Neutral Citation Number: [2021] EWHC 103 (Comm)

Case No: CL-2018-000631

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice,
Rolls Building
Fetter Lane,
London, EC4A 1NL

Date: 27/01/2021

Before :

MR LIONEL PERSEY QC
(Sitting as a High Court Judge)

- -

Between :

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

- -
- -

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

Hearing date: 13 January 2021

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Approved Judgment

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Covid-19 Protocol: This judgment will handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10.30am on Wednesday 27 January 2021.

See: ADDENDUM

Lionel Persey QC :

Introduction

1. On 13 January 2021 I heard the CCMC in this matter. I now give my rulings upon those matters that remain in issue between the parties. These are disclosure, expert evidence and costs.

Disclosure

2. There are three principal disclosure issues and several secondary issues. I will deal with them in the order raised in argument. The parties agree that the applicable principles are to be found in the case of *Lonestar Communications Corp LLC v Kaye* [2020] EWHC 1890. These, in summary, are that if the issue is a key issue arising on the pleadings which must be decided by reference to contemporaneous documents and a party has undisclosed documents which are likely to be both relevant and important to fairly resolve the claim then they should be in the list of documents. If it does not meet those criteria, then they should not.

Disclosure Issue 13

3. This issue is concerned with causation, loss and damage and arises out of the counterfactuals that have been pleaded by SDIR. Put simply, the question is whether disclosure should be given in relation only to the interests of third parties in becoming Rangers' retail partner or whether such disclosure should extend to third party interests in acquiring any of the Offered Rights.

4. The starting point is SDIR's pleading. Paragraph 31A of the Re-Re-Amended Particulars of Claim ("**RRAmPOC**") refers to the matching of rights under the Elite/Hummel Agreement leading to the making of a further agreement. Paragraph 31B of the RRAmPOC goes on to provide that SDIR would have acquired those Offered Rights or parts thereof not covered by the further agreement. Rangers drew my attention to para.26(5) of the Agreed List of Issues and submitted that this shows that the key issue is concerned with parties offering to be Rangers' retail partner. That may well be so, but para.26(7) of the Agreed List does refer to the matching of a third party's offer and, in light of para.26(6), this refers to those Offered Rights not covered by the Elite/Hummel Agreement.

5. I am satisfied that SDIR's pleaded case is broad enough to extend to third party interests in acquiring any of the Offered Rights and is not limited in the way that Rangers submits. The documents sought by them are both relevant and important enough to be disclosed. I consider that SDIR's proposed amendments to Issue for Disclosure 13 should be accepted, and that Rangers' amendments should not be made.

Disclosure Issue 12

6. The wording of Disclosure Issue 12 is agreed. It is as follows:

> "*What did SDIR know and/or believe, when, regarding: (i) who the parties to the Elite/Hummel Agreement were; (ii) what the terms of the Elite/Hummel*

> *Agreement were; and/or (iii) Elite's involvement in Rangers' merchandising?"*

7. It is agreed that SDIR should give Model D disclosure in relation to this issue. Rangers, however, take the position that no disclosure needs to be given by them. They do so principally because they say that their assertion is based upon what SDIR knew at the time and not upon what Rangers knew or thought SDIR knew, and that the documents upon which they rely are a single phone call between SDIR, Lovell Sports and Elite and correspondence between SDIR and their solicitors. SDIR submit that documents showing that neither Rangers or Elite thought that SDIR knew that Elite was a party to the Elite/Hummel Agreement would be highly material to the question of whether the court should make an inference of knowledge from the documents that the recipients of those documents had not made for themselves at the time. I agree that such documents may well have some bearing upon the court's evaluation and assessment of the disclosure issue. Rangers must give Model D disclosure in respect of these documents.

Disclosure Issue 16

8. This issue concerns the date range for which disclosure should be given in relation to the impact of a supporter boycott on SDIR's revenues and profits. The parties are agreed that disclosure should be given for July 2018 onwards. Rangers submit that the documents disclosed should start in November 2014, that being the date when a previous supporter boycott started. SDIR disagree. First, they say that this precedes the date from which the court will be assessing damages. Secondly, they say that the documentation is not going to be helpful because of the very different circumstances in which the earlier boycott occurred. And, thirdly, they say that Rangers already has sufficient documentation in the shape of management accounts for the RRL Joint Venture. Rangers submits that it is entitled to discovery of the management accounts from November 2014 and that they are likely to provide at least some objective information to assess the effect of the fan boycott and to assist in determining the counterfactual of what effect a fan boycott would have had looking forward.

9. I consider Rangers' request to be justified in principle for the reasons that they have given. They accepted at the hearing that production of the management accounts should be sufficient and that they had some, but not all, of these accounts. They should now identify those accounts which are missing and SDIR should give disclosure of these.

The secondary disclosure issues

10. I now turn to deal briefly with the other disclosure issues.

    (1) The first issue is whether Mr Scott Steedman should be treated as a custodian for Disclosure Issues 1, 2, 3 and 4. These issues are concerned with Mr Blair's understanding and intentions. It is said that Mr Steedman, as Rangers' commercial director, was intimately involved with the rights that were being offered and granted by Rangers. SDIR's position is that he is an obvious custodian in a case

where fraud has been pleaded. I agree. I do not think it would be disproportionate for him to be a custodian, particularly in circumstances where he is an agreed custodian in respect of 8 other issues which cover the same date range and many of the search terms that are proposed for Disclosure Issues 1 to 4.

(2) The second issue relates to the end of the date range for which documents relevant to issues 10,11 and 14 are to be disclosed. Rangers' original stance was 30 September 2019 and SDIR's was for 31 July 2020. The parties are now agreed that the end date should be 7 February 2020. I need say no more about this point.

(3) The third set of issues is concerned with Disclosure Issue 13.

(a) The first of these is whether "replica" should be included as a keyword. This is, according to SDIR, a common shorthand for "replica kit". This is not, as I understand it, disputed by Rangers. Their main complaint is that the search term is too wide. They do not, however, give any evidence of other, irrelevant, returns that searching for "replica" alone would give. I consider that "replica" should be included as a keyword.

(b) The second and third issues under this head relate to the appropriate start date and the identity of the custodians. SDIR say the 21 June 2017 and that Mr Murray and Mr King should be custodians. Rangers say the 1 January 2018, and that Messrs King and Murray should not be custodians. As to the start date, I consider that 1 January 2018 is the correct date to take, this being the contractually agreed start date when Rangers were permitted to approach, solicit or tender for the Offered Rights. I do, however, consider that Messrs King and Murray should be included as custodians. They were board members and decisions were being put to the board concerning the third parties who were going to be contracted with.

(4) The fourth issue concerns Disclosure Issue 16 and whether Mr Murray should be a custodian. SDIR say that he should; he was a director of RRL, was a defendant to the derivative claim and was supporting the boycott on behalf of Rangers. I consider, notwithstanding Rangers' arguments to the contrary, that Mr Murray should be a custodian.

Expert Evidence

11. The parties have identified three expert disciplines. There is agreement as to the market experts and accountancy experts. I agree with the need for these and am content to approve the parties' proposed directions in respect of them.

12. There is, however, disagreement as to whether expert evidence of Scots law is appropriate. Rangers say that it is and SDIR say that it is not. Rangers' case is that the Elite/Hummel Agreement is governed by Scots law. SDIR agree that Scots law may be applicable but stress that no issues of Scots law emerge from the pleadings. Although Rangers sought to identify some issues in their submissions, I do not consider that they have done so. Unless and until clear issues of Scots law are on the face of the pleadings the court can and will proceed on the basis that English law is the same as Scots law. It is, therefore, not appropriate for me to order expert evidence of Scots law. I will, however, give Rangers some time to identify and plead what, if any, principles of Scots law they intend to rely upon. SDIR can then respond and, should any issues emerge from this the parties should then raise them before me. I order that Rangers have 21 days in which to identify and plead further particulars of their case as to Scots law and that SDIR then have 28 days in which to reply.

Costs Budgets

13. The issues largely relate to SDIR's budget although, as I shall consider, I am not minded to accept Rangers' figures even where these have been agreed by SDIR. I have well in mind the fact that the question for the court is to consider whether the budgeted costs fall within the range of reasonable and proportionate costs (see §12 of PD3E) and that "the ultimate goal of the cost budgeting exercise is for there to be a figure which is given for each phase of the proceedings" per Jacob J at §12 of *Yirenki v Ministry of Defence* [2018] EWHC 3102.

SDIR's budget

14. SDIR's budget has reasonable hourly rates. Rangers submit, however, that SDIR's hours are grossly excessive. They have adopted a policy of using their own estimated hours as a cap on SDIR's. SDIR points out that this gives rise to anomalies – for example the amount offered for solicitors' trial preparation is similar to that allowed for the Speedy Trial, notwithstanding that the trial will be three times as long as the Speedy Trial and involve more factual witnesses, expert evidence, more claims (including counterclaims). This point is well made. I am not, however, impressed with SDIR's reliance on the fact that their budgeted costs must be reasonable because they are of the same order as Rangers'. Rangers have budgeted on the basis that their solicitors' fees are in some cases more than double SDIR's equivalent rates. This does not make it reasonable for SDIR to work twice the number of hours as Rangers.

15. Turning to the individual phases of SDIR's budget:

    (1) *Statements of case.* I find the budgeted sum of £9,576 to be reasonable and approve it.

    (2) *Disclosure.* SDIR claim that they will spend 680 hours/£162,225 on solicitors' fees and £42,500 in counsel's fees and other disbursements on disclosure. I find this to be excessive. I allow £160,000 in total.

    (3) *Witness statements.* SDIR claim that they will spend 605 hours/£181,732.56 on solicitors' fees and £57,750 in counsel's fees and

disbursements (including two leaders and a junior) and other disbursements. This too is excessive in my view, even allowing for the input on privilege that counsel may have to give. I allow £175,000 in total.

(4) *Experts' Reports.* SDIR claim that they will spend 515 hours/£172,822.50 on solicitors' fees and £65,450 in counsel's fees on experts' reports. They also budget for £300,000 for experts' reports. The budget is made on the assumption that there will be three experts per party. I have presently allowed for two experts each. It seems to me that far too much time has been allowed for legal intervention with the experts. I allow £330,000 in total, assuming that there will be two experts.

(5) *PTR.* SDIR has offered to cap its solicitors' time at £26,500 (the original claim was for in excess of £43,000). I consider that £22,000 is a reasonable figure for its solicitors' time, to which must be added the agreed disbursements of £29,000. I therefore allow £51,000 in total.

(6) *Trial preparation.* SDIR claim that they will spend 690 hours/£185,197.50 on solicitors' fees for trial preparation. The figure of £455,000 has been agreed by the parties for counsel's fees. I consider that the sum of £125,000 is reasonable for solicitors' trial preparation and therefore allow £580,000 in total.

(7) *Trial.* SDIR claim that they will spend £299,400 (including refreshers for 1 leader and junior) at trial. I consider that the budget figure should be £250,000.

(8) *ADR.* SDIR claim that they will incur 170 hours/£60,855 in settlement/ADR. I think that the sum of £45,000 is reasonable and proportionate.

Rangers' budget

16. Only two of Rangers' budget items are disputed by SDIR. The remainder are agreed by SDIR but not by me. I consider that Allen & Overy's fees are not reasonable and proportionate when considered for the purposes of a costs budget for this particular case. I shall deal with the disputed items first.

(1) *Disclosure.* Rangers' budget for solicitors and outsourced document review specialists is 530 solicitor hours/£301,500, to which they add counsels' fees in the sum of £17,500. I consider that a reasonable and proportionate total sum to allow for disclosure is £250,000.

(2) *Trial.* Rangers' budget for solicitors' fees is 410 hours/£235,170. SDIR agree the hours but submit that the high charge-out rates make the total disproportionate and unreasonable. I agree. I consider that a reasonable and proportionate sum for solicitors' fees is £175,000. I allow a budget of £319,750 (including disbursements).

17. As for the remainder of Rangers' budget I am minded to allow the following: -

    (1) *Statements of case*. £18,930 as claimed.

    (2) *Witness statements.* £155,000 as solicitors' fees plus £27,000 disbursements, making £182,000 in total.

    (3) *Expert reports.* £300,000 in all, assuming 2 experts.

    (4) *PTR.* £38,500 in all.

    (5) *Trial preparation.* £450,000 in all.

    (6) *ADR.* £45,000 in all.

18. I appreciate that there was no discussion of my proposed reductions in Rangers' "agreed" budgets at the hearing. I therefore give Rangers until 4.00 pm on Thursday, 28 January 2021 to make such submissions in writing, if any, as they wish to in relation to these.

19. The parties should agree a draft form of order which reflects the findings that I have made.

ADDENDUM TO THE JUDGMENT
HANDED DOWN ON 27 JANUARY 2021

Lionel Persey QC

1. In the judgment handed down in this matter on 27 January 2021 I gave Rangers leave to make submissions in writing on the provisional findings as to THEIR budget made in paragraph 17 of the judgment. On 28 January 2021 Rangers reverted on one item only, that in relation to the estimated costs for the experts' report phase. They submitted that I should approve these costs in the sum of £330,000 and not the £300,000 that I had provisionally allowed. Their application is made on the basis that there is no good reason why it would be reasonable and proportionate for SDIR to spend £330,000 on expert reports but it would only be reasonable and proportionate for Rangers to spend £300,000. The focus of their submissions rests upon the sums allowed in respect of the experts themselves.

2. I do not consider it appropriate to increase Rangers' budget. I allowed the same amount for the experts' reports for each party, viz. £220,000 for two experts each. On top of this, in the case of Rangers I allowed 75 percent of the solicitors' hours claimed for 3 experts at 75% of the rates claimed (giving £51,865) and I allowed 75% of the counsel's fees claimed (giving £25,500). The reduction in hours fairly reflects the fact that there will be two experts as opposed to three. The reduction in hourly rates for the solicitors reflects the same reduction in rates that I made in relation to the other hourly rated items in Rangers' costs budget. No challenge has been made in respect of these reductions. I rounded the total of £297,365 (£220,000 + £51,865 + £25,500) up to £300,000. I see no basis for increasing Rangers' budget for the experts' reports.