

CASE SUMMARY

NewBalance v Liverpool Football Club

Background

New Balance and Liverpool FC first entered into a sponsorship arrangement over eight years ago, in 2011. The sponsorship agreement granted New Balance the option to match third-party offers relating to the provision of Liverpool FC licensed products provided that it did so on ***"terms no less favourable to [Liverpool FC] than (i) the terms of [the parties' existing sponsorship agreement] and/or (ii) the material, measurable and matchable terms of such third-party offer"***.

- > If it did, Liverpool FC would be obliged to enter into a new agreement with New Balance on such terms.
- > If it did not (or chose not to) after the timeframe specified in the contract, Liverpool FC would be free to contract with the third-party.

With the arrangement due to expire at the end of the 2019/2020 football season, Liverpool FC entered into negotiations with New Balance in an attempt to agree a new deal.

No such agreement was reached and at the end of 2018 the parties accepted that Liverpool FC was free to enter into negotiations with other brands.

Back on the field, on 1 June 2019, Liverpool FC won the UEFA Champions League. Shortly after, Liverpool FC reached a lucrative deal with sportswear giant, Nike, which included the payment of **£30 million per year** on top of a 20% royalty on net sales of Liverpool FC products.

Liverpool FC had been concerned about the matching rights in the deal with New Balance (indeed, the Managing Director and Chief Commercial Officer of Liverpool FC messaged a colleague to say ***"This match clause just absolutely screws us"***). With that in mind, Liverpool FC worked with Nike to include in their deal specific terms (in particular regarding minimum distribution channels and locations) that they expected New Balance would not be able to match (on a practical level).

Liverpool FC notified New Balance of the Nike deal, as provided for under the terms of the sponsorship agreement.

New Balance then proceeded to undertake due diligence as to whether it could - or should - seek to match Nike's offer.

Following this due diligence exercise, New Balance responded to Liverpool FC to confirm that it was in fact willing to enter into a new agreement on terms it said were no less favourable than the material, measurable and matchable terms of the Nike offer. The response included proposed terms reflecting this stated position.

Liverpool FC rejected the attempt to match by New Balance as not being "genuine".

Timeline in the New Balance v Liverpool FC case

- > June 2011: Parties enter into sponsorship agreement
- > March 2018: Liverpool FC instruct Deloitte to look at options for a new kit sponsor
- > July 2018: Negotiations begin between New Balance and Liverpool FC on a possible new deal
- > December 2018: Parties agree to allow Liverpool FC to negotiate with other brands
- > April 2019: Liverpool FC in advanced discussions with Nike
- > June 2019: Liverpool FC win Champions league
- > July 2019: Notice provided by Liverpool FC to New Balance with details of a £30m per year deal with Nike
- > August 2019: New Balance notifies Liverpool FC of its intention to match the Nike terms – which Liverpool FC rejects
- > 10 September 2019: Claim commenced by New Balance against Liverpool FC
- > 18 to 22 October 2019: Hearing of the claim (expedited)
- > 25 October 2019: Judgment on the claim
- > 1 November 2019: Permission to appeal by New Balance refused by Court of Appeal
- > 31 May 2020: New Balance sponsorship agreement due to expire

CASE SUMMARY

NewBalance v Liverpool Football Club

The dispute

New Balance brought a claim in the English High Court to enforce its matching rights in the sponsorship agreement.

The parties were able to agree that a number of terms in the Nike offer were 'material, measurable and matchable' (such as the duration, rights fees, royalty amounts etc.) and agree that New Balance had in fact matched those terms. The parties also agreed that the contract was a 'relational' one giving rise to an implied duty of good faith. There were, however, two sticking points:

- > First, whilst the parties agreed that the **distribution obligations** in the Nike offer were 'material, measurable and matchable' (for example, a requirement to sell licensed products in not less than 6,000 stores worldwide), Liverpool FC's position was that New Balance's agreement to match those terms was in essence a hollow one and therefore not valid by reason of New Balance's alleged breach of good faith. Liverpool FC pointed to various errors in the due diligence process relating to distribution channels in support of its case.
- > Secondly, New Balance did not agree with Nike that the **marketing obligations** (for example to market products *"through marketing initiatives featuring not less than three (3) non-football global superstar athletes and influencers of the caliber [sic] of LeBron James, Serena Williams, Drake etc. ..."*) were 'measurable and matchable', even if they were 'material' (and the fact that New Balance agreed these obligations were 'material' appears to reflect a shift in the marketing of licensed products from players in the relevant sport to a wider marketing effort led by influencers and sports superstars from other sporting disciplines). If the obligations were 'measurable and matchable', New Balance claimed it had agreed to match the terms in any event. Notably, New Balance did not specify in its 'matching' terms that its *"three (3) non-football global superstar athletes and influencers"* would be of the *"caliber [sic] of LeBron James, Serena Williams, Drake etc. ..."*

The outcome

The majority of the three-day hearing of the case was taken up with evidence and argument relating to the first issue above relating to the distribution obligations. But the case did not turn on that. Rather, the outcome hinged on the second issue outlined above: the marketing obligations.

- > In relation to the **distribution obligations**, the judge did not consider that any of the errors on New Balance's part in its due diligence exercise amounted to any breach of its duty of good faith as it did not amount to *"conduct which was not faithful to the parties' bargain or conduct which was commercially unacceptable"* ([New Balance Athletics, Inc v The Liverpool Football Club and Athletic Grounds Limited](#) [2019] EWHC 2837 (Comm) at [68]).
- > In relation to the **marketing obligations**, it was found that the calibre athletes and influencers such as Drake, Serena Williams and LeBron James could in fact be measured [79]. By omitting the words *"of the caliber [sic] of LeBron James, Serena Williams, Drake etc."* from its terms, New Balance's terms were therefore less favourable to Liverpool FC than Nike's. New Balance had not, therefore, fulfilled the conditions of the matching rights clause and Liverpool FC was free to contract with Nike.

New Balance applied to the Court of Appeal for permission to appeal the judgment, but this was [recently refused](#) by the Court of Appeal.

CASE SUMMARY

NewBalance v Liverpool Football Club

Key takeaways from the case

New Balance may be wondering what they could have done differently:

- > **Be specific about what is to be matched** (matching rights clause): The matching rights clause in the sponsorship agreement was relatively widely and vaguely drafted: New Balance had to match all the **"material, measurable and matchable terms"** in any third-party offer. If New Balance had been more specific in the sponsorship agreement as to the terms it was required to match in any third-party offer, it may have been easier for it to have matched (or at least there would have been greater certainty for the parties in assessing whether or not there was a valid match). Instead, even though New Balance was able to match everything else Nike was offering (including duration, payments, royalties etc.), it fell down on not matching the offer of three **"non-football global superstar athletes and influencers"** of a particular calibre.

 - > **Notification of intention to match:** The terms of the sponsorship agreement provided that New Balance only had to notify Liverpool FC in writing **"if it will enter into a new agreement ... on terms no less favourable to [Liverpool FC] than ... the material, measurable and matchable terms of [a] third-party offer"**. Instead of providing a short notification to that effect, New Balance chose to accompany its notification with detailed terms it said fulfilled the requirements of the sponsorship agreement. The judge decided they did not fulfil those requirements. If New Balance had only sent a notification (without any detailed terms), it would have been open to them to argue that they could provide marketing initiatives involving global superstar athletes and influencers of the calibre of LeBron James, Serena Williams, Drake etc. Whether New Balance could provide that is another question, but in sending the detailed terms they committed themselves to a position they couldn't back out of (and lost the case because of it).
- What about the key lesson for those seeking to work with a new sponsor but their sponsorship agreement with an existing sponsor contains matching rights?
- > **Be specific about what is to be matched (third-party terms):** A decisive factor in Liverpool FC's win was its decision to work closely with Nike to include reference to specific requirements they believed New Balance - on a practical level - wouldn't be able to match. Whilst it seems Liverpool FC had thought that the distribution terms would be 'unmatchable' for New Balance, it was the specific reference to a calibre of superstar athletes and influencers that New Balance did not match. If Liverpool FC had only focussed on the *distribution* terms (and not included the specific marketing terms it did), New Balance would have won.