



Neutral Citation Number: [2021] EWHC 3364 (Comm)

Case No: CL-2018-000631

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/12/2021

Before :

Peter MacDonald Eggers QC
(sitting as a Deputy Judge of the High Court)

Between :

SDI RETAIL SERVICES LTD
- and -
THE RANGERS FOOTBALL CLUB LTD

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

Hearing dates: 3rd December 2021

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
PETER MACDONALD EGGERS QC

SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

"Covid-19 Protocol: This judgment was 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 13 December 2021 at 10:00."

Peter MacDonald Eggers QC :

Introduction

1.

In this action, the Claimant (“SDIR”) and the Defendant (“Rangers”) entered into a Retail Operations, Distribution and IP Licence Agreement dated 21st June 2017 (“the Agreement”).

2.

SDIR applies for an order for disclosure of certain documents (“the Castore Documents”) pursuant to paragraph 18 of CPR Practice Direction 51U (“CPR PD51U”), which sets out the Business and Property Courts Disclosure Pilot. SDIR also submits that these documents are “known adverse documents” within the meaning of paragraph 2.8 of CPR PD51U and so are disclosable in any event pursuant to paragraphs 3.1(2) and 3.3 of CPR PD51U.

3.

In order to understand the grounds of SDIR’s application, the issues arising out of the Agreement and SDIR’s claim need to be considered.

Factual background and SDIR’s claim

4.

Under the Agreement, Rangers granted to SDIR certain rights, including: (a) the exclusive right to operate and manage the retail sale of “Branded Products”, “Replica Kit” and “Additional Products” at the Ibrox Stadium (including the Rangers Megastore) and on the Rangers Webstore; (b) the non-exclusive right to perform the “Permitted Activities” in relation to the Branded Products, Replica Kit and Additional Products; (c) the non-exclusive right to manufacture Branded Products; and (d) certain Ancillary Rights relating to SDIR’s designation as Official Retail Partner and Official Merchandise Supplier, branding and advertising, and Advertising Rights.

5.

Paragraph 5 of Schedule 3 to the Agreement provided for SDIR to have a matching right (“the Matching Right”) in respect of “Third Party Offers” received by Rangers. The Matching Right entitled SDIR to match any offer made by a third party for certain “Offered Rights” (namely, the right to operate and manage the Retail Operations, the right to perform the Permitted Activities in relation to the Branded Products and/or Additional Products, and/or the right to perform the Permitted Activities in relation to the Official Kit and/or Replica Kit), or to renew the Agreement where offers from third parties were not made, and thus to extend the duration of its rights.

6.

In October 2018 and in July 2019, Teare, J and Mr Lionel Persey QC (sitting as a Deputy Judge of the High Court) respectively held that Rangers breached the Matching Right in entering into three contracts without giving SDIR an opportunity to match. In particular, Rangers entered into an agreement dated 30th March 2018 with LBJ Sports Apparel Ltd trading as The Elite Group (“Elite”) and Hummel A/S (“Hummel”) (“the Elite/Hummel Agreement”), under which Elite and Hummel were granted the rights to manufacture and supply official and replica home, away and third playing kits for the 2018-2019, 2019-2020 and 2020-2021 Scottish football seasons. In September 2018, by two further agreements (“the September 2018 Agreements”), Rangers granted Elite: (i) the non-exclusive right to distribute, market, advertise, promote, offer for sale and/or sell products bearing any Rangers brands or Rangers related brands, replica kit of the official Rangers Football Club kit and Rangers branded products or products dealing with Rangers content; and (ii) further rights in relation to certain retail units.

7.

Rangers therefore did not give SDIR the opportunity to match the Elite/Hummel Agreement. The Court further held that SDIR would have matched the Elite/Hummel Agreement had it been given the opportunity which would have led to a further agreement between SDIR and Rangers for the 2018-2019, 2019-2020 and 2020-2021 seasons ("the E/H Further Agreement").

8.

It is SDIR's case that it would then have acquired those Offered Rights not covered by the E/H Further Agreement, so that it would have been Rangers' Official Retail Partner during the 2018-2019 and 2019-2020 football seasons. It is Rangers' case that a third party (Elite or another) would have sought to be Rangers' official retail partner, but Rangers makes no admission as to whether SDIR would have matched that third party's offer.

9.

At paragraphs 31A-31C of SDIR's Re-Re-Amended Particulars of Claim ("the Particulars of Claim"), it is pleaded by SDIR that:

(1)

Had Rangers provided SDIR, in or around March 2018, with a Notice of Offer in respect of the Offered Rights and connected commercial arrangements granted to Elite/Hummel under the Elite/Hummel Agreement, SDIR would have matched it, leading to a further agreement under paragraph 5.7 of Schedule 3 to the Agreement (the E/H Further Agreement). I understand that this means that SDIR would therefore have acquired rights to manufacture and wholesale the Rangers Replica Kit (amongst other things) for the 2018-2019, 2019-2020 and 2020-2021 seasons.

(2)

SDIR would then have acquired those Offered Rights (or parts thereof) not covered by the E/H Further Agreement.

(3)

Where Rangers did not enter into the Elite/Hummel Agreement, but entered into the E/H Further Agreement: (a) Elite would not have made the offer set out in the "4 June 2018 Purported Notice of Offer", (b) no other third party would have made an offer to be Rangers' retail partner; and (c) SDIR would then have renewed the Agreement in respect of those Offered Rights (or parts thereof) not covered by the E/H Further Agreement. Alternatively, SDIR would have matched the Elite offer (as in fact happened). SDIR maintains that this means that SDIR would also have continued to have rights of retail of Rangers Replica Kit and other Branded Products for the 2018-2019, 2019-2020 and 2020-2021 seasons, but Rangers disputes that this extends to the 2020-2021 season.

(4)

During the 2018-2019 and 2019-2020 football seasons, SDIR would have been Rangers' only retail partner, and would also have had rights under the E/H Further Agreement (paragraph 31C).

10.

Further, at paragraphs 32-32B of the Particulars of Claim, it is pleaded that:

(1)

SDIR's loss and damage includes: (a) lost profits from the sale of Replica Kit and Branded Products; (b) lost profits from the sale of other products that would have been sold to customers who, but for Rangers' breach of contract would have purchased Replica Kit and Branded Products; (c) loss of goodwill as Rangers' Official Retail Partner and Official Merchandise Supplier, as a result of the grant

of rights to Elite and other third parties to sell Replica Kit and/or Branded Products; and (d) loss of the payment SDIR would have received from the brand sponsor under the E/H Further Agreement or an E/H-Similar Agreement.

(2)

SDIR's damages in respect of the lost profits should be calculated as follows: (1) the starting point is that SDIR's revenues would have been at least as great as those made by Elite under the relevant agreement for the relevant season; (2) SDIR's revenues would have been greater than Elite's due to: (a) the retail expertise of the Sports Direct group, to which SDIR had access; and (b) the large number of Sports Direct shops in which SDIR could have stocked Replica Kit and Branded Products, and the reach of the Sports Direct webstore. This would have increased overall sales. Further, if the E/H Further Agreement or an E/H-Similar Agreement had been in place, SDIR would have been able to make a large proportion of its sales through Sports Direct shops and the Sports Direct webstore, and so obtain the retail revenues on those sales.

11.

Therefore, as to the quantum of SDIR's damages in respect of Rangers' breaches of the Agreement, SDIR's case is that:

(1)

In each of the 2018-2019, 2019-2020 and 2020-2021 seasons (ending on 30th June), SDIR would have had exclusive rights of manufacture and wholesale supply of Rangers Replica Kit and certain other branded clothing and accessories similar to that granted to Elite/Hummel for those seasons.

(2)

In the 2018-2019 and 2019-2020 seasons, SDIR would have been the exclusive operator of the Rangers Megastore and Webstore, and would have retailed Replica Kit and Branded Products. These rights also extend to the first month of the 2020-2021 season, because the renewed agreement would end on 31st July 2020 (and the football season commenced on 1st July 2020). This means that the 2020-2021 season's kit would have been launched prior to the 2020-2021 season commencing (from around May 2020) as is customary. SDIR would therefore, as manufacturer and supplier and retailer, have launched the 2020-2021 Replica Kit and made significant retail sales including at the Rangers Megastore and Webstore for approximately three months until 31st July 2020.

(3)

Throughout the remainder of the 2020-2021 season, SDIR would have been able to continue to retail Replica Kit and other Branded Products by virtue of its position as exclusive manufacturer and supplier for each of the 2018-2019, 2019-2020 and 2020-2021 seasons (ending on 30th June), by supplying itself with such products for sale through its bricks and mortar and online stores.

12.

According to SDIR, the assessment of its damages will require an analysis of the sales revenues and profits that SDIR would have received if it had benefited from the rights to manufacture, wholesale and retail Rangers' Replica Kit and other products that it contends it would have had but for Rangers' breaches and wrongs. SDIR submits that the primary source, and starting point, to inform what those hypothetical sales would have been, is the material showing the actual sales that have been made in the relevant periods, being the 2018-2019, 2019-2020 and 2020-2021 football seasons.

13.

Elite/Hummel had the relevant rights in 2018-2019 and in 2019-2020 seasons until termination of the Elite/Hummel Agreement in around February 2020.

14.

From around March 2020, J Carter Sporting Club Ltd (“Castore”) has held the relevant rights, including for the 2020-2021 season (and the current 2021-2022 season).

The Disclosure Application

15.

SDIR applies for specific disclosure of the Castore Documents, comprising:

(1)

The agreement(s) between Rangers and Castore relating to Rangers’ retail operations, and the distribution, advertising, marketing, promoting and/or sale of branded products and replica kit (“the Castore Agreement”).

(2)

The quarterly statements (along with any accompanying information) produced by Castore pursuant to the Castore Agreement (the “Castore Quarterly Statements”).

16.

The parties have agreed a List of Issues for Disclosure and a Disclosure Review Document, which was approved by the Court by paragraphs 6 and 7 of its order dated 16th February 2021, thereby making an order for Extended Disclosure.

17.

The hearing of the application has been expedited given that the documents, if disclosed, are said to be relevant for consideration by the parties’ experts, whose reports are to be served in February/ March 2022, before the trial fixed for June 2022.

18.

SDIR maintains that the Castore Documents are relevant to the assessment of its damages arising from Rangers’ breach of the Agreement in order to calculate the sales revenues and profits that SDIR would have received if it had benefited from the rights to manufacture, wholesale and retail the relevant products, but for Rangers’ breach of the Agreement. As SDIR did not benefit from those rights, this is therefore a counterfactual or hypothetical inquiry, and therefore, it is said, the actual sales revenues and profits generated for the relevant period need to be considered, in particular,

(1)

The Elite/Hummel sales reports for the period from 2018 to February 2020. Rangers accepts that, pursuant to its existing disclosure obligations, the Elite/Hummel sales reports are relevant and disclosable.

(2)

For the period from August 2020 to date, the Castore Quarterly Statements are also relevant (according to SDIR).

19.

SDIR seeks an order for disclosure of the Castore Documents pursuant to, paragraph 18.1 of CPR PD51U. Paragraphs 18.1 and 18.2 provide that:

“18.1 The court may at any stage make an order that varies an order for Extended Disclosure. This includes making an additional order for disclosure of specific documents or narrow classes of documents relating to a particular Issue for Disclosure.

18.2 The party applying for an order under paragraph 18.1 must satisfy the court that varying the original order for Extended Disclosure is necessary for the just disposal of the proceedings and is reasonable and proportionate (as defined in paragraph 6.4).”

20.

By paragraph 6.4 of CPR PD51U, it is provided that an order for Extended Disclosure must be reasonable and proportionate having regard to the overriding objective including the following factors: (1) the nature and complexity of the issues in the proceedings; (2) the importance of the case, including any non-monetary relief sought; (3) the likelihood of documents existing that will have probative value in supporting or undermining a party’s claim or defence; (4) the number of documents involved; (5) the ease and expense of searching for and retrieval of any particular document; (6) the financial position of each party; and (7) the need to ensure the case is dealt with expeditiously, fairly and at a proportionate cost.

21.

Paragraph 18 of CPR PD51U is expressed as a power to vary an order for Extended Disclosure. This means that insofar as an existing order for Extended Disclosure does not embrace the disclosure of a particular document or class of documents, the Court may make a further order for disclosure which encompasses such document or class of documents either by an express variation of the List of Issues for Disclosure, the applicable Extended Disclosure Model, the search parameters or, where relevant, the applicable requests for Model C Disclosure. However, the Court does not have to undertake such a process and it could, if it chooses, simply make an order for specific disclosure of a document or class of documents. Such an order for specific disclosure is expressly circumscribed by two factors: first, the disclosure ordered must be for a specific document (that is, an identified or identifiable or describable document) or a specific class of documents, but that class must be of a “narrow” ambit; second, the document must relate to a particular Issue for Disclosure. Therefore, the specific disclosure contemplated by the second sentence of paragraph 18.1 is perhaps not as wide as the Court’s power under CPR rule 31.12 (*Revenue and Customs Commissioners v IGE USA Investments Ltd*[\[2020\] EWHC 1716 \(Ch\)](#); *[2021] Bus LR 424*, para. 30-31), although any possible limitations might be circumvented by an express variation of an existing order for Extended Disclosure.

22.

There are no further restrictions on the Court’s power to make an order under paragraph 18.1 (*Vannin Capital PCC v Rbos Shareholders Action Group Ltd*[\[2019\] EWHC 1617 \(Ch\)](#), para. 8-10).

23.

The need for the Court’s power to vary existing Extended Disclosure orders arises because during the course of an action, a party or the parties may begin to appreciate that there are new factual issues or further documents bearing on already known factual issues, and the existing order for disclosure may not be adequate to ensure that the disclosure required for the just disposal of the proceedings is provided. This is recognised in the CPR PD51U at paragraph 7.7 and Appendix 2 (“Completing Section 1A of the DRD”), paragraphs 12-13.

24.

Subject to the above factors, the principal considerations in deciding whether an order should be made under paragraph 18.1 are:

(1)

Whether the document(s) in question are relevant to the issues for determination in the action. Paragraph 2.1 of CPR PD51U provides that “Disclosure is important in achieving the fair resolution of civil proceedings. It involves identifying and making available documents that are relevant to the issues in the proceedings”.

(2)

Whether the documents exist or existed and are or were within the control of the respondent party (Pipia v BGEO Group Ltd[2020] EWHC 402 (Comm); [2020] 1 WLR 2582, at para. 12-13). If the documents are or were not within the respondent’s control, no order for disclosure could be made or is likely to be made.

(3)

Whether the order would be necessary for the just disposal of the proceedings.

(4)

Whether such an order would be reasonable and proportionate having regard to the overriding objective.

25.

In the present case, there is no dispute between the parties that the Castore Documents exist and are in Rangers’ control.

26.

The principal issue between the parties is whether the Castore Documents are relevant.

27.

SDIR accepts that the Castore Documents are not within the scope of the existing order for Extended Disclosure and therefore an order is required under paragraph 18.1 of CPR PD51U. However, SDIR also submits that these documents are known adverse documents, and as such they are disclosable in any event.

28.

On 1st December 2021, Rangers through its solicitors Allen & Overy LLP offered to provide disclosure of a Wholesales Report and a Megastore Report as an alternative to disclosure of the Castore Documents.

The parties’ submissions

29.

Mr Sa’ad Hossain QC, on behalf of SDIR, submitted that:

(1)

SDIR’s case is that the starting point for a consideration of the sales SDIR would have made is the sales Elite/Hummel in fact made during the 2018-2019 and 2019-2020 seasons. It is accepted by Rangers that the agreements between Rangers and Elite/Hummel, and the sales reports of Elite/Hummel pursuant to those arrangements, are relevant for disclosure.

(2)

SDIR says that it would have achieved at least the same level of sales as Elite/Hummel. Elite/Hummel was a manufacturer, wholesale supplier and retailer of Replica Kit and retailer of other Rangers branded products: the Elite/Hummel Agreement covered manufacturing and wholesale supply, and the

September 2018 Agreements covered non-exclusive retail rights. SDIR would have been in a similar position. It is accepted that the actual Elite/Hummel position would not or would not necessarily be the same as the counterfactual scenario. There are differences in the rights and obligations acquired.

(3)

Therefore, the actual Elite/Hummel sales will be a valuable source of information for the experts to consider what the counterfactual sales are likely to have been, making appropriate adjustments for the contractual and commercial differences.

(4)

The same considerations apply to the Castore Documents. Castore has been the exclusive manufacturer and wholesale supplier of Rangers Replica Kit and clothing Branded Products for the 2020-2021 season. It has also exclusively operated the Rangers Megastore and an official online store, where it has retailed Replica Kit and other Branded Products and acted as wholesaler and supplier of Replica Kit and clothing Branded Products to retailers (including Sports Direct). Castore's agreement is of the same or similar kind common to both Elite/Hummel's position and to SDIR's counterfactual scenario.

(5)

Castore's sales revenues are the primary source of actual data from which the level of SDIR's counterfactual sales in the 2020-2021 season, and sales made in the 2019-2020 season that relate to the launch of the 2020-2021 season's kit, can be analysed. It is therefore invaluable and irreplaceable to have sales figures that reflect the particular season in respect of which damages are to be quantified.

(6)

Castore's sales revenues will also be an important comparable for the earlier 2018-2019 and 2019-2020 seasons. This is because the Elite/Hummel sales data for those seasons is affected by the inhibiting influence of the injunctions which had been ordered by the Court in respect of the Elite/Hummel Agreement and the September 2018 Agreements during those seasons. After Rangers contracted with Castore in around March 2020 and Castore commenced in its role in August 2020, Replica Kit and other products have been sold without injunctive restraint, and those sales will therefore provide the best (or amongst the best) guidance as to sales in the counterfactual world where SDIR had entered into similar arrangements that were similarly capable of being performed without restraint.

(7)

For similar reasons, those Castore Quarterly Statements that already exist in respect of the current 2021-2022 season will also be an important comparable for all previous seasons.

(8)

As with Elite/Hummel, also for Castore, there are some differences in the contractual and commercial arrangements.

(9)

As far as the Castore Agreement is concerned, SDIR already knows, in broad terms, what the commercial terms are or should be of the Castore Agreement, since Castore's Third Party Offer was communicated to SDIR before the Castore Agreement was entered into, as required by the Matching Right. However, Rangers refuses to disclose the Castore Agreement itself, although it says that the key terms are the same. Disclosure of the Castore Agreement is required in order to avoid the risk of

the experts making an assessment on the basis of incomplete information (i.e. on the basis only of the Castore Third Party Offer).

(10)

The Castore Documents are not just relevant, they are likely to be central to any assessment of damages and therefore are necessary for the just disposal of the proceedings. It is reasonable and proportionate to order their disclosure. Any disclosure order would be in respect of a narrow class of documents: one agreement and five Quarterly Statements for each of the three Offered Rights (with any information or documents accompanying them).

(11)

The Castore Documents fall within the existing List of Issues for Disclosure, in particular Issues 14, 15 and 17.

(a)

Issue 14 states “(a) What were Elite’s revenues from sales of Replica Kit and Branded Products under the relevant agreement(s) for the relevant season(s)? (b) What sales were made by Elite or others, and at what prices, on a wholesale basis? (c) What sales were made by Elite or others, and at what prices, on a retail basis?”. Annex A to the Disclosure Review Documents identifies the date range as from 31st March 2018 to 7th February 2020 (in respect of Rangers’ search for Issue 14). Because of this limited date range, the Castore Documents were not responsive to the search parameters, but no search is required – the documents are already known to exist, are in the possession of Rangers, and they are readily collected and disclosed at minimal expense.

(b)

Issue 15 states “What were SDIR’s historic revenues and profits in selling Replica Kit and/or Rangers Branded Products the 2017/2018 season, and what would its revenues have been had it entered into the E/H Further Agreement and/or the E/H-Similar Agreement? ...”.

(c)

Issue 17 states “What payment, if any, would SDIR have received from the brand sponsor?”.

(12)

For that reason, the Castore Documents would comprise “known adverse documents”, and thus be disclosable under the existing order. As above, the documents are plainly “known” to Rangers. They are also - so far as SDIR can tell - adverse since Rangers has been reporting substantially increased revenues through the arrangements with Castore. Rangers may take a different view of relevance, but if the Court considers, as submitted, that the documents are relevant, then it follows that they are disclosable even without variation under CPR PD 51U, paragraph 18.1.

30.

Mr Akhil Shah QC (who appeared with Mr Max Kasriel), on behalf of Rangers, submitted that:

(1)

The Castore Documents are not relevant to the pleaded issues in this case:

(a)

Paragraphs 32-32B of the Particulars of Claim, setting out SDIR’s case as to quantum, make no mention of Rangers’ agreement with Castore. Rather, they expressly refer only to the revenues made by Elite as being the starting point for assessing the revenues that would have been made by SDIR under the E/H Further Agreement. That is despite the fact that, prior to the Particulars of Claim

(which were served on 24th November 2020), SDIR: (i) must have known that the Elite/Hummel Agreement would not be performed for the 2020-2021 season and had been or would be terminated, given the terms of the “Undoing Injunction”; (ii) actually negotiated with Rangers about the possibility of SDIR performing the role of manufacturer and supplier for the 2020-2021 Scottish football season on the terms of the Elite/Hummel Agreement; (iii) had seen the Third Party Offer made by Castore; (iv) was aware of the fact that Rangers had entered into an agreement with Castore in respect of the 2020-2021 football season; and (v) had contacted Castore regarding the purchase of Rangers’ replica kit for the 2020-2021 season. These considerations are inconsistent with the assertion in the first witness statement of Mr Benjamin Mark dated 10th November 2021, in support of SDIR’s application, at paragraph 37, that “at the relevant time of pleading, Elite was the only third party that it was understood actually held, or would hold, relevant rights in the seasons for which SDIR claims damages”. In answer to this, Mr Hossain QC contends that the amendment to the pleading was in fact made at an earlier time than the last round of amendments in November 2020.

(b)

That SDIR should have chosen to plead its case solely by reference to the revenues made by Elite under the Elite/Hummel Agreement makes sense in light of the fact that the Court found that SDIR would have matched the rights offered to Elite (and Hummel) under the Elite/Hummel Agreement and would have enjoyed rights equivalent to those rights for the 2020-2021 season. There is no basis to suggest that SDIR would have enjoyed rights equivalent to those enjoyed by Castore for that season - SDIR was offered the opportunity to match those rights and declined to do so.

(2)

Further, the Castore Quarterly Statements are not of any general significance to the dispute in that: (a) they relate to sales made by Castore not only in respect of the 2020-2021 season, but also the 2021-2022 season; the 2021-2022 season sales are completely irrelevant to SDIR’s pleaded claim which relates only to the 2018-2019, 2019-2020 and 2020-2021 seasons; (b) unlike the Elite/Hummel Agreement which forms the basis of the relevant counterfactual inquiry, the Castore Agreement is a hybrid manufacturing and retail agreement and SDIR would not have held equivalent rights to Castore in respect of the 2020-2021 season, because it would only have held manufacturing and wholesale rights, which means that the sales recorded in the Castore Quarterly Statements are not a relevant point of comparison; (c) SDIR’s assertion that it would itself have been running a “hybrid” operation (as manufacturer, wholesaler and retailer) for the relevant seasons and would have in any event retained a retail presence for the 2020-2021 season is nothing to the point, because the Castore Agreement came into effect too late for SDIR’s purposes in August 2020; and (d) sales figures for Castore in the 2020-2021 and 2021-2022 seasons will not be relevant comparators in respect of different (earlier) seasons and any suggestion to the contrary is fanciful, as sales of replica kit plainly fluctuate over time depending on a multitude of considerations, including on-field performance and wider macroeconomic circumstances.

(3)

As well as being unnecessary, disclosure of the Castore Quarterly Statements will complicate and add cost to the experts’ stage of the litigation (for which no allowance has been made in the parties’ costs budgets). Since, as Rangers contends, Castore’s rights were considerably broader than those rights SDIR claims it would have had in the 2020-2021 season, if Castore’s sales information is disclosed in these proceedings it is likely that the parties’ experts would have to undertake additional and potentially complicated (i.e. costly) analysis in order to determine what elements of Castore’s sales in the 2020-2021 season relate to rights that SDIR alleges it would have had in that season. The work of

the experts becomes even more complicated and convoluted. Mr Hossain QC on behalf of SDIR took issue with this submission.

(4)

In an effort to avoid the need for this hearing, and without prejudice to its position that the Castore Quarterly Statements are irrelevant to the pleaded issues, Rangers offered to provide the Wholesales Report and the Megastore Report. This offer was made by Rangers' solicitors on 1st December 2021. The Wholesales Report sets out the sums received by Castore and the number of items sold in respect of the manufacture and wholesale supply of (a) the replica Rangers kit, (b) the replica Rangers training wear, and (c) Rangers branded leisurewear, clothing and wearable accessories, in each case in respect of the 2020-2021 Scottish football season and excluding items which were not covered by the Elite/Hummel Agreement. Where Castore was the ultimate retailer of items, the figures in the Wholesales Report include: (a) the number of items sold; and (b) the payment Castore would have received for the wholesale supply of those items as if they had been sold by Castore as supplier to a third party retailer. Thus, the Wholesales Report covers the sales that would have been achieved by Castore if it had only the rights enjoyed by Elite under the Elite/Hummel Agreement (and thus forms the basis for comparison which SDIR claims is relevant when considering the quantum of its claims).

(5)

As to the Castore Agreement, this does not record any sales information and so cannot be said to provide any meaningful information which will assist the Court in determining the quantum of SDIR's claims. The argument that the Castore Agreement is relevant to understanding the Castore Quarterly Statements and any adjustments that will need to be made in using the sales information from the Castore Quarterly Statements in the assessment of SDIR's damages is nebulous. The relevant sales information (if it is relevant, which is denied) is contained in the statements, not the agreement. To the extent that the Court will need to understand the key terms of the Castore Agreement in order to make sense of the figures, they are contained in the Castore Third Party Offer which has already been disclosed.

(6)

There is no basis to suggest that the Castore Documents fall within the scope of the Court's disclosure order made. The date range for Rangers' search for each issue is clearly set out in Annex A to the Disclosure Review Document; save for Issue 16 (which is immaterial to this application), the latest date for disclosure under any issue is 7th February 2020. It follows that none of the Castore Documents fall within the scope of the order. The earliest of the Castore Documents being the Castore Agreement which is dated 30th April 2020. Mr Shah QC also referred to Issue for Disclosure 13 which states "In relation to the various pleaded counterfactuals, what agreements would Rangers have reached (with SDIR or third parties) in relation to Offered Rights (as defined in the Agreement and the Further Agreement)?" whose date range was from 1st January 2018 to 19th May 2019 (and which I note is the same date range as that for Issue 17).

(7)

The Castore Documents are not known adverse documents. They are not adverse to Rangers' case. Indeed, they are not relevant to the pleaded issues at all. Alternatively, if they are adverse, that is not known to Rangers, which believed at all material times (and continues to believe) that the Castore Documents are not relevant to the pleaded issues. Accordingly, they do not meet the definition of "known adverse documents" in CPR PD51U, paragraph 2.8.

Relevance

31.

Whether or not the Castore Documents are relevant for the purposes of the making of an order under paragraph 18 of CPR PD51U is a matter for consideration of the issues in the action as crystallised by the parties' statements of case. The Issues for Disclosure, whilst not immaterial, are not determinative, because the order to be made is one which seeks to vary the existing order for Extended Disclosure. However, if the order is for specific disclosure (as contemplated by the second sentence of paragraph 18.1) it must relate to an Issue for Disclosure.

32.

In my judgment, the Castore Documents are relevant insofar as they concern the 2020-2021 season and so are documents which would, subject to issues of reasonableness and proportionality, justify the making of an order under paragraph 18, for the following reasons. I shall continue to refer to the Castore Documents generally, but I have concluded that the Quarterly Statement for the 2021-2022 season is not relevant or not sufficiently relevant for the purposes of disclosure and so my continued reference to the Castore Documents should be understood as not including the single Quarterly Statement for the 2021-2022 season as sought by SDIR.

33.

First, the Castore Documents are relevant insofar as they are a comparator to the sales and revenue which would have been generated by SDIR as the manufacturer, wholesaler and/or retailer of the relevant Rangers products. Such documents would reveal what sales and revenue could or might have been achieved during the period from August 2020 to the end of the 2020-2021 season, although allowances would have to be made for the fact that SDIR and Castore are different companies with different manners of approach to manufacture and sale of Rangers products and each may have had different commercial demands and opportunities. Accordingly, the finding that such documents are relevant for the purposes of disclosure is not to suggest that such sales data will offer a perfect or even a satisfactory comparison. That is a matter for determination at trial. Indeed, Rangers may well contend at trial, and would be free to so contend, that any basis of comparison is flawed or misplaced. Nevertheless, the Castore Documents are relevant to the counterfactual inquiry underlying SDIR's case as to the quantification of its damages.

34.

Second, the data relating to the sales and revenue generated by Elite and Hummel up to February 2020 are also relevant but for a different time period. The Castore Documents provide potentially significant information relating to sales and revenue during a different period of time. Of course, such data will have to be considered having regard to the different roles which SDIR contends it would have had during different periods of time, whether as manufacturer and wholesaler or as retailer, whether as an official retailer and partner of Rangers or otherwise. The data also offer a potential source of comparison to the sales and revenue which SDIR would have generated during the 2020-2021 season and during the launch window in the last quarter of the 2019-2020 season. The data also offer a point of comparison for earlier periods of time, although I am less convinced about their relevance in respect of the 2018-2019 season.

35.

Third, the fact that there is no reference to Castore in SDIR's Particulars of Claim, at paragraphs 31A-C or 32-32B, is not to my mind determinative of relevance. Unlike the Elite/Hummel arrangements, there is no claim that there was a breach of the Agreement by reason of any Matching Right relating to Castore. Indeed, the Third Party Offer by Castore was notified to SDIR, but SDIR elected not to match that offer. The Elite/Hummel arrangements did however give rise to a breach of the Agreement

and therefore a cause of action and so had to be pleaded. The Castore arrangements which do not themselves amount to a cause of action at the suit of SDIR are nonetheless relevant or potentially relevant to the calculation of the sales and revenue which SDIR might have generated had there been no breach of the Agreement.

36.

At one point, I was concerned that by paragraph 31C of the Particulars of Claim SDIR was limiting its claim to the 2018-2019 and 2019-2020 seasons, given that it is there pleaded that during those seasons, SDIR would have been Rangers' only retail partner, and would also have had rights under the E/H Further Agreement. However, I consider that is no more than a statement of fact as asserted by SDIR and it is not seeking to restrict its claim to these seasons. Indeed, the nature of the claim is reasonably clear in that it is based on the sales and revenue that would have been generated up to 31st July 2020 insofar as SDIR would have been the official retailer and partner of Rangers, but SDIR's alleged counterfactual revenue would have continued beyond 31st July 2020 into the 2020-2021 season as manufacturer and wholesaler and, as I understand the position, as a retailer but not as the official Rangers partner (for example, in respect of stock held by SDIR).

37.

That of course raises the question as to the relevance of the Castore Documents insofar as they concern Castore as the official retailer and partner of Rangers from 1st August 2020, whereas on its own case SDIR would have ceased to be such a retailer on 31st July 2020. The first answer to this given by Mr Hossain QC on behalf of SDIR is that SDIR would have launched the Rangers kit and products in May 2020 for the 2020-2021 season, whereas Castore in fact launched the Rangers kit and products in August 2020. Therefore, the launch sales and revenue data are, it is argued, directly relevant to the case being advanced by SDIR. I think that must be right at least on the basis of the case advanced by SDIR. Furthermore, the retail sales data after that period of launch might be said to be less relevant, but nevertheless it may well serve as a comparator given that there would be no comparable data between February 2020 (when the arrangements with Elite/Hummel terminated) and August 2020 (when the Castore arrangements commenced) and of course SDIR could also have generated non-official sales during 2020-2021. Further, Castore was also a manufacturer and wholesaler and SDIR's counterfactual role as manufacturer and wholesaler would have continued during this later period.

38.

I should repeat and emphasise that as Rangers contests the relevance of the Castore Documents to the quantification of SDIR's damages and this at least in part depends on the extent to which SDIR had "hybrid" rights as manufacturer/wholesaler and retailer for the relevant period, that is a matter for determination at trial and Rangers is not constrained in advancing such arguments and adducing evidence in support of such contentions at trial (at least insofar as any such matters have not already been adjudged by the Court).

39.

Fourth, I consider that the Castore Documents are relevant to the Issues for Disclosure, including Issues 13, 14 and 17, although they plainly lie outside the date range included in the Court's order for Extended Disclosure. In particular, Issue 14 refers to sales generated by Elite "or others", which is broad enough to encompass Castore.

40.

That brings me to the individual documents sought by way of disclosure. Given my conclusion above, it follows that the Castore Quarterly Statements for the 2020-2021 season (which I understand are four quarterly statements) are relevant. The Castore Quarterly Statement sought which relates to the 2021-2022 season must be for the first quarter of that season. I am not convinced that it will be relevant to the same degree as the Castore Quarterly Statements for the 2020-2021 season, not least because SDIR's counterfactual inquiry relates principally to the 2018-2019, 2019-2020 and 2020-2021 seasons, not the 2021-2022 season. Further, it will provide a glimpse of only one quarter of that season. Although I can see that the single Quarterly Statement for the 2021-2022 season might offer some evidence for consideration by the parties' experts in calculating SDIR's damages, in my judgment, it resides on the borderlands of relevance, but I think for the purposes of this application on the wrong side such that its disclosure could not be said to be necessary for the just disposal of these proceedings.

41.

I include within the reference to the Castore Quarterly Statements the accompanying information, which I address below.

42.

As to the Castore Agreement, in my judgment, this is a relevant document because it identifies the basis on which Castore is acting as manufacturer, wholesaler and retailer and so will explain the terms on which Castore operated and generated sales and revenue. I understand that Rangers states that the key terms of the Castore Agreement are those identified in the Third Party Offer communicated to SDIR. That may well be the case, but it seems to me that the terms on which Castore generated sales and revenue are relevant for the purposes of disclosure and these are primarily to be found in the Castore Agreement rather than in any derivative or secondary document such as the Third Party Offer.

Reasonable and proportionate and Rangers' offer of 1st December 2021

43.

SDIR applies for an order for disclosure of specific documents or a narrow class of documents which conforms with the requirements of paragraph 18.1 of CPR PD51U. The Castore Agreement is a specifically identified document, as are the Castore Quarterly Statements. The application also extends to documents containing information which accompanied the Castore Quarterly Statements. It is not entirely clear what this information encompasses.

44.

Mr Hossain QC on behalf of SDIR took me to a letter dated 11th March 2020 from Castore's solicitors (Mishcon de Reya LLP) which contained the offer made by Castore (and which Rangers states includes the key terms of the Castore Agreement). That letter stated that "Within 10 calendar days of the end of each quarter, the Offeror shall produce an accurate report, setting out all stock sold through the Retail Operations during that quarter, the prices at which such stock was sold, and the total gross receipts (excluding VAT) arising from such sales, and accompanied by such information as is reasonably required to allow Rangers to verify the accuracy of the report ... The accompanying information shall be obtained from EPOS till data or other data that Rangers can verify independently and Rangers shall have full rights of audit with regard to all information provided by the Offeror with regard to the calculation of the payments due to Rangers, including full rights of access to the Offeror's financial systems and data relating to the stock sold through the Retail Operations".

45.

Given that the disclosure sought relates to information actually accompanying the Castore Quarterly Statements, the relevant documents appear to fall within a narrow compass. There was no suggestion by Rangers at the hearing that there would be any difficulty in searching for, locating or reviewing these documents for the purposes of disclosure. Furthermore, there is no dispute that these documents exist and are in the control of Rangers.

46.

As far as these documents are concerned - namely the Castore Agreement, the Castore Quarterly Statements for the 2020-2021 season and the accompanying information - any order for disclosing the same would be, in my judgment, both reasonable and proportionate having regard to the nature and complexity of the proceedings, the ambit of the trial to take place in June 2022 and the inquiry into quantifying SDIR's damages by reference to the counterfactual scenario relied on by SDIR where it would have earned revenue as manufacturer, wholesaler and retailer inter alia for the 2020-2021 season and for the launch window during the last quarter of the 2019-2020 window, and the probative value of the information contained in the Castore Documents. There is no reason to suppose that the disclosure of these documents will delay or impact the trial itself.

47.

The chief objection raised by Mr Shah QC on behalf of Rangers in this respect was that it would increase the task to be undertaken by the parties' experts and therefore add to the cost of the expert evidence. I understand this concern, but it is difficult to discern how much this would add to the experts' consideration of the evidence and their preparation of their reports. Given that there is no suggestion that this would imperil the trial itself, I do not consider that it would add excessively to the burden to be borne by the parties' experts and the parties themselves.

48.

I should also refer to the fact that Rangers offered on 1st December 2021 to provide, instead of the documents sought by SDIR, a Wholesales Report produced by Castore which would include information as to the sums received by Castore and the number of items sold in respect of the manufacture and wholesale supply of Rangers kit, leisurewear, clothing and accessories and, where Castore was the ultimate retailer of items, the figures in the Wholesales Report would include: (a) the number of items sold; and (b) the payment Castore would have received for the wholesale supply of those items as if they had been sold by Castore as supplier to a third party retailer. The Wholesales Report would not include: (a) retail receipts; or (b) wholesale sales of products not covered by the Elite/Hummel Agreement or products manufactured for the 2021-2022 season but which were sold in the later stages of the 2020-2021 season, because - on Rangers' case - in each case SDIR would not have held the relevant rights. Rangers has also offered to provide a specific report about the level of sales in the Megastore.

49.

This offer was made without prejudice to Rangers' objections to SDIR's disclosure application. Accordingly, I have not considered it in determining whether the documents sought by way of disclosure are relevant.

50.

However, as Mr Shah QC submitted that the Court should consider ordering disclosure by means of these offered reports instead of the Castore Documents, it seems to me I should consider whether the information contained in it would satisfy the inquiry which gave rise to the disclosure application.

51.

Mr Hossain QC on behalf of SDIR submitted that this offer is insufficient because:

(1)

The offer includes no information as to Castore's operation of Rangers' official online store.

(2)

No retail numbers or figures of any kind are offered to be provided. According to its case, SDIR would have held the relevant rights in respect of retail. In the counterfactual scenarios, SDIR would have benefited from rights to operate the Rangers Megastore and Webstore until 31st July 2020 and SDIR would have sold large amounts of 2020-2021 stock from the launch in May 2020 to 31st July 2020, and the Castore retail figures will be an important comparator for such sales.

(3)

In excluding retail numbers and figures, Rangers would be depriving the Court and the experts of information which would be the best (or amongst the best) comparator as to what SDIR would have sold when holding hybrid rights for 2018-2019 and 2019-2020 seasons.

(4)

There is no information as to the 2021-2022 season.

(5)

The offer does not include information about the prices at which the relevant sales shown in the Wholesales Report were made.

(6)

The offer is to provide a brand new and bespoke sales report from Castore.

(7)

The offer does not include the Castore Agreement.

52.

In my judgment, a newly produced report or reports, instead of documents which are contemporaneous to the 2019-2020 and 2020-2021 seasons, are less desirable for the purposes of disclosure. Moreover, the absence of some of the information identified by Mr Hossain QC (other than the absence of data for the 2021-2022 season) is sufficient to dissuade me that this is a reasonable and useful alternative to disclosure.

53.

In these circumstances, it would be reasonable and proportionate to accede to SDIR's disclosure application, with the exception of the single Quarterly Statement and accompanying information sought in relation to the 2021-2022 season. In my judgment, the disclosure of the Castore Documents (other than the Quarterly Statement and accompanying information for the 2021-2022 season) is necessary for the just disposal of the proceedings.

Known Adverse Documents

54.

Paragraph 3.1(2) of CPR PD51U requires a party to disclose known adverse documents. Mr Hossain QC on behalf of SDIR submitted that the Castore Documents were known adverse documents and so these documents were already disclosable, even absent any order which might be made under paragraph 18.

55.

Paragraph 2.8 defines “known adverse documents” to mean “documents (other than privileged documents) that a party is actually aware (without undertaking any further search for documents than it has already undertaken or caused to be undertaken) both (a) are or were previously within its control and (b) are adverse”. Paragraph 2.7 provides that “A document is “adverse” if it or any information it contains contradicts or materially damages the disclosing party’s contention or version of events on an issue in dispute, or supports the contention or version of events of an opposing party on an issue in dispute”.

56.

Whilst I accept that the Castore Documents are within Rangers’ control, there is no evidence that I have seen which suggests that Rangers is actually aware that the Castore Documents are adverse. Rangers’ case and submissions at the hearing of the disclosure application is that the Castore Documents are not of any meaningful assistance to the calculation of SDIR’s damages. Rangers may be right in this respect or not, but that is a matter for determination at trial. At this juncture, I see no basis on which it could be said that the Castore Documents are known adverse documents.

Conclusion

57.

For the reasons explained above, I allow SDIR’s application for an order under paragraph 18 of CPR PD51U for the disclosure of the Castore Agreement, as well as the Castore Quarterly Statements (to include documents containing the accompanying information within the meaning discussed above) for the 2020-2021 season, but not the Quarterly Statement for the first quarter of the 2021-2022 season.

58.

In my judgment, an order for specific disclosure within the meaning of the second sentence of paragraph 18.1 of CPR PD51U is justified given that the documents sought are specifically identified or fall within a narrow compass and relate to Issues for Disclosure, even if they do not fall within the date range within the Court’s order for Extended Disclosure dated 16th February 2021. Insofar as it is relevant, I would alternatively have been prepared to make an order varying the Court’s order for Extended Disclosure to embrace these documents.

59.

I am very grateful to both counsel for their helpful submissions.