



Matching rights and wrongs: New Balance v Liverpool

Liverpool FC's High Court victory over New Balance provides some valuable lessons for a range of stakeholders when negotiating and litigating kit supply and other sponsorship arrangements. In particular, this case highlights:

- *the importance of ensuring the scope of any matching right is carefully considered and drafted;*
- *the value in undertaking appropriate diligence before making any sponsorship offer; and*
- *the growing strategic importance of global superstar athletes (and non-athletes) to apparel companies.*

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Matching rights and wrongs – sponsorship lessons from Liverpool FC v New Balance

In a season when most things are going right for Liverpool FC on the pitch, the club claimed a different type of victory last week when the High Court [ruled in its favour](#) in a well-publicised dispute with its kit supplier, New Balance. New Balance claimed that Liverpool should be prevented from entering into a new kit supply agreement with Nike on the basis that New Balance had exercised a clause in its existing agreement that entitled it to 'match' any offer made by a third party. The Court ruled that New Balance had validly matched the distribution commitments made by Nike, but had failed to match Nike's marketing commitments. As such, Liverpool is free to have the Nike swoosh adorn its kit from the 2020/21 season.

The outcome is welcome news for Liverpool and any other clubs and rightsholders that have existing sponsorship arrangements with similar terms.

What is a kit supplier agreement and what did Nike offer?

Kit deals are typically structured as a licensing arrangement, whereby the kit manufacturer is granted the exclusive right to use the club's logo and marks on a specified range of kit and apparel (e.g. replica playing kit, training kit, tracksuits, trainers, bags, scarves etc.) that it can sell. In exchange, the club is paid an annual fee (which may have various performance-related bonus elements to it) and a royalty share of the revenues earned from the sale of those products over a certain threshold. The value of this royalty is dependent on the distribution network of the supplier and on its marketing power.

Over the last 20 years, the trend in football has been for clubs to focus on obtaining as high a guaranteed fee as possible with less focus on the revenue share, which is often just 10% of net revenues and may only kick in above a high threshold. The £40 million per season that New Balance reportedly agreed to pay Liverpool when it signed its existing deal in 2011 was a good deal to the club at the time but Liverpool's Premier League rivals have since struck more lucrative bargains. Reports suggest that Manchester United earns £75 million per season from Adidas, while Manchester City and Arsenal earn £65 million per season under their new deals with Puma and Adidas respectively. As winners of last season's Champions League and favourites to win the Premier League this season, it is no surprise that Liverpool's commercial executives were looking to increase the value of their own deal.

Nike's offer to Liverpool bucks this trend, guaranteeing the club 'just' £30 million per season, but offering a healthy royalty of 20% of net sales of all licensed products (except footwear, for which it will pay 5% of net sales). Combined with Nike's commitment to sell such products in at least 6,000 stores worldwide and market the products with its roster of global superstars, Liverpool expects the offer will generate closer to £70 million per season.

What is a matching right and how are they used by sports clubs and rightsholders?

A matching right (otherwise known as a 'right of first refusal') typically grants to the incumbent sponsor or supplier the right to see any bid by a competitor that is seeking to replace it and to decide whether it wishes to match the terms of that offer. If it does so, the rightsholder will usually be required to enter into a new agreement with the incumbent supplier on those terms. A matching right should not be confused with a 'first right' or 'first option', which typically grants a supplier or sponsor an exclusive window, prior to the expiration of its deal, to negotiate and conclude a renewal or extension. Such 'first rights' are common and if no such renewal is agreed during the 'first right' period, the rightsholder will be free to seek offers from other interested parties.

In Liverpool's case, New Balance agreed that Liverpool could seek third party offers before the end of its 'first right' period but, when Nike submitted an offer to replace New Balance as Liverpool's kit supplier, New Balance sought to invoke its 'matching right' in order to continue as kit supplier.

This is not the first time that such a matching right has come before the courts. Indeed, Justice Teare, who heard this case, ruled in October 2018 that Rangers FC had failed to comply with the matching right in its agreement with Sports Direct and so was not entitled to replace its incumbent kit supplier with Hummel. Such disputes are not limited to football kit supplier agreements. In 2012, Oakley launched a claim against Rory McIlroy and Nike in California, claiming that McIlroy had breached the matching right in his apparel

endorsement agreement when entering into a new contract with Nike that covered both apparel and golf clubs. Oakley argued that it was entitled to match the apparel element of Nike's offer, despite Nike offering a much more lucrative collective club and apparel deal. McIlroy (advised by Onside Law) and Nike argued that the clause required Oakley to match the entire deal and, as they did not manufacture golf clubs, this was impossible.

Analysing the scope of the matching right

One of the key questions when analysing the scope of a contractual matching right is: what element(s) of an offer does the incumbent sponsor have to match? It is prudent to consider this question when negotiating a matching right clause at the outset, not simply when the time comes to rely upon it. Rightsholders will seek to make this as broad as possible, allowing for vagueness or leeway so that they might have some discretion as to the comparative value of the bids. Whereas, a sponsor may seek to narrow it to specific key terms, such as financial guarantees.

In this case, New Balance was required to match "*the material, measurable and matchable terms*" of Nike's offer. Having reviewed Nike's written offer, New Balance confirmed that it was willing to enter into a new agreement with Liverpool on the same economic terms proposed by Nike and that it would commit to the same distribution and marketing commitments. However, Liverpool informed New Balance that it did not believe its offer to be "a bona fide attempt to match the terms of the Nike offer" and that the club was therefore free to pursue a new relationship with Nike. New Balance duly brought legal proceedings.

In good faith: matching Nike's distribution network

Both parties accepted that, in seeking to invoke a matching right, there is an implied obligation of good faith. In other words, a sponsor with a matching right in its favour cannot simply match a rival's offer on paper, with no care given as to whether it is capable of fulfilling that offer. The Court was required to perform a comparative exercise, asking first whether New Balance had matched Nike's offer on paper, and second whether it did so in good faith.

The primary focus of Liverpool's case and of the evidence heard at trial was that New Balance's offer to match Nike's distribution commitment was made in bad faith. While New Balance was under no specific distribution obligations under its existing contract, it had sold Liverpool-branded products in under 3,000 "doors" (stores) worldwide; less than half of the 6,000 that Nike had promised. It is clear that New Balance appreciated the challenge it faced to match this commitment and, to determine whether it was able to do so, it undertook an internal diligence exercise. This produced an increased figure of 6,300 doors that New Balance believed it could sell into; more than enough to match the offer made by Nike. While the veracity of some of the regional figures was contested at trial, Teare J declined to decide whether New Balance was likely to be able to fulfil its distribution obligation. Instead, he felt obliged only to establish whether, at the time of making its offer, New Balance honestly believed that it could meet the distribution obligation.

While the diligence exercise undertaken by New Balance may not have been entirely beyond reproach, and while the numbers may have been "aggressive", the court was satisfied that New Balance could not be said to have not cared whether they were feasible or not. Accordingly, New Balance's offer to match Nike's distribution commitment was deemed to be valid.

While many expected this to be the determining element of the entire case, there was another twist to come...

Star power: matching marketing commitments

In addition to the economic and distribution terms, the Nike offer contained a promise to market the Liverpool products with "*not less than three non-football global superstar athletes and influencers of the calibre of LeBron James, Serena Williams, Drake etc.*". New Balance's offer contained the same wording about the use of "global superstars" but did not mention any by name. There were two pertinent questions that the court considered in relation to this commitment: (1) was this commitment a 'material, measurable and matchable' term such that it would be subject to the matching right?; and (2) if so, was the term validly matched by New Balance?

Teare J found that the inclusion of reference to those specific individuals in the Nike offer must have been agreed for a material purpose; namely that they were more than simply 'regular' global superstars. Perhaps even more controversially, Teare J found that the "calibre" of such names is indeed measurable, though he declined to clarify how best to do so. Therefore, by omitting the reference to those specific individuals (or names of other individuals of a comparable calibre), the court held that New Balance had failed to match this element of Nike's offer and so *"it must follow that Liverpool FC is not obliged to enter into a new agreement with New Balance upon the terms of the latter's offer"*.

Considerations for the broader sponsorship landscape

Could New Balance have matched Nike's marketing commitment at all? For a company that until recently adopted the slogan "Endorsed By No One", it does now have Kawhi Leonard (the reigning NBA Finals MVP) and Coco Gauff (the 15-year old tennis phenom who overcame Venus Williams at Wimbledon) on its roster of athletes. However, it is quite possible that even this would not have sufficed. Indeed, it is arguable that no company can truly compete with the calibre of athlete and non-athlete superstars that Nike has on its endorsement roster, potentially giving it a key advantage over its rivals when competing for future kit and sponsorship deals.

It is striking that sports apparel brands such as Nike have been investing significant money in recent years to conclude endorsement deals with non-sports superstars. Where Nike can call on Drake, Adidas have Beyoncé, Kylie Jenner and Kanye West and Puma have a deal with Rihanna. Liverpool's victory in court amplifies the strategic importance of these deals for the apparel companies and, in doing so, might have bolstered the negotiating leverage (and value) of these deals for the top-tier superstars.

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