ex tempore* judgments of 19 July 2019 which explain the reasons for the grant of the Injunction. As the Injunction has penal consequences if disobeyed, it must be construed strictly and restrictively.

61. This court is in just as good a position to consider that issue as the Judge at first instance. Rangers pointed out that it was "fortunate" that the Judge was available to consider the issue, but did not rely upon the fact that the Judge was interpreting his own order in the context of his own judgments, and rightly so. Apart from the fact that the objective nature of the exercise forbids that subjective consideration (not least because the proper interpretation cannot depend in the slightest on whether or not the judge who made the order is the judge interpreting it), the wording of paragraph 6 of the Injunction was not debated at all, but was simply that proposed by SDIR, replicating the wording produced by Teare J in his order of 24 October 2018. Further, the Judge recognised that the question of what would happen if Elite defaulted on its obligations was not considered when the Injunction was granted.

62. Considering first the purpose of the Injunction, both Teare J (in making this form of order on 24 October 2018) and the Judge expressly regarded the order granted as an "undoing" injunction and the Judge, in his *ex tempore* judgment of 19 July 2019, referred to enforcing the terms of Agreement "as far as possible", provided Elite could still supply kit for the 2019/2020 season. It was recognised that, as Rangers had entered the relevant agreement with Elite in breach of its contractual obligations to SDIR, Rangers should not only be prevented from performing the agreement, but also should be required actively to repudiate it. As Elite was not a party to either set of proceedings, the court could not, in either case, require that the relevant agreement be terminated or prohibit Elite from performing it. The court could, however, prohibit Rangers from taking any steps to cause or contribute to Elite's performance of the agreement: that is, in my judgment, plainly the broad purpose and intention of paragraph 6(2) of the Injunction.

63. In my judgment the Judge did not give sufficient, if any, consideration or weight to this broader context and purpose of the Injunction in considering its interpretation. Permitting Rangers to sue on the Elite/Hummel Agreement, whether to enforce a payment obligation or any other obligation, would not be enforcing the terms of the Agreement "as far as possible" (the Judge's own contemporaneous explanation of the purpose of the Injunction), but would be allowing Rangers to rely upon and enforce the very contract it had entered with Elite in unlawful breach of the Agreement and was expressly required to repudiate. What is more, it would be permitting the use of the court process to do so, entailing that the court would be enforcing an agreement which it had held should not have been made and had required, in so far as possible, not to be performed and to be terminated.

64. The Judge instead focused on his observation in paragraph 95 of his reserved judgment of 19 July 2019 that he was not satisfied that Rangers would lose significant revenues because it was likely that Rangers would receive revenues from Elite in respect of the 2019/2020 season and would be entitled to receive them for the 2020/2021 season. The

Judge drew from that passage that the Injunction intended to preserve an entitlement for Rangers to receive revenues due under the Elite/Hummel Agreement, the corollary being that Rangers should be permitted to enforce that entitlement. In my judgment that analysis was flawed for the following reasons:

i) Rangers' only legal entitlement to receive revenues from Elite was its contractual right pursuant to the Elite/Hummel Agreement, the very agreement which was being "undone" as far as possible;

ii) the Injunction plainly did not confer some further or separate entitlement on Rangers to receive revenues from Elite;

iii) the proper analysis is that the Injunction did not (and indeed, could not) prevent Elite from making payments into Rangers' bank account, something which could be done without any involvement at all by Rangers. Thus payments from Elite could not be prohibited, nor could their receipt by Rangers;

iv) it follows that Rangers was only "entitled" to receive the payments in the colloquial sense that it was not restrained from receiving them. However, the Injunction did not thereby recognise, let alone create, a legally enforceable right to receive (or enforce) such payments;

v) therefore the Judge's recognition, on 19 July 2019, that Rangers was not prohibited from receiving revenue from Elite (and might well receive it) did not justify the conclusion that the Injunction permitted Rangers to sue Elite under the Elite/Hummel Agreement to recover that revenue.

65. Rangers placed great emphasis on the Judge's reference to the receipt of such revenues being "likely", arguing that that implied that payment of those revenues could be enforced, not least because payment would not be likely if Elite could not be sued. I do not agree that such implication is appropriate. The Judge was doing no more (in the context of considering the effect of the Injunction on Rangers) than recognising in that, as Elite would be likely to supply kit pursuant to the Elite/Hummel Agreement (rather than accepting Rangers' repudiation), fees and royalties would accrue under the terms of that agreement and Elite was likely to pay contractually due sums. Contrary to Rangers' submission, reputable commercial parties frequently pay sums due under their contracts without thought as to whether they would or could be sued if they did not pay. Further, the Judge did not speculate, in granting the Injunction, on how Elite might react to Rangers' repudiation and failure thereafter to perform. But he plainly recognised, through use of the term "likely", that Elite might not pay and Rangers might not receive the revenues.

66. I conclude that it would be contrary to the clear purpose and intent of the Injunction that Rangers should be permitted, nonetheless, to take proceedings to enforce its terms, including suing for revenues payable by Elite. I appreciate, having seen a draft of his judgment, that the Vice-President reaches a different conclusion on this aspect, giving some prominence in the analysis to the transcript of the argument before the Judge on 19 July 2019. For my part, I would express considerable caution about placing any weight on such material in circumstances where the transcript does not contain the Judge's reasons for making the order (as is sometimes the case where the terms of an order are discussed at the end of a hearing), the Judge in this case having recorded his

reasons in formal judgments. As explained by Lord Sumption in *Sans Souci*, the reasons given by the court for making an order are "an overt and authoritative statement of the circumstances which it regarded as relevant" and are admissible if (and only if) there is an ambiguity. Engaging in an excavation and analysis of the parties' submissions to discover their motives for seeking particular orders seems to me to be a difficult and dubious exercise, with parallels to admitting evidence of negotiations in construing a contract. As far as I am aware, such an approach finds no support (even if not expressly forbidden) in the authorities. But in any event, the submissions of Mr Hossain to which the Vice-President refers seem to have been firmly directed at emphasising to the Judge the distinction between steps Elite had already taken (and could thereafter take) to perform the Elite/Hummel Agreement, steps which SDIR accepted could not be prevented or reversed, and permitting full performance of the Elite/Hummel Agreement for the 2019/2020 season, as might have been allowed had Rangers been granted the "carve-outs" it sought from the Injunction. I see nothing in those submissions which indicated that SDIR (let alone the court) contemplated that Rangers would be entitled to enforce performance of Elite's payment obligations under the Elite/Hummel Agreement.

67. Turning to the terms of the Injunction, I see nothing in its structure or in the language used that runs counter to the purpose and intention I have identified above. On the contrary, I consider that the former aspect reinforces the latter. Paragraph 6 prohibits Rangers performing the Elite/Hummel Agreement, prohibits Rangers from assisting performance and requires Rangers to repudiate it, followed by a detailed list of matters Rangers must not do by way of clarification. The result appears to be a comprehensive order that Rangers "undo" the Elite/Hummel Agreement as far as within its power. The limitation on the width and breadth of that order does not appear from the terms of the prohibition, but solely from the recital of SDIR's agreement that the Club's teams might wear Hummel's kit in the 2019/2020 season. Further, it is in my judgment inappropriate to place too much weight on that recital when considering the meaning of paragraph 6 of the Injunction given that the recital only relates to the 2019/2020 season, whereas the substantive terms of the Injunction apply also to the 2020/2021 season. The recital is an agreement which limits the effect of the Injunction, but cannot sensibly affect, let alone control, its meaning.

68. In the above context, the word "assist" in paragraph 6(2) is, in my judgment, plainly intended to restrain Rangers from taking any steps which would further or promote performance of the Elite/Hummel Agreement by Elite. The word conveys (and may be regarded as a summary of or shorthand for) actions of the type which would lead to accessory liability for another's wrongful conduct. In the civil context, such assistance would include "inducing" or "procuring" a breach. In the criminal context it would be described as "aiding, abetting, counselling or procuring". The prohibition is of any action which causes or contributes to performance of the Elite/Hummel Agreement by Elite.

69. The Judge referred to the fact that the ordinary meaning of "assist" is "help", but that does not in my judgment take the matter any further. "Help" is a synonym of "assist" and so may also connote promotion, facilitation or furtherance of an end. The question is whether the Judge was right to take the view that the concept of assistance (or help) excluded action which was coercive. I consider he was wrong to do so, both in general terms and in the context of the particular usage in the Injunction:

i) as for the general meaning of "assist/help", it is commonplace to speak of assisting or helping someone, by coercive action, to overcome a problem they were unable or unwilling to resolve themselves. Imprisoning a criminal with an addiction might help them recover from that addiction, and force-feeding a patient might help them to survive a hunger strike. More pertinently, suing a debtor might be described as helping them to meet their obligations. Phrases such as "helping them despite themselves" or "helping them to see the error of their ways" encapsulate the concept;

ii) in the particular circumstances of the Injunction, the aim was to prohibit performance of the Elite/Hummel Agreement as far as possible, paragraph 6(2) addressing what could be done to restrict performance by Elite. The word "assist" in that context cannot sensibly be read as permitting Rangers to seek to enforce any and every obligation of Elite by way of specific performance. Whilst such a remedy would be unlikely to be available to Rangers in the circumstances, it would plainly be contrary to the whole tenor of the Injunction that such a claim should even be open to Rangers. The Judge's focus on whether Rangers was permitted to sue for revenues due from Elite was at the expense of considering the more general purpose of the prohibition on steps (including coercive steps) which would contribute to Elite performing the Elite/Hummel Agreement. The point can further be made by considering whether the Injunction should be read as permitting Rangers to sue Elite for damages for failure to perform its obligations in relation to 2020/2021 (that is to say, enforcing Elite's secondary obligation in that regard). On the Judge's analysis, such a claim would be permissible because it would be coercive. But it would plainly be absurd if (assuming Elite did not accept Rangers' repudiation) Rangers were permitted to enforce Elite's obligations in respect of the 2020/2021 season. That would be to drive a coach and horses through the Injunction.

70. Rangers placed emphasis on the risk that Elite might sue Rangers for damages for repudiatory breach of the Elite/Hummel Agreement, arguing that it would be deeply unjust (and could not be an intended effect of the Injunction) if it could not set-off debts due to Rangers under that same agreement. Rangers further argued that if it could set-off, thereby extinguishing or reducing the debt owed by Elite, that was in effect no different to taking proceedings to recover those debts in the first place. I accept the first part of that argument, but I disagree with the analysis underlying the second part. Demanding payment of, and if necessary suing for, a debt is an exercise in encouraging and procuring performance of the relevant payment obligation by the debtor, either by eliciting payment or converting the obligation into a judgment. For the reasons explained above, I consider that amounts to "assisting" performance within the meaning of the Injunction. In contrast, asserting a set-off is purely a defence to the opposing claim, unilaterally and automatically reducing or extinguishing the debt (to the extent that the set-off is effective), not assisting the other party do so. It follows that it would not, in my judgment, be a breach of the Injunction for Rangers to seek to set-off the debts owed by Elite, so long as Rangers does not also counterclaim such debts.

71. I would add that, in my judgment, if Rangers invoiced Elite for revenues due under the Elite/Hummel Agreement, that would clearly be assisting Elite to make payment and thereby to perform its obligations. The invoice would provide helpful information as to

the amount due, when and in respect of what it was due and the account details for payment. Invoicing would also encourage payment and procure that it was made. To the extent that SDIR conceded that such conduct would not be in breach of the Injunction, it was wrong to do so.

72. In the light of the above analysis, and notwithstanding the need to interpret the Injunction restrictively, I conclude that if Rangers seeks to enforce payment by Elite of sums due under the Elite/Hummel Agreement, by proceedings or otherwise, it will be in breach of paragraph 6(2) of the Injunction and liable to committal for contempt of court.

Further observations

73. I would make two further observations. The first is that, whilst the argument before the Judge and on this appeal focused on the meaning and effect of the word "assist" in paragraph 6(2) of the Injunction, I consider that Rangers would also be in breach of paragraph 6(1) if it were to pursue proceedings against Elite for recovery of sums due under the Elite/Hummel Agreement. In my judgment the prohibition on Rangers "performing" that agreement must be interpreted as including the exercise of any of its rights thereunder, an interpretation confirmed by the fact that the list of specific restrictions in paragraph 7 relates mainly to preventing Rangers exercising such rights, not performing obligations owed to Elite. If that is correct, such prohibition must extend to the enforcement of such rights, such as Rangers' right to payment.

74. The second is that, if the appeal is allowed, it would remain open to Rangers, at least in theory, to apply to vary the Injunction, the Judge having declined to determine Elite's application in that regard given his decision on interpretation. Whilst any such application would have to be determined on its merits if and when restored in the Commercial Court, it will be plain from my reasoning above that I would not encourage any such restoration. Rangers entered into the Elite/Hummel Agreement in flagrant breach of its obligations to SDIR under the Agreement, as part of an ongoing illegitimate campaign to deprive SDIR of its contractual rights. The court will require strong reasons to permit Rangers to benefit from that wrongful act without SDIR's consent, particularly through the use of the court's own processes.

Conclusion

75. For the above reasons, I would allow the appeal.

Lord Justice Baker

76. I agree that this appeal should be allowed.

77. Paragraph 6.2 of the order of 19 July 2019 must be read in the context of paragraph 6 as a whole:

> "6. Rangers shall:
>
> (1) not perform the Elite/Hummel Agreement;
>
> (2) not assist Elite or Hummel to perform the Elite/Hummel Agreement; and shall

> (3) inform Elite and Hummel that it will not perform the Elite/Hummel Agreement."

This imposed an absolute bar on Rangers doing anything by way of performance of the Elite/Hummel Agreement. The restriction is not confined to any temporal period. The fact that the specific restrictions imposed by paragraph 7 of the order related for the most part to the 2020/2021 season does not qualify the generality of paragraph 6, as the first words of paragraph 7 make clear.

78. Were Rangers to submit an invoice for sums due under the Elite/Hummel Agreement and/or to bring proceedings for the recovery of such sums, they would be exercising rights under the agreement and thereby "performing" the agreement, in breach of paragraph 6.1. They would also be "assisting" Elite to perform the agreement, in the sense identified by Phillips LJ at paragraphs 68 to 71 of his judgment, in breach of paragraph 6.2 of the agreement. The limited concession made by SDIR as recorded in the recital to the order does not, in my view, have any wider effect of the scope of the injunction.

79. As Lord Sumption observed in *Sans Souci Ltd v VRL Services Ltd*, the reasons for making an order given by a court in its judgment are always admissible for the purposes of construction of the order. In his reserved judgment handed down on 19 July 2019, the judge observed (at paragraph 95):

> "I am not satisfied that Rangers will lose significant revenues. It has already received the revenues due in respect of the 2018/2019 season and, given the limited nature of the injunctive relief now sought, will likely receive those due from Elite in the 2019/2020 season."

It could be said that these words point to an interpretation of the Injunction which excluded from its scope Rangers' right to sue for sums already due from Elite. On the other hand, the contrary interpretation is indicated by words immediately following in the same paragraph:

> "In any event the potential loss of revenues and exposure to claims from Elite are both ordinary and natural consequences of Rangers' breaches of the Agreement."

Of great importance, however, are the words in his ex tempore judgment which was delivered after receiving submissions expressly directed at the terms of the order:

> "….in so far as it is possible to enforce the terms of the agreement by the grant of appropriate injunctive relief, it seems to me that I should do so provided that, and this is an important proviso, the continued supply of kit for the purchase by fans is not impeded for the 2019-2020 season …."

Those words illustrate not only the limited scope of the recital but also, more importantly, that the Judge was intending to enforce the terms of the agreement so far as it was possible to do so by injunctive relief. That intention was then reflected in the very broad terms of paragraph 6 of the order.

80. Like Phillips LJ, I am cautious about the extent to which it is appropriate to consider submissions made in argument before an order is made as relevant to the interpretation

of the order. The starting point must be the terms of the order and the judgment in which the court explains its reasons for making it. I do not see any ambiguity in the terms of the order and the interpretation I put on those terms is reinforced by the Judge's ex tempore judgment delivered after considering the submissions.

81. In agreeing that the appeal should be allowed, however, I recognise that neither the Judge nor the parties may have had in mind the possibility of how the terms of the order might impinge upon any dispute between Rangers and Elite over the payment of sums due under the Elite/Hummel Agreement. It remains open to Rangers apply to vary the injunction. I express no view on the merits of such an application. I agree with Phillips LJ that the court will require strong reasons to permit Rangers to benefit from their wrongful act, but in my view this court is not in a position to express a view as to whether such reasons exist.

Lord Justice Underhill:

82. I have reached the contrary conclusion to Phillips and Baker LJJ, and I would have dismissed this appeal.

83. My starting-point is that I cannot regard it as a natural use of language to describe the initiation of proceedings by Rangers against Elite to obtain payment from it of sums due under the Elite/Hummel agreement as "assisting" Elite to perform its obligations under that agreement. Being simply a question of ordinary English usage, I am not sure that the point is capable of much elaboration. With all respect to the Judge, I do not find it useful to substitute the term "help". Equally, I do not think it right to substitute "furthering or promoting", as suggested by Mr Hossain. I am prepared to accept that there may be cases where steps taken to force someone to do something may be described as "assisting" them, as Phillips LJ says at para. 69 (i) of his judgment, but the examples that he gives are far from the present case and do not persuade me that it is a natural use of language in a commercial context. I cannot think of a case where a creditor who sues a debtor would be described as assisting them to pay the debt.

84. I nevertheless agree with Phillips LJ that it is not appropriate to interpret para. 6 (2) of the order by focusing exclusively on the precise words used. As in any other construction exercise, it is necessary to read the words in question in the context of the circumstances known to the parties and the evident purpose of the order of which they form part: see the authorities to which he refers at para. 45 above. If I had reached the same conclusion as my Lords about what the overall purpose of the injunction must be taken to have been I might have found it possible – though not, I think, without some difficulty – to read the language of para. 6 (2) in the way that they do. However, for the reasons which I explain below I would not accept their characterisation of the relevant purpose.

85. I accept that in broad terms the purpose the injunction was to undo, so far as possible, the Elite/Hummel Agreement. But the words "so far as possible" are crucial, particularly since the language of para. 6, as proposed by SDIR and accepted by the Judge, is borrowed from an order made by Teare J many months previously, in different circumstances and in respect of a different agreement. It was in fact recognised by both parties in July 2019 that as a result of events since the breach the Elite/Hummel Agreement could only be "undone" in part. It could obviously not be undone as regards the 2018/2019 season, which was effectively over by the time of the hearing before the

Judge in mid-April 2019. But nor could it be wholly undone as regards the 2019/2020 season. As at the date of the hearing, although the start of that season was still about three months away, designs for the player kit for 2019/2020 had already been made under the Elite/Hummel Agreement, and it was recognised by both parties that it was too late for any alternative to be designed and supplied. SDIR accordingly agreed in the course of the hearing that the players would be permitted to wear that kit during the 2019/2020 season, and a recital to that effect was incorporated in the draft order which it submitted to the Court. That meant, although the recital does not refer to this, that the replica kits sold to fans during 2019/2020 would likewise be manufactured and supplied by Elite: that is clearly acknowledged in Mr Hossain's submissions at the time, quoted at para. 87 below (see para. [4]). By the time that the reserved judgment was handed down, three months later, replica kit in the 2019/2020 design had already been manufactured and gone on sale to fans.

86. It was arguable that in that case the essential damage had been done in relation to 2019/2020 as well as 2018/2019. That was how the Judge initially understood SDIR's position, and he recorded in the draft of the reserved judgment circulated to counsel that Mr Hossain had acknowledged that in relation to both 2018/2019 and 2019/2020 SDIR was "reduced to a damages claim" and that any injunctive relief would only relate to the 2020/2021 season. However, Mr Hossain pointed out to the Judge that that was a misunderstanding of SDIR's position; and at the hand-down hearing he allowed the point to be further argued. SDIR pressed for an injunction in the same terms as para. 6 of the eventual order. Rangers submitted a draft order that introduced certain qualifications, described in the hearing as "carve-outs", which allowed them to continue to perform at least some further obligations to Elite as regards the 2019/2020 season. We have a transcript of both parties' submissions, to which I think it is useful to refer.

87. Mr Hossain made his submissions first. After referring to the history, he said (I have added paragraph numbers for ease of reference and italicised some key parts):

> "[1] … We accept that the kit has been designed. There is no restriction on Elite going now to manufacture and supply the kit. The restriction – and we are told that sale dates, launch dates have already been agreed – so with the carve-out that the players are entitled to wear the kit there is nothing there to prevent Elite from going on to sell the kit. Indeed, they are selling the kit, and in particular the very next day after the hearing, Elite opened the Belfast store, so they are continuing to sell the kit and they will be able to continue selling the kit, notwithstanding the injunctive relief that we seek in relation to 2019-2020.
>
> [2] *The two aspects that are important and the reason why these injunctions still have bite in relation to that season is that, first, there are provisions to do with delivery of sponsorship.* We say that Rangers is not entitled to deliver the various items of sponsorship in respect of the 2019-2020 season. *Secondly, although they have not said what it is that they want to do, they have* sought to include additional carve-outs. So *they seek an additional carve-out that would allow them to deliver sponsorship, which is contrary to the order that we were seeking for 2019-2020.* … [Mr Hossain then refers to a particular proposed carve-out] … We say in relation to that, that although that does not prevent Elite from manufacturing and selling the kit for 2019-2020, Rangers is

> not entitled, because it would be a breach of the agreement, to deliver the sponsorship under the Elite/Hummel Agreement. So we seek to have that restraint.
>
> …
>
> [3] What [Rangers] seek is a carve-out that would allow them to perform or assist Elite/Hummel to perform the manufacture and supply of a replica kit or the leisure wear and so on for 2019-20. They have not said specifically what it is that they want to do, but we infer that what they want to do is effectively to be released entirely from the prohibition on them performing the Elite/Hummel Agreement, or assisting Elite/Hummel to perform by being allowed to promote for the 2019-20 season the sales by Elite. They have not indicated what it is that they want to do, but again that runs completely counter to *the general prohibition on taking those further steps to promote, market, advertise, or assist Elite in making those sales*. The distinction, my Lord, is we accept that -- we are not restraining Elite from manufacturing and selling the kit, the damage has already been done, Rangers has already taken the steps necessary for that to happen. But we do say that *Rangers should not be allowed to take further steps in breach of the agreement, either to promote or assist Elite to make those sales in order to increase the volume of sales and the profits that it may seek to make from that, or to deliver the prospective sponsorship that it promised to give to Hummel.*
>
> [4] What that does, my Lord, is the point that was argued at trial against me was that the effect of the prohibition that we were seeking in 2019-20 would be to prevent the players from wearing the kit, and if the players were not wearing the kit nobody would want to buy the replicas of it. It was in response to that point that we agreed, as a carve-out from the injunctive relief that we were seeking for 2019-20, that they would be entitled to wear the kit. Therefore, the suggestion that nobody is going to want to buy the kit is no longer a suggestion that can be made because the kit has been worn by the players and sold by Elite. Where we do draw the line is in respect of those prospective acts in further breach of the Elite/Hummel Agreement by Rangers, where we seek to restrain them from doing that."

I have quoted most of the relevant passage in full because it was not easy to edit, but the essential point is that SDIR recognised that Elite would be supplying the replica kit for the 2019/2020 season but that what concerned it was that Rangers should not take part in any sponsorship or sales activities in that regard.

88. The main point made by Mr Ryan, who was junior counsel for Rangers, was, as I have indicated, that now that Elite had manufactured the 2019/2020 kit the substantial harm was done as regards that season, and injunctive relief was only appropriate for 2020/2021. As regards sponsorship and promotional activities, he submitted that these were designed to increase sales of the replica kit, which could not harm SDIR and might indeed assist them since the additional revenue would be available to help Rangers meet the damages claim. It is clear from his submissions that, as one would expect, Elite had

already manufactured replica kit to meet anticipated demand, although he raised the possibility that it might be necessary for them to manufacture more later in the season.

89. Mr Hossain in his submissions in reply pointed out that Mr Ryan's assertions about the effect of sponsorship events were unsupported by evidence. He said:

> "There is no evidence that has been put forward, 'Well, here are the sales that we have been able to make since trial versus what we would have been expected to make' – no projections about what the difference might be of being able to have sponsorship and so on."

90. The Judge dealt with those submissions as follows:

> "5. Rangers dispute that I should give an injunction in [the terms sought] and seek certain carve-outs. They do so in circumstances where they contend that, as matters are now well advanced for the 2019-2020 [season] and as they assert SDIR would not be in a position to perform some of those functions which they seek to restrain in the terms of the injunctions which they seek, it would be unjust and cause damage to both Rangers and Elite and Hummel if an injunction in those terms was to be granted.
>
> 6. I disagree. In so far as it is possible to enforce the terms of the agreement by the grant of appropriate injunctive relief, it seems to me that I should do so provided that, and this is an important proviso, the continued supply of kit for the purchase by fans is not impeded for the 2019-2020 season. I have been assured by Mr Hossain for SDIR that this is not the intention of SDIR and that they are content that Elite continues to supply kit throughout the course of the season because there will be demand for it in circumstances where the players will be, or indeed as I understand it already are, wearing such kit. On the basis of that undertaking, I will grant an injunction in the form that SDIR have sought and I will not permit the carve-outs for which Rangers intends to be made [*sic*]."

91. We accordingly have a situation where it was clearly understood and intended at the time that the order was made that Rangers fans would throughout the 2019/2020 season be buying replica kit manufactured and supplied by Elite. Under the Elite/Hummel Agreement Rangers were entitled to payment of a fee and/or royalties ("royalties" for short) on those sales. The Judge had proceeded at para. 95 of his reserved judgment (quoted by Phillips LJ at para. 34 above) on the basis that those royalties would be payable by Elite: see his second sentence, referring to them as "due" and likely to be paid. SDIR did not suggest in the subsequent argument that it would be a breach of the order for Rangers to receive such payment, and Mr Ryan made it clear, without any demur from Mr Hossain, that they were expecting to do so: as appears from the submissions that I have quoted, his concern was about sponsorship and promotion activities.

92. Against that background I do not believe that it is right, in seeking to construe the injunction in the present case, to refer primarily to the general purpose of "undoing"

the Elite/Hummel Agreement. The crucial point is that it was recognised that that overall purpose could not be achieved as regards the supply of kit for the 2019/2020 season. Rather, the focus must be on what the Court must be taken to have intended in circumstances where, in that respect, Elite would be continuing to supply kit for a further period and would be *prima facie* liable under the Elite/Hummel Agreement to pay the appropriate royalties. I would add that we were told that at least some of the royalties were already due, since replica kit had apparently started to go on sale shortly after the hearing in April: to the extent that that is the case, we are concerned with consequences of Rangers' breach which had already occurred and were not merely prospective.

93. In my view the natural understanding in those circumstances would be that Rangers would be entitled not only to receive the royalties due but to take steps to enforce payment if they were not received. The way that the Judge put it at para. 10 of the judgment was that:

> "[On SDIR's case] Rangers was entitled to be paid by Elite provided that it did not ask to be paid or take any steps to ensure that it was paid. This is an unattractive distinction."

I agree, though I might have said "artificial" rather than "unattractive". A right to sue is the natural corollary of a right to be paid: that is so despite the fact that, as Phillips LJ says at para. 68, most parties to a contract pay what they owe without having to be sued. I can see nothing to suggest that it was part of the purpose of the injunction to preclude Rangers from taking advantage of that right. The position would be different if there were any evident commercial or other purpose in denying Rangers the right to enforce payment, but there is none. Its effect is purely punitive, which should not be the effect of an injunction any more than of an award of damages. I do not believe that the Court should be taken to have intended such a result; and, as I have said, on a natural reading of the language used it did not do so.

94. I have also considered carefully the concerns expressed by Phillips LJ at para. 66 of his judgment about the legitimacy of referring to the submissions which led to the making of the order, as I do at paras. 87-89 above (though the references are not in fact essential to my reasoning). I agree that it is not generally desirable to have to do this kind of forensic excavation: a well-drafted order should speak for itself. But I cannot think that it is objectionable in principle in a case where, as here, there is real doubt about the intended effect of the order. The relevant intention is of course that of the Court, rather than, as in the contractual context, that of the parties. The submissions made to the Court may shed light on that intention, or on the overall purpose of the order, to the extent that they establish the relevant factual background and what the issues were understood to be.

95. I should deal briefly with a further point which arose both below and before us, though I do not think it is central to the analysis. I respectfully agree with Phillips LJ (see para. 71 above) that the logic of SDIR's position is that it would be a breach of the injunction even for Rangers to invoice Elite for royalties due, or indeed to make any other form of demand. In his submissions before us Mr Hossain was rather reluctant to face up to that: his principal point was that the question did not arise, though he did suggest that the acts in question could be distinguished. It appears from a passage in the transcript

of the hearing which we were shown by Mr Shah that he may have been similarly coy before the Judge. That stance may reflect a recognition on his part that to accept that consequence would point up the artificiality of SDIR's construction; if so, I think it was realistic.

96. In summary, I can see nothing in the context or overall purpose of the injunction that supports a construction of para. 6 (2) under which Rangers are prohibited from suing Elite for any royalties due. On the contrary, they seem to me to support what I believe to be the natural meaning of the language of the order.

97. I am reinforced in that conclusion by three other considerations. First, although the Judge very properly approached the construction of the injunction objectively, I do not think that it is illegitimate to recognise the special advantage he had, as the person making the order, in assessing the context in which it was made. Secondly, it is clear from my summary of the submissions to the Judge on 19 July 2019 (see para. 87 above), that the reason why Mr Hossain submitted that "these injunctions still have bite in relation to [the 2019/2020] season" (see the beginning of para. [2]) had nothing to do with a submission that it would be wrong to allow Rangers to take steps to recover unpaid royalties: there is no sign that anyone had that question in mind at all. Of course, that is not fatal to SDIR's case: courts often have to construe the effect of general words in particular circumstances that no one contemplated at the time. But it is at least an important premise for the third reinforcing consideration, which is that the language of any injunction must be construed strictly.

98. My reasons for respectfully differing from the conclusion reached by my Lords will be sufficiently apparent from what I have said so far. But I should perhaps say that I do not think that it is a separate objection to Rangers' construction that it would entail involving another court (in fact, the Scottish courts) in enforcing a contract which was made in breach of an obligation to a third party: see para. 63. The fact is that it *was* made, and I do not think that it is objectionable for another court to enforce it between the parties except to the extent that Rangers have been enjoined from doing so – at which point the argument becomes circular.

99. Those reasons address SDIR's grounds (1), (3) and (4). As for ground (2), which contends that the Judge failed to take into account the fact that his construction would permit Rangers to seek specific performance of other obligations of Elite under the Elite/Hummel Agreement. The only example which Mr Hossain gave related to contributions which the Elite/Hummel Agreement required it to make as regards marketing. He acknowledged that (at least on the assumption that Scots law was the same as English) the Court would not in practice grant such an order since Rangers would be precluded by the order of the English court from performing its part of the bargain; but he said that the order must have been intended to preclude such an application in principle. But even if that were so it does not seem to me to advance the argument. The question as regards any particular obligation must be whether the purpose of the order was to procure (so far as possible given that it was not a party) that Elite should not do the thing in question. For the reasons given, I do not believe that to have been the purpose so far as regards payment in respect of Rangers' kit for the 2019/2020 season.