

New Balance v Liverpool FC

Related Lawyers: **John McElroy, Ginevra Biccio**

Related Practice Areas: **Commercial Disputes**

Hausfeld recently acted for New Balance Athletics, Inc. (New Balance) in its claim against The Liverpool Football Club & Athletic Grounds Limited (the Club) arising out of a sponsorship agreement related to the provision of playing kit and other licensed products.

The case, which went to trial in the Commercial Court in October 2019 on an expedited basis, is understood to be the first time the English courts have considered the operation of a matching provision which provides the incumbent party (in this case, New Balance) an opportunity to match the “*material, measurable and matchable terms*” in a third party offer (in this case, made by Nike). Teare J found in New Balance’s favour in relation to the principal issue of whether it was in breach of the obligation of good faith as regards a distribution obligation which it had agreed to match. However, he found in the Club’s favour in relation to the secondary issue which related to a marketing obligation.

Background

Under the terms of the sponsorship agreement, the Club had an obligation to disclose to New Balance an acceptable offer received from a third-party in relation to the subject matter of the sponsorship agreement. New Balance then had the right to offer terms “*no less favourable to the Club*” than the “*material, measurable and matchable*” terms of any such offer (the Matching Right). If New Balance exercised the Matching Right, the Club would be obliged to enter into a new contract with New Balance.

In July 2019, the Club agreed terms with Nike in relation to the subject matter of the sponsorship agreement (the Nike Terms) and submitted those terms to New Balance. In August 2019, New Balance submitted a matching offer to the Club.

Of relevance to the proceedings, New Balance elected to match the Nike Terms:

1. word-for-word as regards the requirement for the Club’s licensed products to be sold in not less than 6,000 stores worldwide including 500 stores “*owned or controlled*” by New Balance (the Distribution Obligation)
2. requiring the Club’s licensed products to be marketed through unspecified “*marketing initiatives*” featuring “*not less than three non-football global superstars*” although New Balance excluded the words “*of the caliber of LeBron James, Serena Williams, Drake, etc.*” which appeared in the Nike Terms (the Marketing Obligation).

The Club rejected New Balance’s matching offer on the basis that it was not a “*genuine*” and “*bona fide*” offer to match the Nike Terms. In particular, the Club pleaded that New Balance did not: (i) reasonably believe that it could comply with the Distribution Obligation so that its offer was in breach of an implied duty of good faith; or (ii) match the Marketing Obligation because its offer omitted the words “*of the caliber of LeBron James, Serena Williams, Drake, etc.*”.

Judgment

Teare J noted that the trial raised a number of “*novel questions*”.

1. *The Distribution Obligation*

It was common ground between the parties that there was an implied obligation of good faith in the sponsorship agreement (given that it was a relational contract) although there was a dispute as to the scope of that duty. The Club’s case was that New Balance had breached the obligation of good faith because it either knew or did not care that it could not comply with the Distribution Obligation, or it had no reasonable grounds for such a belief. At trial, the Club’s case relied on five alleged errors in the commercial due diligence exercise undertaken by New Balance.

New Balance’s case was that there could only be a breach of the obligation of good faith if New Balance did not intend to meet, or knew that it could not meet, the Distribution Obligation. In any event, the contemporaneous documents evidenced that it had carried out a careful month-long internal commercial due diligence exercise to assess the commercial viability of matching the Nike Terms before proceeding to match the Distribution Obligation. This issue took up the vast majority of the evidence and submissions in the three-day trial.

Teare J held that:

i) the duty of good faith could be breached either by dishonesty or conduct which “*lacks fidelity to the parties’ bargain*”. In determining whether a party’s conduct lacked fidelity, it was necessary to take into account: (i) the nature of the bargain; (ii) the express terms of the contract; and (iii) the context in which the obligation of good faith arises. The key question was whether reasonable and honest people would regard the conduct in question as commercially unacceptable. Further, if New Balance held an honest belief that it could comply with the Distribution Obligation but its basis for so doing was “*unreasonable*” or “*careless or unwise*”, that would not amount to dishonesty

ii) on the facts, New Balance had not acted in bad faith. Its due diligence exercise was prudent and none of the alleged errors, even if established, would have amounted to dishonesty or conduct that reasonable and honest people would regard as commercially unacceptable.

2. *The Marketing Obligation*

New Balance’s principal position was that the Marketing Obligation was not “*material, measurable and matchable*” because it was a vague term and there was no single objective means of measuring it. In contrast, the Club’s position was that the term was measurable because it was possible to measure it, albeit that there was no single objective means of doing so. Teare J held that the term was measurable because it was possible to measure it, notwithstanding that there were a number of subjective means of doing so. Accordingly, New Balance’s claim was dismissed.

Commentary

Teare J’s decision clarifies that in order to establish a breach of the duty of good faith, some element of dishonesty or lack of fidelity to the bargain is required. Crucially, in relation to the former, if a party held an honest belief, even if its grounds for such a belief were “*unreasonable*” or “*careless or unwise*”, that would be insufficient to establish a breach of the duty of good faith given that the party’s conduct would have been “*innocent*”. This is a helpful clarification of this developing area of law.

John McElroy acted for New Balance together with Duran Ross, Jane Maltby, Ginevra Bicciolo and supported by Jamie Nicolaides. Hausfeld instructed Daniel Oudkerk QC and Edward Brown of Essex Court Chambers.