

Construing the meaning of a judicial order or injunction (SDI Retail Services Ltd v The Rangers Football Club Ltd)

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Commercial analysis: How does one interpret the meaning of a judicial order? What materials are admissible as part of that process? Applying existing authority, the Court of Appeal held that the construction of a judicial order or injunction is an objective exercise, depending on what its language would convey, in the circumstances in which the court made it, so far as these circumstances were before the court and patent to the parties. An order granting an injunction, having penal consequences, is to be restrictively construed. In either case, the reasons given by the court for making its order are always admissible as part of the process of construction. But it is doubtful whether the intentions of the judge making the order, or the submissions made by the parties, can usually or ever be relevant. Written by Seb Oram, barrister at 3PB Barristers.

SDI Retail Services Ltd v The Rangers Football Club Ltd [2021] EWCA Civ 790

What are the practical implications of this case?

The general approach of construing orders, set out above, was explained by the Privy Council in *Sans Souci Ltd v VRL Services Ltd* [2012] UKPC 6 (not concerning an injunction). The court explained that the judge's reasons are always admissible as part of that process, and not only when the order is ambiguous (at para [13]). But an injunction carrying penal consequences is to be strictly construed (*JSC BTA Bank v Ablyazov (No 10)* [2015] 1 WLR 4754 (SC), at para [19]).

In *SDI Retail Services* the Court of Appeal followed each of those approaches. The decision clarifies the kind of material that will be of assistance in that process. It seems that transcripts of the parties' submissions will rarely, if ever, be relevant since they do not demonstrate the court's reasons. That appears consistent with the general approach that, as a public document, an order should not be construed by reference to a background fact that was known only to the parties (see, for example, *Group Seven Ltd v Allied Investment Corp Ltd* [2013] EWHC 1509 (Ch), at para [75]).

While the decision explains what material is admissible to construction, as Lord Sumption cautioned in *Sans Souci* (at para [16]), it does not follow that such material will always or necessarily be helpful. That is because the matrix of fact may be used to interpret the language of the order, but not to contradict it.

What was the background?

The appellant, a company in the Sports Direct Group (SD), had entered into an agreement with Glasgow Rangers FC by which it was appointed to operate and manage the club's retail operations on an exclusive basis for a fixed period. The club had the right, within the last six months of the term, to negotiate with third parties to supply similar services after the agreement had expired. The club had to inform SD of the material terms of any third-party offer received, and SD had an entitlement to match it.

The club entered into three further agreements, including one with 'Elite'. It did so in breach of the matching right, without first informing SD. When it found out, SD brought proceedings in the Commercial Court for an injunction preventing the club from performing the Elite agreement.

At trial, the judge made a final injunction against the club, requiring it to 'not perform' and 'not assist [Elite] to perform' the agreement (the Injunction). The club did not at that stage tell the court that sums were due to it from Elite under the Elite agreement and, after the injunction was granted, brought proceedings against Elite to obtain payment of those sums.

The club returned before the judge seeking a declaration that the Injunction did not prohibit it from attempting to recover those sums due to it from Elite. The judge agreed and made that declaration. On appeal, the issue was whether the club's act of demanding payment under the Elite agreement, or commencing proceedings to enforce Elite's obligation, amounted to 'assisting' Elite in the performance of the Elite agreement; alternatively 'performing' it.

What did the court decide?

There was no dispute as to the essential principles of construing an order (ie the need to construe it, like any other instrument, objectively in light of the known circumstances in which it was made). There was, however, a difference in reasoning as to the materials that the court was entitled to have regard to as part of that process.

For the majority (Lord Justice Phillips and Lord Justice Baker), the act of enforcing payment of the Elite agreement had amounted to a breach of the Injunction. The expressed purpose of the Injunction had been to 'undo' the club's breach of contract by entering into the Elite agreement, and to require the club to repudiate it. Given that purpose, while the Injunction did not prevent the club from passively receiving payment from Elite, the club would be 'assisting' the performance of the agreement by issuing proceedings for its enforcement. It would also be 'performing' the agreement by exercising its rights under it.

The majority noted that the meaning that the judge would have placed on his own order was irrelevant (at para [61]). Further, there had to be considerable caution about placing weight on the submissions that had been made by the parties before the order was made (at paras [66], [80]).

Lord Justice Underhill, dissenting, reached a different conclusion as to the purpose of the Injunction. Moreover, instigating proceedings against a creditor could not naturally be described as assisting them to perform the agreement. His Lordship did not consider it objectionable in principle to have regard to the submissions leading to the Injunction where, as here, there was real doubt about the intended effect of the order.

Case details:

- Court: Court of Appeal, Civil Division
- Judge: Lord Justice Phillips, Lord Justice Baker, Lord Justice Underhill
- Date of judgment: 27 May 2021

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