

Neutral Citation Number: [2020] EWHC 136 (Comm)

Case No: CL-2018-000631

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 January 2020

Before:

Lionel Persey QC (sitting as a Judge of the High Court)

Between:

SDI RETAIL SERVICES LIMITED

Claimant

- and -

THE RANGERS FOOTBALL CLUB LIMITED

Defendant

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- **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: 15 January 2020

JUDGMENT/RULING

Lionel Persey QC:

Introduction

1. On 19 July 2019 I gave judgment (“**the Judgment**”) following the trial in this action between the Claimant, SDI Retail Services Limited (“**SDIR**”), and the Defendant, The Rangers Football Club Limited (“**Rangers**”). The Judgment, which sets out the relevant background, is to be found at *SDI Retail Services Ltd v Rangers Football Club Ltd* [2019] EWHC 1929 (Comm) and should be read together with the present Ruling. All definitions in the Judgment are adopted in this Ruling. I held in the Judgment that Rangers had breached the matching right provisions in the Retail

Agreement by entering into the Elite/Hummel Agreement. My Order contained a final injunction (“**the Injunction**”) in the following terms:-

“... **Injunctions**

... 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 ...

...

Liberty to apply

11. Either party has liberty to apply to vary the Order in the event of a material change of circumstances ...”

2. Under the Elite/Hummel Agreement Elite was required to pay an Annual Fee and Royalty Payments to Rangers. The base Annual Fee was £2 million for the purchase of 1-100,000 units and the Agreement made further provision for the payment of certain royalties based on global wholesale sales. It is Rangers’ position that at the time the Injunction was granted sums totalling £960,236.75 (including VAT) had not been paid by Elite. The Court was not informed of this at the time and nor was SDIR aware of it. Since the grant of the Injunction Rangers say that a further £1,470,000 (including VAT) has become due under the Elite/Hummel Agreement and has not been paid by Elite. Although Elite has paid some monies to Rangers the vast majority of the sums claimed are still said to be outstanding. I will assume for the purposes of this judgment that Elite does owe monies to Rangers under the Elite/Hummel Agreement.
3. Rangers now wish to recover the sums that it claims are due to it from Elite and asks the Court:
 - (1) To declare that the Injunction does not prohibit Rangers from seeking to recover sums said to be due to it under the Elite/Hummel Agreement, including by issuing, signetting or having signetted, serving or pursuing proceedings against Elite;
 - (2) Alternatively, to vary the Injunction so as to permit Rangers to seek to recover those sums from Elite.
4. This application is opposed by SDIR. SDIR argues:
 - (1) that the purpose of the Injunction was to undo the effect of the Elite/Hummel Agreement insofar as it was possible to do so given that Elite was not at that stage before the court; and
 - (2) that Rangers is prohibited by the Injunction from assisting Elite to perform the Elite/Hummel Agreement.

Discussion

5. The correct approach to the construction of a judicial order was described by Lord Sumption in *Sans Souci Ltd v VRL Services Ltd* [2012] UKPC 6, 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.”

6. I was also referred to the judgment of Flaux LJ (with whom Gross and Lewison LJ agreed) in *Pan Petroleum AJE Ltd v Yinka Folawiyo Petroleum Co Ltd* [2017] EWCA Civ 1525, in which he summarised the relevant principles at [41].

- (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. In particular, the order must be clear and unequivocal 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.

7. The parties are agreed that paragraph 95 of the Judgment is relevant as an aid to the construction of the Injunction. I set out paragraphs 94 and 95 below.

“... 94. 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 secure kit and other products; and
- (3) Rangers’ ability to function as a football club will be impaired.

95. 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 now 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 ...”

8. Both parties addressed me on the meaning and effect to be given to paragraph 95 of the Judgment in the context of the present application. The Judgment 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, given what I described as the limited effect of the injunctive relief sought in respect of the latter. There was no discussion at the time as to what would happen if Elite defaulted on its obligations. Is the effect of the Injunction such that Rangers is prevented from seeking recovery from Elite in those circumstances? The unattractive consequence of that would be to permit Elite to breach with impunity its payment obligations to Rangers under the Elite/Hummel Agreement.

9. The argument at the hearing was largely focussed upon the meaning of “assist” in sub-paragraph (2) of the Injunction. 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 described as “assisting” the counterparty in the performance of a contract?
10. Mr Hossain QC for SDIR submits that seeking to compel Elite to comply with its obligations, or even the issuance of VAT invoices by SDIR to facilitate and encourage or promote the payment process, would amount to assistance that is prohibited by paragraph 2 of the Injunction. SDIR does not, however, contend that Rangers was not entitled to receive monies from Elite under the Elite/Hummel Agreement provided that it did so passively. In other words, 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. 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.
11. As Mr Shah QC submitted in argument, there is 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 latter, but not the former. 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 sums due from Elite to Rangers.
12. It follows from the above that Rangers will not be in breach of the Injunction should it seek (whether by court action or otherwise) to recover sums said to be due to it under the Elite/Hummel Agreement. It is, therefore, unnecessary for me to consider the parties’ interesting arguments as to whether the Injunction should be varied.
13. The parties should now agree a form of order which gives effect to this judgment/ruling.