IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
INTELLECTUAL PROPERTY ENTERPRISE COURT (ChD)
[2020] EWHC 3907 (IPEC)

No. IP-2020-000071

Rolls Building
Fetter Lane
London, EC4A 1NL

Monday, 23 November 2020

Before:

HIS HONOUR JUDGE HACON

B E T W E E N :

PIXDENE LIMITED — Applicant

- and -

PADDINGTON AND COMPANY LIMITED — Respondent

MR P. ROBERTS QC and MR D. FLETCHER (Suttons Solicitors) appeared on behalf of the Applicant.

MR N. CADDICK QC (instructed by Reed Smith LLP) appeared on behalf of the Respondent.

J U D G M E N T

(via Skype Conference)

(Transcript prepared without access to all documentation)

JUDGE HACON:

1 This is an application for pre-action disclosure. I will refer to the applicant as "Pixdene" and the respondent as "Paddington". Phillip Roberts QC appears for Pixdene, Nicholas Caddick QC for Paddington.

2 The centre of the dispute between the parties is a Royalty Distribution Agreement dated 12 March 2013. I will call this the "RDA". The recital to the RDA states that it sets out in writing the terms of an unwritten agreement dating back to the 1970s. This informal agreement related to the income derived from character merchandising rights associated with Paddington Bear, the leading character in books written by Michael Bond and more recently the title character in two successful films.

3 The RDA records that Paddington has licensed the worldwide merchandising rights to Copyrights Group Limited, which I will call "CGL". Clause 1 states that Pixdene will receive 10 percent of the net merchandising income paid to Paddington after deductions. One of the deductions is a fee paid to CGL. CGL acts as Paddington's agent in developing and exploiting the rights.

4 This is not the first time the parties have fallen out over the terms of the RDA. At one point, Paddington's position was that it was not bound by the RDA at all and that all payments it had made to Pixdene had been gratuitous, on an entirely without prejudice basis. Pixdene brought an action in this court seeking a declaration that the RDA is binding on the parties. There was an interim hearing, after which the action was settled before trial. According to the terms of the settlement it is now not in dispute that the RDA is binding.

5 The assertion as to the non-binding nature of the RDA came after Paddington was acquired by Vivendi, the French conglomerate. Pixdene believes that this was part of a newly aggressive stance taken by Paddington to maximise its profits. I say nothing about that, but it brings me to the new dispute.

6 On 7 May 2020, the financial controller of CGL, Nicola Costar, sent an email to David Lee of Pixdene's accountants. The email stated that Mr Lee would shortly be receiving the usual quarterly account of merchandising revenues and it drew Mr Lee's attention to what Ms Costar calls:

> "...changes in the accounting methodology that take effect from this quarter."

7 I would have taken this to imply that the changes took effect from 1 April 2020, although it was apparently not as simple as that.

8 The first change was that Paddington had agreed to pay the broadcaster, Nickelodeon, a share of the net merchandising revenues. Nickelodeon was due to broadcast a new TV series of Paddington Bear. This change was stated to date from 1 January 2020. The second change was that David Heyman was to be paid a share of the revenues. Mr Heyman appears to be a producer of the TV series and also producer of a third Paddington film due to be released in 2022. The letter states that these payments would reduce the sums payable to

Pixdene. There was a third change, the one which has caused Pixdene most concern. The letter explained it as follows:

> "A third change is that P&Co has agreed that the commission rate earned by Copyrights on UK merchandising income will be increased from 25% to 35% on 2020 and future royalties. The previous rate was set in the 1970s and does not represent the current level of commission rates charged by other UK based licensing agents or by Copyrights in respect to other properties that it represents. The commission rate for the UK has therefore been realigned to the market rate so Copyrights can continue to invest in growing the merchandising income. Overseas commission rates remain unchanged."

9 Pixdene believes it to be significant that when the RDA was entered into in 2013, Paddington and CGL were separately owned whereas in 2016 they both came under the control of Vivendi. Pixdene points out that in 2013 it was in Paddington's interest to keep the commission payable to CGL as low as possible. Since 2016 however, that incentive has gone since it has become just one Vivendi company paying another. In fact, from the Vivendi Group's perspective the higher commission paid to CGL the better because a higher commission means a greater deduction from the share of merchandising income paid to Pixdene. Pixdene is reinforced in this view by the fact that Paddington's two directors are now respectively the chairman and CEO of CGL. Moreover, Paddington's accounts suggest that it is now just a shell company operated for the benefit of CGL.

10 On 20 May 2020 Pixdene's solicitors wrote to Paddington. Among other things, they asked for the complete and unredacted agreements with Nickelodeon, Mr Heyman and CGL. On 21 May, Ms Costar sent an email to Pixdene's solicitors. Ms Costar said that her firm would give consideration to any request from Pixdene's auditors to inspect any documentation relevant to their review but otherwise offering nothing by way of disclosing documents. Ms Costar also referred to Paddington and CGL as having:

> "...entered into a new agreement effective 1 January 2020."

11 The documents sought by Pixdene in correspondence were not provided. On 8 July 2020, Pixdene issued the present application notice seeking pre-action disclosure. The draft order accompanying the application notice has since been amended. Thirteen categories of documents are now sought by Pixdene, they are:

> "1. By 4 p.m. on [4 weeks from the Order], the Respondent must carry out a reasonable search to locate all documents (including electronic documents) in the classes listed below and disclose and permit the Applicant to inspect those documents within the Respondent's control:
>
> (1) The current agency agreement between the Respondent and The Copyrights Group Limited ("**Copyrights**" as a party to the "**New Copyrights Agreement**");
>
> (2) Any other agreement that has replaced the agency agreement between the Respondent and Copyrights dated 3 October 2012 (the "**Old Copyrights Agreement**");

(3) Drafts of the documents in subparagraphs (1) and (2) above;

(4) Board minutes or similar documents recording the approval of the Respondent's entry into the New Copyrights Agreement or any other agreement that replaced the Old Copyrights Agreement;

(5) Drafts of the documents in subparagraph (4) above;

(6) For a date range of 1 October 2019 until one month after the date on which the Respondent confirms that the New Copyrights Agreement has been concluded, emails concerning:

(a) The purpose or negotiation of the New Copyrights Agreement; or

(b) Payments to the Applicant under the Royalty Distribution Agreement between the Applicant and the Respondent dated 12 March 2013,

except for emails that were sent to or by the Applicant or its solicitors;

(7) Any term sheet, heads of terms or similar document recording the potential or proposed terms of an agreement to replace the Old Copyrights Agreement;

(8) For the date range of 1 October 2019 until one month after the date on which the Respondent confirms that the New Copyrights Agreement has been concluded, any emails, notes, memoranda, board minutes or other documents concerning the purpose or negotiation of an agreement to replace the Old Copyrights Agreement, except for emails sent to the Applicant or its solicitors;

(9) Royalty audits carried out on behalf of the Respondent or Copyrights since 1 July 2017;

(10) The protocol(s) used to calculate or pay royalties due from Copyrights to the Respondent or from the Respondent to the Applicant (in each case from 1 July 2017 onwards);

(11) Merchandise licensing agreements in respect of the Paddington Bear character (for the period from 1 July 2017 onwards);

(12) Accounts and similar records summarising receipts, payments and transactions relating to merchandising income from the Paddington Bear character (from 1 July 2017 onwards);

(13) Invoices for, or statements of, royalties received by Copyrights or the Respondent in respect of merchandising income from the Paddington Bear character (from 1 July 2017 onwards)."

12 The first document sought on that list defined as the "New Copyrights Agreement" was also first in the list in the draft order provided in July 2020. Pixdene assumed from what Ms Costar had said that Paddington and CGL had concluded a new agreement which increased CGL's commission on the UK merchandising income from 25 to 35 percent. In a letter dated 19 October 2020, Paddington's solicitors stated:

> "This so-called New Copyrights Agreement does not exist in writing and has not yet been concluded."

13 The letter continues:

> "Once an agreement has been concluded, the third-party auditor will be able to see it as part of the normal inspection process under clause 5 of the RDA."

14 This response does not seem to be consistent with Ms Costar's email of 7 May 2020, in which she said the increase of CGL's commission had been agreed to start as of 1 April 2020, or her email of 21 May 2020 in which she said that Paddington and CGL had entered into the new agreement as of 1 January 2020. In all events, today Mr Caddick confirmed that there is an oral agreement to increase the commission to 35 percent, effective as of 1 January 2020, but as yet no written agreement.

15 Pixdene believes it has two potential claims against Paddington. The first is for breach of an implied term in the RDA. The implied term is of a nature similar to that considered by the Supreme Court in *Braganza v BP Shipping Limited & Anor.* [2015] UKSC 17. *Braganza* concerned a contract of employment and a claim by the widow of the former employee for death in service benefit. The benefit had been denied by the employer on the ground of a finding made by the employer that the deceased had probably committed suicide.

16 The Supreme Court held that where contractual terms give one party to a contract a power to exercise a discretion or to form an opinion as to relevant facts, and where the decision would have affect the rights and obligations of both parties, in appropriate cases a term would be implied into the contract that the power should be exercised in good faith and without being arbitrary, capricious or irrational in the sense in which such terms are used when reviewing the decisions of public authorities. In other words, it is a test something like the *Wednesbury* test. In this judgment, I will refer to it as a test of good faith, although that should be taken to mean the test as fully explained by the Supreme Court.

17 Returning to the present dispute, the RDA contains the following recital:

> "For the sake of clarity, Paddington maintains the right to vary the computation of the net payment to Pixdene, for example, but not limited to, it's [sic] right to deduct further payments prior to payment to Pixdene such as for example, Paddington's approved legal expenses, trademark expenses, marketing expenses or participation granted to third parties for services judged by Paddington to be of commercial advantage to Paddington, including but not limited to its,

> merchandising income. At no point however, shall such deductions be limited solely to the net income being paid to Pixdene."

18 I understand Pixdene's potential argument to be that under the RDA Paddington has the discretion to form an opinion as to payments to third parties including CGL. Those payments come out of the sums received from the merchandising rights of Paddington Bear. Paddington's decision about such payments therefore affects the rights of Pixdene. Accordingly, Pixdene would argue, there is an implied term in the RDA that any increase in payment to a third party by Paddington must be decided in good faith.

19 Today, Pixdene has focused largely on the increase in commission paid to CGL. The central issue would therefore be whether the increase in commission was decided in good faith.

20 Pixdene advances another potential claim, this one arising from clause 5 of the RDA:

> "During the term of this Agreement a third party auditor may, upon prior written notice to Paddington and not more than once per every two year period, inspect the agreements and any other business records of Paddington with respect to the relevant records or associated matters during normal working hours to verify Paddington's compliance with this Agreement."

21 The claim would be that Paddington is in breach of clause 5 of the RDA because it refuses to supply documents necessary for an audit to verify Paddington's compliance with the RDA. I will call this the "Audit Claim".

22 Pixdene seeks pre-action disclosure of the new agreement between Paddington and CGL, although that apparently does not exist in writing. Pixdene also seeks disclosure of other documents in order to arrive at a view as to how Paddington reached its decision to increase the commission paid to CGL. These are categories 2 to 8.

23 Categories 9 to 13 are documents which, Pixdene says, have been identified by an independent auditor as required for carrying out an audit pursuant to clause 5 of the RDA.

24 I turn to the law. The starting point is CPR 31.16:

> "(1) This rule applies where an application is made to the court under any Act for disclosure before proceedings have started.
>
> (2) The application must be supported by evidence.
>
> (3) The court may make an order under this rule only where -
>
> > (a) the respondent is likely to be a party to subsequent proceedings;
> >
> > (b) the applicant is also likely to be a party to those proceedings;
> >
> > (c) if proceedings had started, the respondent's duty by way of standard disclosure, set out in rule 31.6, would extend to the

documents or classes of documents of which the applicant seeks disclosure; and

(d) disclosure before proceedings have started is desirable in order to -

(i) dispose fairly of the anticipated proceedings;

(ii) assist the dispute to be resolved without proceedings; or

(iii) save costs.

(4) An order under this rule must -

(a) specify the documents or the classes of documents which the respondent must disclose; and

(b) require him, when making disclosure, to specify any of those documents -

(i) which are no longer in his control; or

(ii) in respect of which he claims a right or duty to withhold inspection.

(5) Such an order may -

(a) require the respondent to indicate what has happened to any documents which are no longer in his control; and

(b) specify the time and place for disclosure and inspection."

25 CPR 31.16(3) was considered by Rix LJ in *Black v Sumitomo Corporation* [2001] EWCA Civ.1819. As Rix LJ explained, the rule involves a two-stage test. First, the jurisdictional thresholds set out in (a) to (d) must be satisfied. Secondly, if they are satisfied the court must exercise its discretion in coming to a view as to whether to order disclosure, taking into account all relevant circumstances. I will return to *Black v Sumitomo* and indeed other authorities in context. I will, however, add an observation now about the threshold under (c) which I addressed in *Intuitive Limited v Educare Learning Limited* [2018] EWHC 3976 (IPEC):

"[7] It is common ground that the requirements of Rule 31.16(1), (2), and (3)(a) and (b) have been met. CPR 31.16(3)(c) raises a particular issue in this court. If proceedings had started in this court, Educare would have to give standard of disclosure. Standard disclosure is never ordered in this court. There is a further complication. Because proceedings have not started, the dispute has not been formally allotted to IPEC or, for that matter, to any other list in the High Court.

[8] Ms Reid said that I must take paragraph (3)(c) at face value, notwithstanding that standard disclosure is never ordered in IPEC. Paragraph 16(3)(c) provides a jurisdictional and discretional hurdle which should apply equally in IPEC as it would

in any other part of the High Court. At this point, it is convenient to set out CPR 63.24:

> '(1) Rule 63.9 does not apply.
>
> (2) Part 31 applies save that the provisions on standard disclosure do not apply.'

[9] Where rule 63.24(2) says 'Part 31 applies save that the provisions on standard disclosure do not apply,' on one view, and I think probably the better view, this disapplies the reference to standard disclosure in rule 31.16(3)(c).

[10] Even if Ms Reid is right and that the hurdle under 31.16(3)(c) is the same in IPEC as elsewhere in the High Court, when it comes to exercising the court's discretion, it seems to me highly relevant for the court to consider whether the disclosure sought by way of pre-action disclosure takes the form of documents which, in practice, would be disclosed under the IPEC procedure."

26 With regard to the potential *Braganza* Claim, Paddington accepts that the jurisdictional thresholds under (a), (b) and (d) of CPR 31.16(3) are satisfied. Paddington does not formally accept that the threshold under (c) is satisfied on the ground that the potential claim lacks clarity, although this objection was not advanced with any great force by Mr Caddick in the context of the jurisdictional thresholds. He reserved his argument more for the issue of discretion.

27 With regard to the potential Audit Claim, Paddington accepts that the thresholds under (a) and (b) are satisfied, Mr Caddick submitted that the threshold under (c) is again not satisfied because the whole purpose of the audit action would be to construe clause 5 of the RDA and for the court to decide whether the documents in issue should be provided to an independent auditor for inspection during normal working hours. Pre-action disclosure of those documents now would predetermine the outcome of such an action in Pixdene's favour. Furthermore, having them disclosed to Pixdene rather than to its auditor would give Pixdene greater access to the documents than it could be entitled to, even if it were to win the action. It follows, Mr Caddick says, that this court would never order disclosure of the documents in categories 9 to 13 if the Audit Claim were brought. No point was taken by Paddington in relation to the threshold under (d) for the Audit Claim.

28 I have no real doubt that if the *Braganza* Claim was started in this court there would be, in the normal course, an order for disclosure of any document which records an agreement between Paddington and CGL as to CGL's commission, assuming there are any. There may be an order for some of the documents in categories 2 to 8 of the draft order. I am therefore satisfied that threshold under (c) is satisfied at least in relation to some of the documents sought in relation to the *Braganza* claim.

29 With regard to the Audit Claim, I think there is force in Mr Caddick's submission regarding (c) of CPR 31.16(3). Pixdene is attempting to use pre-action disclosure of documents in order to achieve the very relief sought in the action. The same would apply to disclosure after the action has started. I agree that if the Audit Claim were brought, the court would not order that disclosure. It follows that pre-action disclosure of those documents does not satisfy the threshold requirement of (c).

30 I next consider the arguments on discretion. Mr Roberts approached the question of discretion by saying that there was an overlap between (d) of the jurisdictional thresholds and discretion. On that basis, he addressed the three limbs of (d) and said that the documents sought would assist Pixdene in assessing the strength of its potential claims and may even be dispositive particularly of the *Braganza* Claim if the documents revealed that Paddington had acted in good faith.

31 Mr Roberts said the claim is not speculative because Vivendi has such an obvious incentive to increase the commission payable to CGL and has in effect the unilateral power to bring that about through Paddington. Mr Roberts also referred to the overriding objective and the requirement that the court should endeavour to ensure that the parties are on an equal footing. Paddington is part of the huge Vivendi Group whereas Pixdene is a small family company. It seems that the RDA is Pixdene's only significant source of revenue. Mr Roberts also drew attention to the inconsistencies in Paddington's position with regard to whether there had been agreement to increase CGL's commission.

32 Paddington argues that the following matters are relevant to the exercise of the court's discretion. First, in *Black v Sumitomo,* Rix LJ said at para.88 the clarity of the issues which would arise in the prospective action - or the lack of clarity - is relevant to discretion as well as to one of the jurisdictional thresholds. Paddington argues that the potential *Braganza* Claim is unclear particularly since Pixdene has not proffered draft Particulars of Claim.

33 Secondly, Paddington submits that the factual and legal basis for the *Braganza* Claim is speculative. Rix LJ referred to this as a relevant issue in *Black v Sumitomo* at para.91. Rix LJ also said that where the court is satisfied that the prospective claim is speculative, unless there is evidence of dishonesty or abuse that only early disclosure can properly reveal, the court should be slow to allow a rolling inquisition of another party's documents. Mr Caddick for Paddington submitted that the problem for Pixdene was that the recital in the RDA quoted above expressly contemplates Paddington increasing the deductions from payments to Pixdene. The fact that there had been or will be such deductions cannot give Pixdene a claim. No evidence has been filed to support an allegation of lack of good faith therefore the claim is entirely speculative. Pixdene is just hoping that something will turn up in the documents sought. So far as the Audit Claim is concerned, Mr Caddick submitted that this is equally speculative. He pointed out that there had been two previous audits which did not identify any lack of documents from Paddington or any underpayment.

34 The third argument is that Paddington has provided the reasons for the increase in CGL's commission in correspondence. Those reasons given were that the rate of 25 percent was set about fifty years ago, it no longer reflects the market rate, and is accordingly less than the rate charged by CGL to its other clients.

35 Fourthly, Paddington now has no staff of its own. All the work is done by CGL so one would expect CGL to be paid for that.

36 The fifth argument is that if this claim for pre-action disclosure is successful, Pixdene is liable to review the documents and then come back for more causing further expense.

37 Sixthly, in the earlier action between Pixdene and Paddington, Pixdene elected not to run claims for breach of a *Braganza* implied term or a claim to the effect of the audit clause, both of which had figured in draft Particulars of Claim supplied in advance of that earlier action. Mr Caddick submitted that all or part of the currently proposed *Braganza* and Audit Claims could probably not be pursued under the rule in *Henderson v Henderson* [1843] 67

ER 313. Once there is a pleading, the application of *Henderson v Henderson* to this case, if any, can be reviewed and if necessary determined by the court. Pixdene should not get disclosure now in relation to claims which, as it may turn out, Pixdene is not entitled to run.

38 Seventhly, the cost of this application for pre-action disclosure and the cost of complying with any order are liable to be out of proportion to the benefit to Pixdene. There is evidence from Jonathan Radcliffe, a partner in Reed Smith LLP who act for Paddington in this matter. He estimates that the cost of giving the disclosure sought would be somewhere between £44,000 and £260,000 depending on whether it is possible to use filters and keywords. As against that, Mr Caddick has calculated that the reduction of royalties due to Pixdene caused by the projected increase in CGL's commission is no more than £2,000, being a reduction from £15,000 to £13,000.

39 Eighthly and finally, Paddington says that the application for pre-action disclosure is not helped by Pixdene's allegations in the evidence that it has been persistently underpaid. That evidence is anyway unreliable.

40 Although I have found that the documents sought in relation to the prospective Audit Claim do not satisfy one of the threshold requirements, I will consider all the arguments on discretion.

41 I do not agree that the correct approach in exercising the discretion of the court in an application for pre-action disclosure is to run through the issues set out in (d) of CPR 31.16(3) as Pixdene suggests. These are expressly said to be relevant to the jurisdictional stage and should be treated as such. Of course, there may be an overlap, but it must be the case that a court could be satisfied that a pre-action disclosure is desirable in order to dispose fairly of the anticipated proceedings, assist in resolving the dispute and save costs, and yet reach the conclusion that the court's discretion should not be exercised to order pre-action disclosure. There are wider considerations.

42 It is probably the case that Pixdene would be assisted in assessing the strength of the *Braganza* Claim if the documents in categories 1 to 8 were disclosed now. It is possible that the contents of those documents would resolve the claim one way or the other. However, in *Hutchinson 3G UK Limited v O2 UK Limited* [2008] EWHC 55 Comm, David Steel J observed at para.55 that in almost every dispute a case could be made out that pre-action disclosure would be useful in achieving a settlement or otherwise savings costs:

> "It must be that, in almost every dispute, a case could be made out that pre- action disclosure would be useful in achieving a settlement or otherwise saving costs. It follows, in my judgment, that, in order to obtain pre-action disclosure, the circumstances must be outside 'the usual run' to allow the hurdle to be surmounted: *Trouw UK Ltd v Mitsui & Co (UK) Plc* [2006] EWHC 863 (Comm) at para.43."

43 I respectfully agree and in this regard I refer also to *Black v Sumitomo* at para.85.

44 In *Loches Capital Limited v Goldman Sachs International* [2020] EWHC 2327 (Comm), Stephen Hofmeyr QC (sitting as a deputy High Court judge) said at para.43 that in most cases pre-action disclosure will not be appropriate. That is consistent with the view that the circumstances in which pre-action disclosure will be ordered are going to be outside usual run.

45 I think it is fair to say the logic of the submission advanced by Pixdene is that prospective claimants should almost always be entitled to trawl through documents held by a proposed defendant before having to decide whether to commit to bringing an action. That is not the law.

46 On the other hand, I accept that the court must bear in mind any imbalance in resources between the parties. I also accept that there is a significant imbalance in the present case. I think the relevant point here is not so much the imbalance in financial resources as the fact that Pixdene does not have access to large sums of money to support litigation.

47 It seems to me that there could be circumstances in which an impecunious party should be entitled to pre-action disclosure of documents which are of a nature and which are sufficiently few in number to result in an inexpensive search by the respondent. This would be the case where sight of such documents would be likely to give the impecunious party the opportunity to reach an informed view on whether to bring the proceedings without being forced to incur the costs of starting an action and possibly having to compensate the opposing party in costs in due course.

48 That said, impecuniosity of the applicant will never be enough by itself to warrant pre-action disclosure. Each case will turn on its own facts; important considerations would be the likelihood on the evidence as it stands that the applicant has a significant potential claim against the respondent, the likelihood that the documents sought would provide decisive information as to the strength of the claim, whether the disclosure sought would be costly for the respondent to provide, whether the potential cost of starting an action in the usual way would be likely to act as a barrier to justice for the impecunious party, and so on.

49 In the present case, it is not suggested that there is one key document or even just a few of them. By way of example, there is apparently no written agreement between Paddington and CGL as to the increase in CGL's commission, but even if there were, Pixdene already knows the important term. CGL's commission has risen, we now know, from 25 percent to 35 percent. Pixdene does not need sight of a document setting that out in order to frame a case in relation to that. Pixdene's real target is all the documents it can think of to find out how good its case on lack of good faith might be, without the evidence that it is likely to have a *Braganza* claim against Paddington at all. In my view the pre-action disclosure sought for the *Braganza* Claim can fairly be described as fishing.

50 The same goes for the pre-action disclosure sought in relation to the prospective Audit Claim. A large number of documents are sought in order to find out whether Pixdene's suspicion that they should have been disclosed in accordance with clause 5 is well-founded. It would be expensive fishing at that. Mr Radcliffe's estimates of the cost of searching for these documents was disputed but I cannot just dismiss that evidence. His lower end estimate was £44,000; Pixdene is offering only a modest sum, £6,000, to compensate for those costs.

51 Turning to Paddington's rather confusing emails and letters as to whether there has been a new agreement with CGL yet or not, I agree that they have been inconsistent and unhelpful but that of itself is no reason to make an order for pre-action disclosure.

52 I am therefore not satisfied that Pixdene has advanced sufficient reason for pre-action disclosure in relation to either its potential *Braganza* or its potential Audit Claim. Pixdene must make up its mind whether to bring an action for one or both claims and in the normal course will obtain disclosure appropriate in this court. If Pixdene does start an action, it will

be entitled to rely on the rules on costs and procedure which apply in this court to minimise the effect of the discrepancy in financial resources as between itself and Paddington.

53 In deference to the arguments advanced on behalf of Paddington, I will address them briefly. I do not agree that the potential claims suffer from a lack of clarity such as to militate against the grant of pre-action disclosure. To my mind, the claims which Pixdene are contemplating are tolerably clear. I have outlined above what they are.

54 On the other hand, as I have discussed I accept that the strength of both claims is largely speculative. I do not say this because one of the recitals in the RDA expressly contemplates that Paddington is entitled to make deductions from the payments to Pixdene. I do not understand it to be in dispute that Paddington is entitled to do this; the question is whether it has been done in good faith. My reason for reaching the view that the claims are speculative is that there is no evidence, and no draft pleading, providing good grounds to suppose either that there has been a lack of good faith on the part of Paddington or a lack of documents provided under clause 5.

55 Going on to Mr Caddick's third point, it is true that Paddington has provided reasons for the increase in CGL's commission. I think that goes no further than raising an argument as to why the increase in CGL's commission may have been agreed in good faith. It is not decisive of anything. Likewise, the fact that Paddington has no staff does not preclude a lack of good faith.

56 Paddington fears that if Pixdene is given pre-action disclosure now it will be encouraged to come back for more. Whether or not a further bite of the cherry is warranted would be for the judge hearing any subsequent application to decide, but I do not see that it affects my decision today.

57 I think there may be some force in Paddington's point about *Henderson v Henderson* although it is hard to say how much. The consequence of the interim judgment I gave in the previous action between these parties is that it is possible - I put it no higher than that - that the scope of Pixdene's claims could be limited by the rule in *Henderson v Henderson*. Because it is possible, it may be more satisfactory to sort out the limitation - if there is one - before disclosure rather than afterwards.

58 I am not sure that the likely cost of the potential *Braganza* and Audit claims is relevant. Pixdene has the unenviable choice of either rolling over every time Paddington chooses to decrease Pixdene's income, or every time Paddington declines to provide certain documents under clause 5, or alternatively electing to fight its corner. That unattractive choice is one that Pixdene is entitled to make. Paddington and its associates can afford to amount a defence.

59 Finally, I am unable to reach a view as to whether Pixdene has been persistently underpaid under the RDA. That is for another day, if it comes.

60 For the forgoing reasons, the application for pre-action disclosure is dismissed.

L A T E R

61 Turning to costs, in my view the better view is probably that this has been a proceeding in IPEC. It is an application generated by an application notice which, on any view, was an application notice issued in this court. Even if I were to be wrong about that, there is an

overriding discretion on costs, and it seems to me that that the discretion should be applied here to afford the usual protection in relation to costs that applies in IPEC.

62 The usual cap on costs in IPEC for an application is £3,000 and I will apply that cap. The respondent has succeeded. The application has been dismissed. Therefore I will order the applicant to pay £3,000 in respect of the respondent's costs.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

Transcribed by ***Opus 2 International Limited***
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital

This transcript has been approved by the Judge