Good faith and ‘matching’ in New Balance Athletics, Inc v Liverpool FC and Athletic Grounds Ltd

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Commercial analysis: This article provides an analysis of the decision in New Balance Athletics v Liverpool FC regarding the interpretation of an implied term of good faith in a sponsorship agreement between a football club and a manufacturer of sportswear, as well as summarising the familiar principles of construction in relation to contracts of good faith. The article also deals with the court’s decision on terms for ‘matching’ and considers drafting and strategic management of matching clauses. Written by Neil Fawcett, specialist business and property barrister, at 3 Paper Buildings

New Balance Athletics, Inc v Liverpool Football Club and Athletic Grounds Ltd [2019] EWHC 2837 (Comm) New Balance Athletics, Inc v Liverpool Football Club and Athletic Grounds Ltd [2019] EWHC 2837 (Comm)

What are the practical implications of this case?

Teare J summarised the real-world implications of these sorts of contracts referring to the facts of the case before him (at para [1]):

> ‘This is (another) dispute about football shirts. A manufacturer of sportswear is keen to retain the right to sponsor a famous and successful football club and to manufacture and sell [football shirts]. The football club would prefer to give that right to another sportswear manufacturer.’

Two issues arose in this case, and very often arise in similar types of case where negotiation of contracts between parties is involved. Conceivably, similar principles could apply to numerous sorts of contract, particularly those relating to tendering.

Firstly, the court had to consider whether parties seeking to enter into these sorts of agreement are required to do so in good faith, and the court considered the definition of good faith in these contexts.

Secondly, the court had to consider whether one sponsor had put forward a contract on terms at least as favourable as those of another contender for the sponsorship deal, ie whether one party had ‘matched’ the terms of another.

It is important to consider not only how the court approaches issues of good faith and matching, but also how parties ought to draft terms to provide certainty in the event of litigation.

What was the background?

By a written sponsorship agreement (the Agreement) concluded in 2011 and amended in 2012 and 2014, New Balance Athletics (NBA) had agreed to manufacture and distribute football shirts for Liverpool Football Club and Athletic Grounds Ltd (LFC).

The key clause was clause 16, which provided the mechanism for the parties to renew the Agreement. Clause 16 defined a period (the First Dealing Period) within which the parties would negotiate with each other for the agreement to be renewed. The purpose of the clause was to give LFC the chance to choose a third-party manufacturer if they could offer better terms, but also to give NBA the chance to ‘match’ those terms and thereby continue with what was a very lucrative contract.

Clause 16 provided that NBA ‘shall then have thirty (30) business days from the date of receipt of such third-party offer to Notify the Club in writing if it will enter into a new agreement with the Club on terms no less favourable to the Club that (i) the terms of this Agreement and/or (ii) the material, measurable and matchable terms of such third-party offer’.

In the event that NBA notified LFC of its intention to match a third-party offer, the clause continued: 'the Club shall be obliged to enter into a new agreement containing such terms with the Sponsor'.

NBA and LFC agreed that LFC could seek third-party offers within the First Dealing Period. An offer was received from Nike.

The offer provided, among other things, for Nike to pay LFC £30m per season plus 20% of net sales of licenced products and 5% of net sales of footwear. The offer required Nike to sell products throughout the term of the agreement, and distribute products in at least 6000 stores worldwide, '500 of which are Nike owned or controlled'. The offer also obliged Nike to market products through initiatives featuring no less than three 'non-football global superstar athletes and influencers of the calibre of Lebron James, Serena Williams, Drake etc[…]'.

NBA proceeded to notify LFC that it intended to enter into a new agreement on terms no less favourable to LFC than the 'material, measurable and matchable terms of Nike's offer'.

LFC wrote back, rejecting NBA's offer as 'contrived and unconsidered'. LFC had serious concerns about whether NBA was in a position to match Nike's ability to distribute to 6,000 stores and doubted its ability to engage high calibre celebrities. LFC regarded the distribution element of the offer as less than genuine and not put forward in good faith, and the offer failed to match Nike's offer about engaging high profile celebrities at all. NBA started proceedings in the Commercial Court.

What did the court decide?

The court noted that it was common ground between the parties that there was an implied term of good faith, although the judge did not elaborate on the reasons for that. It is worth noting that the court is notoriously slow to imply into contracts in English law terms imposing duties of good faith. A useful introduction to the implication of terms requiring good faith can be found in SDI Retail Services Ltd v Rangers Football Club Ltd [2019] EWHC 1929 (Comm), at para [78] onwards. Essentially, the usual basis for implying such a term is that these sorts of contracts are 'relational contracts' in which parties have a longer-term relationship with each other involving a substantial commitment.

The court's definition of 'good faith' in this case appeared at para [44]:

> 'It is now clear from a number of decisions that the duty of good faith (or fair dealing) can be breached not only by dishonesty but also by conduct which lacks fidelity to the parties' bargain. In judging whether a party has not been faithful to the parties' bargain it is of course necessary to bear in mind the nature of the bargain, the terms of the contract and the context in which the matter arises. Ultimately, the question for the court is whether reasonable and honest people would regard the challenged conduct as commercially unacceptable; see the review of this area of the law by Fraser J in *Alan Bates and others v Post Office* [2019] EWHC 606 (QB), [2019] All ER (D) 100 (Mar) at paragraphs 706–711.'

Teare J considered two propositions in relation to good faith, accepting that both were valid considerations. Firstly, whether NBA 'did not in fact intend to meet or knew that it could not meet the distribution obligation', in which case it would be acting dishonestly and therefore in bad faith. Secondly, whether NBA was reckless, or acted so as not to care whether they could meet the distribution obligations (see at para [69]).

The court rejected LFC's arguments regarding good faith. Teare J held that NBA had neither acted dishonestly nor recklessly when saying that they could match Nike's offer, citing their due diligence exercise in investigating whether they could in fact match Nike's offer, before making their own offer.

In relation to matching the offer relating to the calibre of celebrities used for marketing purposes, the key issue was how clearly the term was defined and whether the requirement was 'matchable'. NBA's argument was that those sorts of benefits were too vague to match because whether a celebrity was the same calibre as Serena Williams or others was entirely subjective and ought not to be considered an obligation to match in the same way as an obligation to market in 6000 stores worldwide, which could be more empirically measured.

The judge took the view that that sort of offer was indeed measurable, even if it was measurable in a number of different ways, taking a realistic and practical view of the circumstances. The court considered, for example, that the celebrity's amount of social media exposure could be measured, as could other metrics like 'max add value', 'share of voice value' or 'promotional quality score' using a

‘repeatable methodology’. The judge therefore held that the term was capable of being matched, that NBA had failed to put forward proposals regarding that part of Nike’s offer, and dismissed the claim.

Conclusion

How should practitioners manage these sorts of cases and draft contracts where good faith and matching are relevant?

In this case it was crucial that the sponsor, NBA, had carried out a due diligence exercise with its own regional branches before putting forward their offer to LFC. It was clearly significant in the judge’s view that NBA was not in those circumstances putting forward an uninvestigated and reckless offer without any care as to how it might be fulfilled. Similar exercises in due diligence providing reliable evidence to back up any proposed matching will be of significant benefit to claimants.

While this case did not involve consideration of whether a term of good faith ought to be implied (the parties agreed that it was), it was an issue in SDI Retail Services and conceivably could arise as an issue in many cases. Where there is no express term of good faith in the contract, whether a duty of good faith ought to be implied will generally depend on the type of relationship involved. For the avoidance of doubt, practitioners should consider either drafting to provide for an express term, or an exclusion of a duty as appropriate.

In relation to matching more generally, NBA lost on the basis that Nike had put forward an offer that was quantifiable, rather than subjective. It would therefore be advisable to consider by what metrics an offer could be quantified when putting one forward in order to increase one’s chance of a lucrative sponsorship deal, framing terms narrowly enough to allow parties to demonstrate their meaning in some measurable way.

Case details:

- Court: Queen's Bench Division, Commercial Court
- Judge: Teare J
- Date of judgment: 25 October 2019

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