



Neutral Citation Number: [2022] EWHC 50 (Comm)

Case No: CL-2020-000704

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: 26/01/2022

Before :

HIS HONOUR JUDGE PELLING QC
SITTING AS A JUDGE OF THE HIGH COURT

Between :

EUROPEAN PROFESSIONAL CLUB RUGBY

- and -

RDA TELEVISION LLP

Mr Paul Harris QC and Mr Brendan McGurk (instructed by **Onside Law**) for the **Claimant**

Mr Andrew Hunter QC (instructed by **Level Law**) for the **Defendant**

Hearing dates: 6 - 8 December 2021

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
HIS HONOUR JUDGE PELLING QC SITTING AS A JUDGE OF THE HIGH COURT

HH Judge Pelling QC:

Introduction

1.

This is the trial of a claim by the claimant (“EPCR”) for damages that it maintains it has suffered as a result of the wrongful repudiation by the defendant (“RDA”) of a Media Rights Agreement between the parties made on 11 May 2018 (“MRA”). RDA denies that it has wrongfully repudiated the MRA and maintains that it was entitled to terminate the agreement relying on a force majeure clause within it. It counterclaims for prepayments made for the period after the date when it purported to terminate the MRA and for an adjustment of the sum paid for the season during which it served notice of termination.

2.

The trial took place between 6-8 December 2021. I heard oral evidence adduced on behalf of the claimant from M Vincent Gaillard, who was EPCR’s Chief Executive Officer at all material times and M Francois Vergnol who was at all material times and remains EPCR’s Marketing and Commercial Director. I heard oral evidence adduced on behalf of RDA from Mr Richard Dennis, RDA’s principle shareholder and Chief Executive Officer.

Background

3.

EPCR is the governing body and organiser of the two premier club rugby union competitions in Europe (namely, the European Rugby Champions Cup and the European Rugby Challenge Cup (“the Competitions”). Under the MRA, EPCR licensed its media rights in the Competitions to RDA for the 2018-19, 2019-20, 2020-21, and 2021-22 seasons. The MRA was preceded by a tendering process. The structure of the Competitions was set out in the invitation to tender (“ITT”). The structure of the Champions Cup was described in the ITT as taking place:

“ ... over a total of nine (9) weekends during the domestic club rugby season and consists of:

a pool stage comprising five (5) pools of four (4) Clubs within which each Club will play each other Club within its pool twice, both at home and away;

four (4) quarter-finals between the eight (8) Clubs qualifying from the pool stage;

two (2) semi-finals between the four (4) winners of the quarter-finals; and

a final between the two (2) winners of the semi-finals.”

The ITT described the structure of the Challenge Cup as taking place:

“... over the same nine (9) weekends as the European Rugby Champions Cup during the domestic club rugby season and consists of:

a pool stage comprising five (5) pools of four (4) Clubs within which each Club will play each other Club within its pool twice, both at home and away;

four (4) quarter-finals between the eight (8) Clubs qualifying from the pool stage;

two (2) semi-finals between the four (4) winners of the quarter-finals; and

a final between the two (2) winners of the semi-finals.”

4.

RDA was the successful tenderer and the parties thereafter entered into the MRA. It was well understood by all parties that if RDA was the successful tenderer, then its business model would be to

sub-license the rights licensed to it by EPCR in relation to the Competitions to sub-licensees who would then broadcast the Competitions in defined territories and RDA would pay EPCR a minimum guaranteed payment and, if revenues exceeded the minimum guarantee, a proportion of such excess revenues received from its sub-licensees. What was to be paid was set out in Schedule 2 to the MRA, to which I refer in more detail below.

5.

In so far as is material, the Operative Terms of the MRA provide:

"1. Operation

1.1. By signing this Agreement, the parties hereby bring into legal force and effect this Agreement including these Operative Terms and the enclosed Schedules, which are hereby incorporated by reference in full into this Agreement and which shall come into force and be binding on the parties from the Commencement Date. For the avoidance of doubt, this Agreement shall have no legal effect unless and until signed by both parties.

1.2. This Agreement shall remain in force from the Commencement Date, unless terminated earlier in accordance with its terms, until the later of (i) 30 June 2022 and (ii) one month after the final Match of the Competitions in the 2021/22 Season (the "Term")...

1.3. If there is a conflict between any of the provisions of these Operative Terms of this Agreement and any of the Schedules, unless otherwise expressly specified, the following order of precedence shall apply:

1.3.1. Operative Terms;

1.3.2. Schedule 2 (Financial Terms); then

1.3.3. Schedule 6 (Standard Legal Terms); then

1.3.4. the remainder of the Schedules....

4. Licensed Rights

4.1. In consideration of the payments by Company of the Rights Fees, EPCR grants to the Company:

4.1.1. the exclusive right and licence (including the right to grant such rights to Sub-Licensees) to Transmit Relevant Programmes by any Delivery System;

4.1.2. the exclusive right and licence (including the right to grant such rights to Sub-Licensees) to sell Broadcast Sponsorship in relation to Relevant Programmes;

4.1.3. the non-exclusive right and licence (including the right to grant such rights to Sub-Licensees) to use and publish Player imagery provided by EPCR for that purpose (for the relevant Competition) on a collective basis only (at least three Players from any single Club and/or at least two Players from different Clubs), not in a manner which may imply any personal endorsement and subject to any guidelines issued from time to time by EPCR, in relation to the promotion of Relevant Programmes; and

4.1.4. the non-exclusive right and licence (including the right to grant such rights to Sub-Licensees) to use and publish, the Competition Titles and Competition Logos, the name and logo of the Clubs on a

collective basis only (for the relevant Competition) in relation to the promotion of Relevant Programmes (including the use of logos of competing Clubs to promote forthcoming fixtures), in each case in the Territory and during the Term only, and strictly in accordance with the terms and conditions set out in this Agreement (including the restrictions and obligations set out in Schedule 6).

5. Provision of Match Footage and Commentary

5.1. Subject to clause 5.2 of these Operative Terms, EPCR shall procure that Match Footage is produced and made available to the Company in accordance with the provisions of Schedule 4.

5.2. Company shall be responsible for the production of Match Footage in respect of Italian Matches (if any) to the extent and on the terms set out at clause 3 of Schedule 4.

5.3. Company shall also have the opportunity to attend Matches for the purposes of capturing Ancillary Footage and producing commentary, subject to the terms and conditions set out at clause 4 of Schedule 4.

5.4. Company shall have access to English language commentary of Matches subject to the terms and conditions set out at clause 5 of Schedule 4...

8. Standard Legal Terms

Schedule 6 sets out the standard legal terms that shall apply to this Agreement. Each party shall comply with their respective obligations, requirements and applicable conditions as set out therein.

9. Definitions

Schedule 7 sets out the rules of interpretation and definitions that shall apply to this Agreement....”

6.

The MRA contained a series of six schedules. Schedule 1 set out the Licensed Rights. It is not necessary to set out its provisions in any detail. In summary however the principal right licensed was the right “... to make Transmissions of each Available Live Match in whole on a Live basis”. The various other rights set out in Schedule 1 were ancillary to that.

7.

The Rights Fees payable by RDA to EPCR were set out in Schedule 2. By clause 1 of Schedule 2, a minimum sum of €15m was to be paid by RDA by instalments defined in clause 1.2 as being:

“(a) a prepayment of €750,000 (seven hundred and fifty thousand Euros) representing €187,500 (one hundred and eighty-seven thousand five hundred Euros) per Season, payable within eight (8) Business Days of the Commencement Date;

(b) in respect of the first Season €3,119,000 (three million one hundred and nineteen thousand Euros) payable in four equal instalments on or before 1st October 2018, 1st December 2019, 1st February 2019 and 1st May 2019;

(c) in respect of the second Season €3,368,000 (three million three hundred and sixty-eight thousand Euros) payable in four equal instalments on or before 1st October 2019, 1st December 2020, 1st February 2020 and 1st May 2020;

(d) in respect of the third Season €3,619,000 (three million six hundred and nineteen thousand Euros) payable in four equal instalments on or before 1st October 2020, 1st December 2021, 1st February 2021 and 1st May 2021; and

(e) in respect of the fourth Season €4,144,000 (four million one hundred and forty-four thousand Euros) payable in four equal instalments on or before 1st October 2021, 1st December 2022, 1st February 2022 and 1st May 2022;”

8.

Schedule 2 also contained provisions relevant to the sharing of any net revenues that exceeded the minimum payment referred to above. These provisions are not material to this dispute. In summary however, RDA only profited under the MRA if it generated Net Revenues as defined in excess of the minimum sum I refer to above and then only to the extent of 15% of the excess. Clause 1.2.2 of Schedule 2 set out how any additional revenue was to be accounted for and at sub paragraph (e), two relaxations on RDA’s obligation to pay additional revenue are set out but subject to a proviso that RDA “ ... shall not as a result be entitled to reduce the aggregate Rights Fees payable below the aggregate Minimum Guarantee payable at the applicable date pursuant to clause 1.2.1...” and by clause 1.7 it was agreed:

“In the event that either (a) an Available Live Match is (i) cancelled or (ii) abandoned before the 20th (twentieth) minute (and, in either case, not rescheduled during the Term); and/or (b) a whole or substantial part of any Available Live Match Feed is not delivered by or on behalf of EPCR in accordance with the terms of clause 1 of Schedule 4, in each case for any reason, including due to a Force Majeure Event, Company shall be entitled to a pro rata reduction of its Rights Fees for that Season to account for the unavailability of that Available Live Match Feed calculated as a proportion of the total number of Available Live Matches in that Season; provided that, such reduction shall only be payable to the extent that it has suffered actual, demonstrable losses of such value as a result.”

RDA was required to report on Net Revenues received quarterly throughout the Term of the MRA and by clauses 2.2 and 2.3 of Schedule 2 it was agreed that RDA would:

“2.2 ... keep and maintain throughout the Term and for a period of 2 years thereafter, proper records and books of account showing all income relating to the Net Revenues (but not Technical Costs). (i) Such records and books; and (ii) all Sub-Licence Agreements (redacted only to obscure any Technical Costs), shall be open during normal business hours to inspection and audit by EPCR (or its authorised representatives), who shall be entitled to take copies of or extracts from the same, a maximum of one occasion per calendar year (unless EPCR reasonably suspects that Company has made an underpayment of Rights Fees due hereunder)...

2.3 Further, in the event that EPCR reasonably suspects Company to be in breach of its obligations under clause 1.3 above, EPCR may appoint a third party auditor from an internationally-recognised accountancy firm, to inspect Company's books and records relating to its receipt of Technical Costs from Sub-Licensees concerning the Licensed Rights, a maximum of one occasion per calendar year. Company shall make such books and records open during normal business hours to inspection and audit by such auditor in the same manner as clause 2.2, provided that such auditor shall have executed Company's standard non-disclosure agreement in order to protect the confidentiality of such information and providing that such auditor shall not be entitled to disclose any information received from such audit or inspection to EPCR unless it has, in the auditor's reasonable opinion, discovered a breach of Company's obligations under clause 1.3. ... ”

9.

As provided by clause 8 of the main body of the MRA, the general terms of the MRA were set out in Schedule 6 to the MRA. As I have said already, RDA's business model involved and was understood by all relevant parties down to the date when the MRA was entered into by the parties to involve sub-licencing some or all of the Licensed Rights the subject of the MRA as the means by which it generated revenues. By clause 8.1 the sub-licences were to be in a format approved by EPCR and by clause 8.3, it was agreed that:

"Without prejudice to the rights and remedies of EPCR, and Company's express commitments set out elsewhere in this Agreement, Company shall use reasonable endeavours to:

8.3.1. enforce the terms of each Sub-Licence; and

8.3.2. in the event of any claim by a Sub-Licensee for a reduction or reimbursement of any licence fees payable under a Sub-Licence Agreement, seek to minimise such reduction or re-imbusement as far as reasonably possible (although EPCR ¹ acknowledges and agrees Company shall not be required to take any action that would prejudice Company's own position)."

10.

By clause 13 of Schedule 6, EPCR warranted and undertook to RDA that:

"13.1.2. EPCR will stage each Competition each Season during the Term and [will not change]¹ the format of the Competitions in such way as to materially dilute the quality of, or materially devalue, the Licensed Rights in relation to either Competition; ...

13.1.4. the Available Live Matches will be made available for Live Transmission each Season; ..."

The definition of the capitalised words and phrases used in these provisions are defined in Schedule 7 and is set out below.

11.

What was to happen in the event of a Force Majeure Event was set out in clause 26 of Schedule 6. What constituted such an event was defined in Schedule 7 as being:

"any circumstances beyond the reasonable control of a party affecting the performance by that party of its obligations under this Agreement including inclement weather conditions, serious fire, storm, flood, lightning, earthquake, explosion, acts of a public enemy, terrorism, war, military operations, insurrection, sabotage, civil disorder, epidemic, embargoes and labour disputes of a person other than such party".

By clause 26 of Schedule 6:

"26. Force Majeure

26.1. If either party is affected by a Force Majeure Event which prevents that party from performing its obligations under this Agreement, the affected party shall promptly notify the other of the nature and extent of the circumstances in question.

26.2. Subject only to clauses 1.7 of Schedule 2 and 26.3 of this Schedule 6, neither party will be liable neither for any delay in performing its obligations nor for failure to perform its obligations under this Agreement if and to the extent that the delay or failure is caused by a Force Majeure Event affecting its performance of the relevant obligations.

26.3. If either party is affected by a Force Majeure Event, it shall use all reasonable endeavours to mitigate and/or eliminate the consequences of such Force Majeure Event and inform the other party of the steps which it is taking and proposes to take to do so.

26.4. If the Force Majeure Event prevents, hinders or delays a party's performance of its obligations for a continuous period of more than 60 days, the party not affected by the Force Majeure Event may terminate this Agreement by giving 14 days' written notice to the affected party."

12.

The consequences of termination of the MRA were agreed as set out in clauses 15.2 and 15.3 of Schedule 6:

"15.2. On expiry or termination of this Agreement by either party for any reason, any and all rights granted to Company shall revert immediately to EPCR and all liabilities and obligations under this Agreement shall cease, with the exception that:

15.2.1. all clauses which are expressed to survive termination, including:

(a) clause 7 of the Operative Terms;

(b) clauses 1.2.2, 1.11 and 2 of Schedule 2;

(c) clauses 15.2, 16, 17, 18, 22, 27, 29 and 30 of this Schedule 6,

shall survive any termination of this Agreement;

15.2.2. Company shall execute any documents reasonably required by EPCR to effect the termination at EPCR's sole reasonable cost and expense; and

15.2.3. such termination shall be without prejudice to any other rights or remedies to which a party may be entitled under this Agreement or at law as a result of or in relation to any breach or other event which gives rise to such termination, and shall not affect any other accrued rights or liabilities of either party as at the date of termination, including Company's obligation to pay Rights Fees.

15.3. On early termination of this Agreement (for whatever reason) the parties agree that the Minimum Guarantee shall be deemed to accrue on a per-Season basis, in the proportions set out at clause 1.2.1 of Schedule 2, save that the prepayment set out at clause 1.2.1(a) shall be deemed to be apportioned on an equal basis between the four Seasons. In respect of each Season, the Minimum Guarantee shall be apportioned on a pro rata basis (with an equal amount apportioned to each day)."

13.

Clause 20 provided that the MRA could be varied only with the prior written consent of both parties; and by clause 21:

"The parties agree that:

21.1.1. this Agreement sets out the entire agreement between the parties (and supersedes any previous agreement between the parties) in relation to the subject matter of this Agreement;

21.1.2. no other term, express or implied, and no usage, custom or course of dealing forms part of or affects this Agreement; and

21.1.3. each party agrees and acknowledges that in entering into this Agreement it does not rely on any representation not expressly set out in this Agreement of any nature made to it by any person

(whether a party or not). Each party irrevocably waives all claims, rights and remedies in relation to any such representations made to it before entering into this Agreement.”

14.

Finally, by clause 22.5 of Schedule 6 it was agreed that the “ ... rights, powers and remedies conferred on the parties by this Agreement are cumulative and not exclusive of any rights, powers and remedies provided by law or otherwise.”

15.

Aside from the definition of a Force Majeure Event referred to earlier, the only other definitions that I need refer to at this stage are that of

i)

“Season”, which was defined by Schedule 7 to mean “ ... the seasons of the Competition set out in clause 3 of the Operative Terms, with each Season commencing on 1 July in the applicable year and ending on 20 June in the following calendar year ...”;

ii)

“Available Live Matches”, which was defined to mean:

“... each Season:

(a) in the European Rugby Champions Cup:

(i) all Matches from every round in the pool stages;

(ii) each quarter-final Match;

(iii) each semi-final Match; and

(iv) each final Match; and

(b) in the European Rugby Challenge Cup:

(i) at least one Match from every round of the pool stages;

(ii) each quarter-final Match;

(iii) each semi-final Match; and

(iv) each final Match;

iii)

“Live”, which was defined to mean “ ... a Transmission of Match Footage that is simultaneous with the playing of the Match in question; and

iv)

“Transmission”, which was defined to mean “ ... any transmission, broadcast or other exhibition or making available of audio-visual material”.

16.

It is not in dispute that pursuant to its obligations set out in clause 13.1.2 of Schedule 6, EPCR had scheduled the quarter finals of the 2019-2020 Competitions to take place on 3-5 April 2020; the semi-finals to take place on 30 April - 2 May 2020 and the finals to take place on 21-22 May 2020, in each case within the 2019/2020 season, which ended on 20 June 2020.

17.

On 11 March 2020 the World Health Organisation declared Covid-19 to be a global pandemic ("Pandemic"). It is common ground and in any event I find that the onset of the Pandemic was a Force Majeure Event as defined in Schedule 7 to the MRA. This is so since "epidemic" includes a pandemic in the context of use of that word in the definition of a Force Majeure Event and in any event because the Pandemic was a circumstance " ... beyond the reasonable control of a party affecting the performance by that party of its obligations under this Agreement ..."

18.

On 16 March 2020, EPCR announced that the quarter finals of the Competitions were being postponed by reason of the onset of the pandemic and by a letter dated 20 March 2020, EPCR wrote to RDA informing it of the suspension of the Competitions in these terms:

"Dear Richard,

Suspension of Quarter Finals, Semi-Finals and Finals of 19/20 Champions Cup and Challenge Cup ("the Tournaments")

I write in connection with the Media Rights Agreement between European Professional Club Rugby ("EPCR") and RDA Television LLP ("RDA"), ("the Agreement"), pursuant to which RDA is granted various rights in relation to the Tournaments.

Following the World Health Organisation's decision on 11 March 2020 to characterise COVID-19 as a pandemic, the board of EPCR has determined, in the interests of the safety of the players, fans and all stakeholders, that the Quarter-Finals, Semi-Finals and Finals of the Tournaments cannot take place on the scheduled dates. As you know, we have already publicly announced the postponement of the Quarter-Finals. We intend to announce, early next week, postponement of the Semi-Finals and the Finals. Given this, I wished to ensure you had advance notification of our decision before it is made public.

This decision is not one which has been taken lightly. It has been forced upon us by the rapidly evolving position in relation to COVID-19 and the measures being adopted by relevant nation states (specifically England, France and Ireland) to address the pandemic.

EPCR is exploring whether it is possible to reschedule the Quarter-Finals, Semi-Finals and Finals of the Tournaments and will do all it reasonably can to try and find alternative dates so that the fixtures can be played and the Tournaments completed. We will, of course, keep you updated on the steps we are taking and proposing to take."

None of the postponed matches were re-scheduled before the 2019-2020 season ended on 20 June 2020 because restrictions imposed as a result of the pandemic prevented the games taking place lawfully. They were eventually played in September and October 2020 after the start of the 2020-2021 season.

19.

RDA responded to this letter by email from Mr Dennis to M Gaillard on 27 March 2020 in these terms:

" ... we confirm receipt of two notifications from EPCR (on 16 March and 23 March) notifying us of the delay/postponement of the quarter finals, semi-finals and finals of the 2019/20 Heineken Champions Cup and Challenge Cup tournaments, on account of the Covid-19 pandemic and the measures taken by relevant national authorities to combat it.

We do understand that this decision must have been a very difficult one to take, and clearly we must accept your statement that EPCR has been forced into delaying the delivery of these matches to RDA (and our broadcast partners) as a result of this unprecedented force majeure event. In the circumstances, clause 26 of our Agreement applies.

Please be assured that we have informed our international broadcast clients of the present situation and we will need to manage these relationships carefully, so please do keep us up to date.

We will await your updates as to the options ahead.”

20.

Thereafter two different disputes developed. By his email to M Vergnol of 30 April 2020, Mr Dennis informed EPCR that:

“.. whilst the season remains suspended — and whilst it remains a possibility that the remaining matches may not take place — we feel that it is simply not appropriate at this point to make payment of the final invoice for the 2019/2020 season until the position is clarified, not least because we expect to face claims for rebates, renegotiations and possible termination from our sub-licensees. We feel that we must both therefore use the period ahead to monitor the situation before assessing any consequences caused by the delays (and any subsequent cancellations) before deciding upon any adjustments with our sub-licensees and with you.

In the circumstances, I am sure you will understand that is simply not appropriate at this stage to make the payment for content that has not been delivered and with no certainty it can be delivered. ...
”

21.

By his email of 4 May in reply, M Vergnol maintained that RDA was not entitled to withhold payment and that if it failed to pay what was due then “...it will be in material breach of the agreement”. In relation to the force majeure issue that had been identified by Mr Dennis in his 27 March email, M. Vergnol stated:

“we take issue with the assertion in your email of 27 March 2020 that clause 26 of Schedule 6 applies. It does not. EPCR has not been prevented from performing the specific obligations required of us under our agreement.”

On 12 May, Mr Dennis responded substantively stating:

“... I appreciate that the timing of our email wasn't great but nothing about this situation is easy, and we are all in a rapidly evolving and entirely unprecedented situation. Whilst we can save the contract points for another day (although we should say that we disagree with your analysis), we do need to address some urgent operational issues.

We are feeling significant pressure building from EPCR international broadcasters who require updates and clarity on whether or not the rest of the season is likely to be played. With the cancellation of the Top14 season in France and stringent travel restrictions introduced in UK, Ireland, France and Italy, it is understandable if our broadcast partners have major doubts if the remainder of EPCR's tournaments will be played this season. We have significant concerns that several of our partners may default, others will make claims for reductions and possibly even look to terminate as a result of the current postponements, particularly if they end up turning into cancellations. Is there any more information you can offer that will assist us to manage our partners and demonstrate that EPCR

and RDA are taking all possible steps to find a pathway through the present difficulties? Do you still expect the remaining fixtures to be played this season? If so, when do you think they will take place, given the recent pronouncements regarding team sports in France? If you do not have this information, can you give us a timeline, or even a best-guess, as to when you think this will be known, so that we can let the broadcasters know when they should be expecting further updates? We receive regular operational updates from our clients at Pro14 and Premiership Rugby, it would be great to have a call with EPCR's operations team to gain an understanding of your plans. ... ”

22.

Mr Dennis states in his first witness statement and it is accepted by EPCR that:

“...Like many areas of businesses, the Covid-19 pandemic has had a significant detrimental effect on the sports media rights industry which is almost entirely dependent on live sporting events taking place. For rights holders, their fundamental obligation is to hold the sporting events in question and Covid killed live sport for a number of months. Whilst our business was not directly affected by covid-19 we were affected through our clients. Our clients were primarily affected in their ability to hold live sports events and in turn provide their broadcast partners with the relevant media rights...”

Various schedules have been disclosed by RDA that show various projections made by it as to anticipated lost revenue as a result of claims for credit and refunds by sub-licensees. The amounts do not matter. They varied from time to time but in all cases were substantial. This leads EPCR to submit that “ ... RDA was a party “...affected by a Force Majeure Event...” and, moreover, a party affected as regards its payment obligations under the MRA ...” This is not in dispute as a matter of fact nor could it be. It is entirely consistent with Mr Dennis’s description of his dealings with RDA’s main sub-licensees summarised in paragraph 61 and following of his first witness statement. In my judgment, this undermines at a factual level the suggestion that RDA’s reliance on the Force Majeure machinery within the MRA was in some way motivated by some impermissible concern as to the profitability of the MRA. A force majeure provision within a contract is generally inserted to enable parties affected by such an event to avoid contracts that have become financially disadvantageous by reason of such an event.

23.

By an email of 13 May 2020, M Vergnol set out EPCR’s intentions for the postponed games in these terms:

“From a pure operational perspective, and strictly confidentially, 'scenario A' which we are working hard to confirm as soon as possible, is :

- Quarter Finals on Sept 11-13 (or possibly one week later i.e. 18-20)
- Semi Finals on Sept 26-27 (or possibly one week later i.e. Oct 3-4)
- Finals on Oct 16-17

Our stakeholders are aligned on making this happen, but of course it still depends on many factors outside of our control, amongst others the evolution of the pandemic in Europe and subsequent 'deconfinement' plans from various governments to allow us to play professional rugby safely.

Our firm intention remains therefore unchanged since our last conversation end of April, and that is to complete the 2019/20 season by re-scheduling all matches that have had to be postponed due to the pandemic.”

24.

With this information RDA decided that it was entitled to and would terminate the MRA using the Force Majeure machinery set out in clause 26 of Schedule 6 to the MRA. It purported to do so by its letter to EPCR dated 5 June 2020, which was in these terms:

“Dear Sirs,

Notice of Termination of Media Rights Agreement

1. We refer to the Media Rights Agreement between us and you dated as of 11 May 2018, (the “Agreement”). Initially capitalised terms that are undefined in this letter have the meanings ascribed to them in the Agreement.

2. We hereby exercise our right to terminate the Agreement on 14 days' notice in accordance with clause 26.4 of Schedule 6 of the Agreement. The grounds for doing so include inter alia that EPCR has been prevented, hindered or delayed from performing its fundamental obligation (for a continuous period of over 60 days as a result of a Force Majeure Event, namely the Covid-19 epidemic) to stage each Competition this Season in such way as to not materially dilute the quality of, or materially devalue, the Licensed Rights as required under clause 13.1.2 of Schedule 6. Additionally EPCR has been prevented, hindered or delayed from performing its obligation under clause 13.1.4 of Schedule 6 to make the Available Live Matches (namely the quarter-finals, semi-finals and final) available for Live Transmission during the present Season for a continuous period of over 60 days as a result of a Force Majeure Event, namely the Covid-19 epidemic.

3. Our agreement will therefore terminate in 14 days from the date of actual or deemed receipt of this notice (whichever is the earlier in accordance with clause 27.2 of Schedule 6 of the Agreement).

4. Our termination of the Agreement is not a waiver of any of our other rights under the Agreement or at law. We reserve all our rights and remedies under the Agreement.”

25.

EPCR considered that this was wrong and that by purporting to terminate the MRA when it was not entitled to, RDA has wrongfully repudiated the MRA. It alleges that in those circumstances it was entitled to accept RDA's alleged repudiation and itself bring the MRA to an end and that it did so by a letter from its solicitors dated 22 July 2020, in which amongst other things, it was asserted that:

“On 5 June 2020, RDA purported to terminate the Agreement by way of notice to EPCR. For the reasons set out in our subsequent correspondence with you and your legal advisers, Level Law, RDA's purported termination of the Agreement is invalid and unlawful. RDA's wrongful termination of the Agreement on 5 June 2020 is a renunciation of its contractual obligations to EPCR. It is a repudiatory breach of the Agreement, entitling EPCR to terminate the Agreement itself. This letter is formal notice that EPCR is exercising its right to terminate the Agreement with immediate effect on grounds of RDA's repudiatory breach.”

26.

Following the service of its 5 June notice, RDA terminated its sub-licence agreements by reference to the same Force Majeure Event that it relied on when serving its notice on EPCR – see RDA's letters to Rugbybypass limited dated 29 June 2020, SuperSport International (Pty) Ltd dated 26 June 2020, Perform Investment Limited of 26 June 2020, Spark New Zealand Trading Limited of 26 June 2020, International Media Content Limited of 26 June 2020, ESPN of 26 June 2020, Go Plc dated 29 June

2020, Cyprus Telecom Authority dated 29 June 2020, Sport TV Portugal SA dated 29 June 2020, Telefonica Audio-visual Digital SLU dated 29 June 2020 and numerous others at or about that time.

The Parties Respective Cases on the Repudiation Issue

27.

RDA's case is that it was entitled by operation of clause 26 of Schedule 6 to the MRA to serve notice terminating the MRA at any time 60 days after 16 March 2020, when it contends the Pandemic first started to " ... hinder... or delay...[EPCR's] ... performance of ..." its obligation under clause 13.1.2 of Schedule 6 to the MRA to " ... stage each Competition each season during the Term ..." and/or its obligation under clause 13.1.4 to make the Available Live Matches "... available for Live Transmission each Season".

28.

EPCR submits that RDA was not entitled to terminate as it has purported to do because it too was a party "... affected by a Force Majeure Event ..." within the meaning of clause 26.3 of Schedule 6 to the MRA and thus was obliged instead to " ... use all reasonable endeavours to mitigate and/or eliminate the consequences of such Force Majeure Event and inform the other party of the steps which it is taking and proposes to take to do so". EPCR maintains therefore that RDA committed a repudiatory breach of the MRA by purporting to terminate the MRA by its 5 June letter.

Motivation

29.

In its skeleton argument EPCR alleges in effect that RDA was motivated to serve its notice because it was dissatisfied with the commercial terms set out in the MRA and that the purpose of serving that notice was a means by which RDA and Mr Dennis (who it characterises as being the "alter ego" of RDA) sought to pressure EPCR into varying the financial terms of the MRA. It is asserted that this is apparent from the fact that earlier in the relationship between the parties, RDA sought to renegotiate and threatened to terminate the agreement for Force Majeure by reference to an issue concerning alleged acts of piracy over broadcasts by third parties and from RDA's refusal to pay the final invoice for the 2019/2020 season.

30.

EPCR place some reliance on the fact that RDA delayed terminating the sub-licences it had with its sub-licensee broadcasters until no earlier than 26 June and thus at least some 3 weeks after service by RDA of its 5 June notice, as supporting its point that RDA had served its 5 June notice in order to induce it to offer revised financial terms.

31.

In my judgment this approach is mistaken. First, given the admitted impact of the Pandemic on RDA it was fully entitled to terminate the MRA using the Force Majeure machinery contained within it. Secondly, even if that was not the true reason for serving notice, it does not matter if on a true construction of the MRA, RDA was entitled to serve notice terminating it for Force Majeure. Thirdly, it may well be that such a party would hope to negotiate revised terms following a termination and may perceive the service of a notice terminating the agreement concerned as a means of inducing its counter party to negotiate such terms but that does not render reliance on the Force Majeure machinery concerned invalid or ineffective or a repudiation of the contract concerned. The only question is whether as a matter of construction and in the events that have happened a party seeking to rely on the Force Majeure clause was entitled to terminate the contract concerned using that

machinery. Fourthly, it is not alleged in this case that the Force Majeure clause was subject to any Braganza² implied terms that qualified the ability of either party to take advantage of the Force Majeure machinery when otherwise it would have been entitled to do so. I leave to one side whether such an assertion would have any merit because it does not arise on the facts of this case. The sole question in my judgment is whether as a matter of construction RDA was entitled to terminate the MRA by its 5 June notice by reference to clause 26 within Schedule 6 of the MRA. If it was, then it was entitled to take full advantage of that provision regardless of its reason or reasons for doing so.

The Construction Issues

Applicable General Principles

32.

The principles applicable to the construction of contracts subject to English law are not in dispute. In summary:

i)

The court construes the relevant words of a contract in its documentary, factual and commercial context, assessed in the light of (a) the natural and ordinary meaning of the provision being construed, (b) any other relevant provisions of the contract being construed, (c) the overall purpose of the provision being construed and the contract in which it is contained, (d) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (e) commercial common sense, but (f) disregarding subjective evidence of any party's intentions – see [Arnold v Britton \[2015\] UKSC 36 \[2015\] AC 1619](#) per Lord Neuberger PSC at paragraph 15 and the earlier cases he refers to in that paragraph;

ii)

A court can only consider facts or circumstances known or reasonably available to both parties that existed at the time that the contract or order was made - see [Arnold v Britton \(ibid.\)](#) per Lord Neuberger PSC at paragraph 21;

iii)

In arriving at the true meaning and effect of a contract, the departure point in most cases will be the language used by the parties because (a) the parties have control over the language they use in a contract; and (b) the parties must have been specifically focussing on the issue covered by the disputed clause or clauses when agreeing the wording of that provision – see [Arnold v Britton \(ibid.\)](#) per Lord Neuberger PSC at paragraph 17;

iv)

Where the parties have used unambiguous language, the court must apply it – see [Rainy Sky SA v Kookmin Bank \[2011\] UKSC 50 \[2011\] 1 WLR 2900](#) per Lord Clarke JSC at paragraph 23;

v)

Where the language used by the parties is unclear the court can properly depart from its natural meaning where the context suggests that an alternative meaning more accurately reflects what a reasonable person with the parties' actual and presumed knowledge would conclude the parties had meant by the language they used but that does not justify the court searching for drafting infelicities in order to facilitate a departure from the natural meaning of the language used – see [Arnold v Britton \(ibid.\)](#) per Lord Neuberger PSC at paragraph 18;

vi)

If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other - see Rainy Sky SA v Kookmin Bank (ibid.) per Lord Clarke JSC at paragraph 21 - but commercial common sense is relevant only to the extent of how matters would have been perceived by reasonable people in the position of the parties, as at the date that the contract was made - see Arnold v Britton (ibid.) per Lord Neuberger PSC at paragraph 19;

vii)

In striking a balance between the indications given by the language and those arising contextually, the court must consider the quality of drafting of the clause and the agreement in which it appears - see Wood v Capita Insurance Services Limited [2017] UKSC 24 per Lord Hodge JSC at paragraph 11. Sophisticated, complex agreements drafted by skilled professionals are likely to be interpreted principally by textual analysis unless a provision lacks clarity or is apparently illogical or incoherent - see Wood v Capita Insurance Services Limited (ibid.) per Lord Hodge JSC at paragraph 13 and National Bank of Kazakhstan v Bank of New York Mellon [2018] EWCA Civ 1390 per Hamblen LJ at paragraphs 39-40; and

viii)

A court should not reject the natural meaning of a provision as incorrect simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight, because it is not the function of a court when interpreting an agreement to relieve a party from a bad bargain - see Arnold v Britton (ibid.) per Lord Neuberger PSC at paragraph 20 and Wood v Capita Insurance Services Limited (ibid.) per Lord Hodge JSC at paragraph 11.

To this summary I would add only that generally a court should give effect to the whole of the language used and not conclude that any part of it is surplusage unless no other conclusion is available.

33.

EPCR placed some reliance on the first instance decision in Lebeaupin v. Richard Crispin and Company [1920] 2 KB 714. In my judgment this authority must be read subject to the later authorities (all of which are Supreme Court decisions) but in any event there is nothing in what McCardle J said in that case that is inconsistent with the principles set out above other than perhaps reflecting the more literalist approach that might arguably have applied to the construction of contacts in 1920. In my judgment, the Judge was saying in that case no more than that a Force Majeure clause must be read and construed in the context of the contract in which it appears when read as a whole and as such is consistent with sub-paragraph 1(b) and (c) above. I have applied these principles in addressing the construction issues that arise.

34.

The contextual material that matters is that which I have identified in paragraphs 3 and 4 above. Whilst I accept that the MRA included an entire agreement provision in clause 21 of Schedule 6 to the MRA, it would be unreal and contrary to basic principle to ignore the facts and circumstances summarised in those paragraphs. I did not understand Mr Harris QC to dispute this - see his closing submissions at T2/99/2-10.

Discussion

35.

The first issue that arises is whether as EPCR submits, the effect of the agreement when read as a whole is that it was permitted to perform by completing the Competitions in any following season as long as it fell within the Term (as defined by clause 1.2 of the Operative Terms) either by operation of clauses 1.7 of Schedule 2 and/or 26.3 of schedule 6 to the MRA.

36.

EPCR submits that the effect of these provisions is that the 60 day period referred to in clause 26.4 never commenced running and certainly had not commenced to run on 5 June when RDA served its notice under clause 26.4. I am not able to accept that submission for the following reasons.

37.

By clause 13.1.2 of Schedule 6, EPCR undertook to stage each of the Competitions during each Season. Season was defined expressly as being from 1 July 2018 to 20 June 2019, 1 July 2019 to 20 June 2020, 1 July 2020 to 20 June 2021 and 1 July 2021 to 20 June 2022. The Season that is relevant for present purposes ran from 1 July 2019 to 20 June 2020. That being so, the effect of clause 13.1.2 was that EPCR undertook to stage each of the Competitions for 2019-20 in the period between 1 July 2019 to 20 June 2020.

38.

The effect of clause 13.1.4 was that EPCR undertook to make available the "Available Live Matches" for the 2019-2020 season between 1 July 2019 to 20 June 2020. The phrase "Available Live Matches" had an agreed meaning set out above and in Schedule 7 to the MRA. It included expressly each quarter final, semi final and final in each of the Competitions. By the time when the 5 June notice came to be served, (a) none of those rounds of either of the Competitions had been staged or even re-scheduled or (b) made available for Live Transmission. Further, EPCR had made clear in the correspondence set out earlier that they could and would not be played or rescheduled before 20 June 2020 – see the email of 13 May 2020, the substance of which I set out earlier. There is no dispute that this was the result of the Pandemic as is made clear in that email when read in the context of the emails and letters that had passed between the parties prior to that email.

39.

EPCR submits that is nothing to the point however because " ... the obligations and rights of the parties under the MRA become the obligations and rights set out in clause 1.7 of Schedule 2 and clause 26.3, when there is a Force Majeure Event that affects them ..." – see paragraph 69 of EPCR's opening written submissions. In my judgment this is mistaken.

40.

Clause 26.2 of Schedule 6 is concerned exclusively with the liability of a party for a failure to perform or a delay in failing to perform its obligations under the MRA caused by a Force Majeure event. But for that provision, such a party would be liable for breach of contract and its counter party would have all the remedies available to a victim of what would be a breach of contract but for clause 26.2. The right of a party to avail itself of the protection of clause 26.2 in the way I have described it has no impact on the right of its counterparty to have recourse to the power to terminate contained in clause 26.4. Clause 26.4 accords the non-affected counter party the contractual right to terminate if the party is prevented hindered or delayed from performing its obligations by a Force Majeure event for a period of longer than 60 days.

41.

In summary clauses 26.2 and 26.4 are concerned with entirely different issues. Clause 26.2 provides the hindered party with qualified protection from liability for what would otherwise be a breach of

contract caused by a Force Majeure Event. Clause 26.4 provides the counter party affected by the other party's non or delayed performance with a contractual right to terminate subject to the controls imposed by that clause - that is that (i) the disruption of performance must have continued for a continuous period of 60 days before notice can be given and (ii) the notice period must be 14 days.

42.

I do not accept EPCR's submission that where both parties are affected (in different ways) by the same Force Majeure Event the effect of clause 26.2 is to deprive the parties of recourse to clause 26.4. Clause 26.2 is concerned with performance. The defence is available to each party in respect of any liability that party would otherwise have to the other for any failure or delay by that party to perform its obligations under the MRA.

43.

It follows from what I have said so far that the opening words of clause 26.2 ("...Subject only to clauses 1.7 of Schedule 2 and 26.3 of this Schedule 6 ...") create a qualification to the general exclusion of liability provided by clause 26.2 for claims for breach of contract based on a failure to perform or delay in performance caused by a Force Majeure Event.

44.

Clause 26.3 imposes an obligation on the party in delay by reason of a Force Majeure Event to use all reasonable endeavours to mitigate and/or eliminate the consequences of the Force Majeure Event that is preventing or delaying that party's performance as a condition of benefitting from the protection otherwise afforded by clause 26.2. If the non-performing or delayed party fails to take such steps then it is not able to take advantage of the protection afforded by clause 26.2. Clause 26.3 must be read together with clause 26.2 and so read has no effect other than that I have described.

45.

It is necessary now to consider clause 1.7 of Schedule 2. The first thing to note about Schedule 2 is that it is concerned exclusively with the fees payable for the rights granted by the MRA. But for the qualification of clause 26.2 of Schedule 6 by reference to clause 1.7 of Schedule 2, the effect of clause 26.2 would have been that no remedy would be available in the event that a whole or substantial part of any Available Live Match Feed was not delivered by or on behalf of EPCR by reason of a Force Majeure Event (other than a right to terminate under clause 26.4 providing the conditions for the availability of that provision were satisfied).

46.

In order to provide a remedy for such an event clause 1.7 provided that if such an event occurred then RDA would be " ... entitled to a pro rata reduction of its Rights Fees for that Season to account for the unavailability of that Available Live Match Feed calculated as a proportion of the total number of Available Live Matches in that Season; provided that, such reduction shall only be payable to the extent that it has suffered actual, demonstrable losses of such value as a result.". The reference to clause 1.7 of Schedule 2 within clause 26.2 is to (and only to) provide a carve-out from the defence that would otherwise be provided by clause 26.2. The availability of that remedy says nothing about the availability of the right to terminate which depends as I have said on whether the conditions imposed by clause 26.4 are satisfied in the particular circumstances. As clause 22.5 of Schedule 6 provides, the " ... remedies conferred on the parties by this Agreement are cumulative and not exclusive of any rights, powers and remedies provided by law or otherwise."

47.

EPCR relies on the part of clause 1.7 that is concerned with the cancellation or abandonment before the 20th minute of "... an Available Live Match ...". I question whether sub paragraph (a) of clause 1.7 is of any application where multiple matches are not played. There is a distinction drawn between the singular phraseology used in sub-paragraph (a) and the reference in (b) to "... a whole or substantial part of any Available Live Match Feed ...". I accept however that there is a latent ambiguity about this not least because of the unsatisfactory nature of the definition of "Feed" in Schedule 7. I accept that the effect of the words in parenthesis in sub-paragraph (a) is that the financial remedy provided by clause 1.7 is not available where a cancelled match or one that is abandoned before the 20th minute is re-scheduled during the Term of the agreement. However that does not assist EPCR because as I have explained clause 1.7 creates a carve-out in favour of RDA from the defence otherwise provided to EPCR by clause 26.2. It has no impact on the availability of the right to terminate contained in clause 26.4.

48.

I now return to clause 26.4 and turn to the next construction point relied on by EPCR being that set out in in paragraph 18(a) of its Reply in these terms:

"... the supposed notice of termination under clause 26.4 is invalid because only "...the party not affected by [the] Force Majeure Event may terminate this Agreement...", but, by its own admission, the Defendant was affected by the Force Majeure Event. In particular, by an email from Mr. Dennis of the Defendant dated 30 April, the Defendant conceded that some of its own partners and sub-licensees were "...simply refusing to pay their invoices..." in consequence of the postponement of the Postponed Matches caused by the pandemic ... "

In my judgment this point depends on a mistaken construction of clause 26.4 that arises from a failure to adopt the principles of construction summarised earlier and in particular a failure to consider all the relevant provisions of the contract being construed. My reasons for reaching that conclusions are as follows.

49.

The phrase "... the party not affected by the Force Majeure Event ..." must be construed in the context of clause 26 when read as a whole and in the context of the definition of "... Force Majeure Event ...". As I have explained above, clause 26 distinguishes between a party whose performance is affected by a Force Majeure Event and the party who would be entitled to treat the non or delayed performance as a breach of the MRA. That this is so is apparent from the opening words of clause 26.1 which defines its applicability to a party "... affected by a Force Majeure Event which prevents that party from performing its obligations under this Agreement." Similarly clause 26.2 provides the contractual defence to a party that would otherwise be liable to the other "... for any delay in performing its obligations nor for failure to perform its obligations under this Agreement if and to the extent that the delay or failure is caused by a Force Majeure Event affecting its performance of the relevant obligations.". The obligation to mitigate applies only to a party otherwise entitled to the benefit of the contractual defence in clause 26.2.

50.

Clause 26.4 is to be read in the context of clauses 26.1-26.3, which have the effect described above. It is also to be read subject to the definition of "... Force Majeure Event ..." in Schedule 7. It applies to "... any circumstances beyond the reasonable control of a party affecting the performance by that party of its obligations under this Agreement ..." [Emphasis supplied]. The phrase "... the party not affected by the Force Majeure Event ..." in clause 26.4 is referring simply to the party to whom is owed the

performance that has been prevented hindered or delayed and distinguishes between that party (in this case RDA) and the party whose performance has been prevented hindered or delayed by the relevant "... Force Majeure Event ...". The phrase does not have the effect of depriving a party in the position of RDA of the benefit of clause 26.4 simply because it has been affected in a general sense by the same Force Majeure Event that has prevented hindered or delayed the performance by the other party (in this case EPCR) of its obligations under the contract. The outcome for which EPCR contends would be commercially absurd as the facts of this case demonstrate.

51.

I reject EPCR's submission that because it did not serve a notice expressly referring to clause 26.1 that thereby precluded RDA from taking advantage of clause 26.4. That is an absurd construction because if right it would mean that the party placed in breach by reason of the Force Majeure Event could preclude its counter party from serving notice under clause 26.4 simply by not serving a clause 26.1 notice. There is no justification for such a construction in the language used in clause 26 when read as a whole. The reference to "the" in clause 26.4 is a reference to the Force Majeure Event engaged by clause 26.2. The obligation to give notice under clause 26.1 is not a condition precedent to the applicability of the sub paragraphs that follow. In any event, there is nothing formal required by clause 26.1. There is no reason why to the extent necessary the 20 March letter should not be regarded as being such a notice. However, the real point is that a notice is not required before clauses 26.2 and 26.4 can take effect in accordance with their terms. Thus understood, clause 26.4 applies wherever performance is either prevented, hindered or delayed by a Force Majeure Event for a continuous period of more than 60 days.

52.

One final point that I should mention concerns the date of RDA's notice. It was dated 5 June 2020. The season did not end until 20 June 2020. At paragraph 19(b) of the Reply, EPCR pleads that:

"... on the Defendant's own case (which is misconceived for the reasons given above), the Season had not ended as at 5 June 2020. It follows that, even on the Defendant's case, it remained open to the Claimant, as at that date, to reschedule the Postponed Matches prior to 20 June 2020".

This point did not feature in EPCR's written submissions. RDA's submission on this point is that as at the date when the notice was delivered:

"... a period of 60 days had elapsed following EPCR's postponement of the 14 remaining 2019-20 matches. As at that time, EPCR had not rescheduled the 14 matches before the end of the 2019-20 Season on 20 June 2020 or at all, because it remained prevented or hindered from doing so by the ongoing Force Majeure Event. On the contrary it had indicated, confidentially, that it was now working towards a "Scenario A" where the remaining matches would all be played in September/October 2020, 3-4 months into the 2020-21 Season."

It adds that by 13 May EPCR had confirmed that it was no longer planning to schedule any matches for the remainder of the season - see the email of that date referred to earlier and that by 8 June 2020 (the date when the 5 June notice was delivered and therefore given by RDA to EPCR) "... it was obviously impossible for it to do so even if all restrictions had instantly been lifted (which obviously they were not): there remained only two weekends left before the Season end and none of the matches had been scheduled. EPCR was thus prevented altogether from complying with its Clause 13.1.2 and 13.1.4 obligations by the Force Majeure Event." This point was put in cross examination to M. Gaillard and was accepted by him as correct - see transcript at page 86 passim.

53.

I am satisfied that it is not open to EPCR to assert that notice was given prematurely. By 8 June 2020, the outstanding games had been postponed for well in excess of 60 days and EPCR had not informed anyone of the dates on which the outstanding games would be played. It was impossible to fix them for any date prior to 20 June as at that date. In fact they were not fixed to be played before that date and the dates when they were fixed were notified to RDA only after the expiry of the 5 June notice and were for dates after the end of the 2019/2020 season. EPCR had been hindered or delayed in complying with its relevant obligations for 75 days running from the date when the quarter finals were postponed (16 March 2020) to the date of the notice (5 June 2020) or 61 days from the date when the quarter finals were due to be played (3-5 April 2020) to the date of the notice. If time is treated as starting to run from the date notice is given (8 June 2020) rather than the date of the notice itself then the time elapsed was 78 and 64 days respectively.

The Financial Claims

54.

The claim for damages by the claimant based on its allegation of wrongful repudiation by RDA of the MRA fails and is dismissed for the reasons set out above.

55.

That leaves two issues being:

i)

EPCR's claim to the sterling equivalent of the unpaid 1 May 2020 instalment in respect of the 2019/2020 season; and

ii)

RDA's counterclaim for (a) the prepayments made under Clause 1.2.1(a) of Schedule 2 in the amounts of €375,000 for each of Seasons 2020/21 and 2021/22 and (b) an adjustment of the Rights Fees paid for 2019/2020 season.

56.

There is no real dispute that the unpaid May instalment should have been but was not in fact paid on 1 May 2020. I have set out the relevant correspondence earlier. The only issue is whether and if so to what extent there should be a pro rated reduction applying the terms of the MRA and whether the sum otherwise payable should be adjusted to take account of the postponement of the quarter finals, semi finals and finals of the Competitions for the 2019/20 Season.

57.

On the basis that notice was given when it was delivered (8 June 2020), the MRA came to an end 14 days later - that is on 22 June 2020. The effects of that termination are those set out in clause 15.2 and 15.3 of Schedule 6 to the MRA. That is so because (a) clause 15.2 applies on "... expiry or termination of this Agreement by either party for any reason ..."; (b) clause 15.3 applies on "... early termination of this Agreement (for whatever reason) ..." and (c) the effect of a clause 26.4 notice is to "... terminate this Agreement ...". By clause 15.2.3, the effect of termination is that rights and liabilities that had accrued at the date of termination were unaffected by its termination. However by clause 15.3 on early termination for whatever reason "...the parties agree that the Minimum Guarantee shall be deemed to accrue on a per-Season basis, in the proportions set out at clause 1.2.1 of Schedule 2, save that the prepayment set out at clause 1.2.1(a) shall be deemed to be apportioned on an equal basis between the four Seasons. In respect of each Season, the Minimum Guarantee shall

be apportioned on a pro rata basis (with an equal amount apportioned to each day). Thus the effect of clause 15.3 is to set out a contractually agreed basis for ascertaining what sums are to be treated as accrued for the purpose of clause 15.2.3.

58.

As at the date when the clause 26.4 notice took effect (22 June 2020) RDA had paid EPCR €750,000 pursuant to clause 1.2.1(a) of Schedule 2 to the MRA. Applying clause 15.3, RDA submits that the effect of the termination of the MRA on 22 June 2020 is that the part of the clause 1.2.1(a) payment attributable to the 20/21 and 21/22 seasons must be repaid by EPCR to RDA. As I understand EPCR's case this is not disputed other than by reference to its case that RDA was not entitled to terminate the MRA by reference to clause 26.4. That case has failed. I agree with RDA that in those circumstances there is due from EPCR to RDA half the clause 1.2.1(a) payment it made, which is €375,000.

59.

The remaining issue concerns the May 2020 portion of the Minimum Guarantee payment. It is common ground that the sum payable subject to RDA's case concerning adjustment is €842,000. This is the effect of clause 1.2.1(c) of Schedule 2. Clause 15.3 does not assist RDA since its clause 26.4 notice took effect on 22 June 2020 - that is after the end of the 2019/2020 season - and clause 15.3 deems the Minimum Guarantee payment to accrue daily at an equal amount. On this basis the whole of the May 2020 portion of the Minimum Guarantee payment was deemed to have accrued due as at the date of termination of the MRA. On that basis the whole of the sum that fell due for payment in May remains due notwithstanding the termination of the MRA.

60.

RDA submits however that it is entitled to an adjustment of the Minimum Guarantee payment paid or payable for the 2019/2020 season by operation of clause 1.7(a) of Schedule 2.

61.

That part of clause 1.7 applies only if "... either (a) an Available Live Match is (i) cancelled or (ii) abandoned before the 20th (twentieth) minute (and in either case, not rescheduled during the Term)...". The word "Term" "... has the meaning set out in clause 1.2 of the Operative Terms ..." - see Schedule 7 to the MRA. The definition of "Term" contained in clause 1.2 of the operative terms of the MRA is "...from the Commencement Date, unless terminated earlier in accordance with its terms, until the later of (i) 30 June 2022 and (ii) one month after the final Match of the Competitions in the 2021/22 Season (the "Term") ...". [Emphasis supplied]. Since the emphasised phrase could not on any view apply to the start date it could only have been intended to qualify the end date. It follows from this that the effect of RDA's clause 26.4 notice was that the "Term" of the MRA came to end on 22 June 2020. After termination of the MRA, EPCR re-scheduled the postponed matches to be played on dates in the 2020/2021 season which by definition were not "... during the Term ..." within the meaning of clause 1.7.

62.

On this basis, RDA submits that it is entitled to a pro rata reduction of the Minimum Guarantee payment paid by it for the 2019/20 season by reference to the 14 matches that were not played or rescheduled before the MRA terminated on 22 June 2020 (that is the quarter finals, semi finals and finals in each of the Competitions). It submits that the effect of clause 1.7 in these circumstances is in practice to reduce the sum due to EPCR in respect of the May payment to €169,338, calculated as follows:

(1)

2019-20 Min Guarantee / prepayment: €3,555,500

(2)

Amount per scheduled Available Live Match: €48,047.30

Reduction for 14 cancelled matches:

14

x €48,047.30 = €672,662

(3)

Final Min Guarantee instalment due to EPCR:

€842,000 - €672,662 = €169,338.

63.

Aside from relying on its case concerning RDA's termination of the MRA pursuant to clause 26.4 (which I have rejected for the reasons set out above), EPCR disputes this on the basis on two alternative bases summarised in paragraph 12.6 of its opening skeleton argument. First it submits that as it puts it in its written opening submissions:

"It is plainly wrong, in circumstances where RDA, not EPCR, was seeking to terminate in reliance on the Force Majeure Event, that it could do so in a manner that unilaterally enabled it to truncate the period in which EPCR might otherwise be entitled to reschedule the matches".

I am not able to accept this submission. As I explained earlier as long as the requirements of clause 26.4 are satisfied RDA was fully entitled to serve its notice under that provision at a time and in circumstances of its own choosing.

64.

Next, EPCR submits that "... the right and obligation to reschedule (within the Term) had crystallised when the Force Majeure Event incepted which, on any view, was long before RDA purported to give even notice to terminate ...". In my judgment this too is mistaken: The words in parenthesis in clause 1.7(a) of Schedule 2 are not concerned with either a right or obligation to re-schedule but simply with whether in fact the postponed games had been re-scheduled. They had not been. The matches had not in fact been re-scheduled at all prior to the termination of the MRA on 22 June 2020.

65.

Clause 1.7 is subject to a proviso that the reduction will not apply "... to the extent that [RDA] has suffered actual, demonstrable losses of such value as a result." This was not pleaded or argued as an answer to RDA's counterclaim and rightly so. It had been driven to terminate its sub-licences as a result of the relevant games being cancelled and not rescheduled prior to the termination of the MRA. Further Mr Dennis had informed EPCR by his email of 30 April 2020 that some of its sub-licensees were refusing to pay RDA as a consequence of the cancellation of the matches. Which meant that RDA and, therefore, its sub-licensees had not received the relevant content with, critically, no end in sight. None of this is surprising - as was submitted on behalf of RDA "... it's obviously right ... that RDA's business was, in a general sense, affected by COVID-19 through its clients. Of course, it was. Everyone in this industry was affected in the general sense by COVID-19". As Mr Harris submitted in closing (in the context of his submission, which I have rejected, that RDA was not entitled to terminate since it was as affected by the relevant Force Majeure Event as was EPCR):

“Mr Dennis accepted that both EPCR and RDA were sellers of sports media rights and that they were, in his words, in a chain. It therefore follows that, as I put to him, when EPCR was disabled from selling sports rights to RDA, RDA in turn was disabled from selling the same sports rights down that chain --his word-- to its sub-licensees. And they were, as Mr Dennis confirmed, the same rights. ... And we completely agree, these were back-to-back chainlike contracts, so it’s therefore very unsurprising that when the Top Co in that chain, in this case EPCR, is affected in its ability to supply the licence rights, unsurprisingly the next party down in the chain, in this case RDA, is similarly affected by its own ability to sell on the exact same rights”.

As he added a little later:

“ ... Mr Dennis course confirmed orally that DAZN were halting rights payments with immediate effect, and indeed that they had, in the case of RugbyPass, already refused to pay \$150,000 which would have been used to pay part of the minimum guarantee. So it’s quite plain on the facts that they were affected as regards the MRA. And indeed, Mr Dennis’ own words are “in respect of the MRA”. Significant financial impact in respect of the MRA. They’re his own words. Then on any view \$150,000 is not a relatively small amount of money. That was Mr Dennis’ response then. But be that as it may, that’s only one example. On his own internal documents you will recall that they were forecasting having to refund, that’s S2 refund column on the right-hand side of that document, of in the amount of approximately either €1 million or \$1 million. It doesn’t make any difference for my purposes. Little wonder that I’m able to make this submission that they were affected in respect of the MRA. Those were the payments they were going to use to pay the minimum guarantee”.

66.

No other basis for resisting the counterclaim was argued at trial. In those circumstances, I am satisfied that it succeeds for the reasons set out above.

Disposal

67.

The claim fails other than in relation to Minimum Guarantee payment which succeeds to the extent set out in paragraph 58 above. The counterclaim succeeds.

68.

In those circumstances, RDA submits that against the sum due on the counterclaim (€169,338) there should be set off the sum due to RDA in respect of the 2020/2021 and 2021/2022 seasons of €375,000 so as to leave net the sum of €205,662 due to RDA from EPCR. In principle, I accept that this is correct. However, I reach this conclusion provisionally since whether it is appropriate or fully appropriate may depend on the incidence of interest. I will therefore hear counsel following the hand down of this judgment on the set off and interest issues.

¹ It was common ground between the parties that this clause contained a typographical error and should have read “EPCR will stage each Competition each Season during the Term and **will not change** the format of the Competitions in such way as to materially dilute the quality of, or materially devalue, the Licensed Rights in relation to either Competition...”

² See [Socimer International Bank v. Standard Bank London \[2008\] EWCA Civ 116](#); [\[2008\] 1 Lloyds Rep. 558](#) and [Braganza v. BP Shipping Limited \[2015\] UKSC 17](#); [2015] 1 WLR 1661. Mr Harris QC accepted that this was not a pleaded issue in his closing submissions - see T2/95/8-16 .