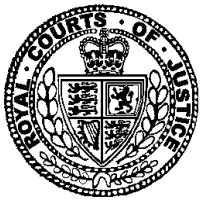

Neutral Citation Number: [2025] EWCA Civ 486

Case No: CA-2025-000471

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
MR JUSTICE MARCUS SMITH
[2025] EWHC 444 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/04/2025

Before:

SIR JULIAN FLAUX CHANCELLOR OF THE HIGH COURT
LORD JUSTICE PHILLIPS
and
LORD JUSTICE SNOWDEN

- -

Between:

HIPGNOSIS SFH 1 LIMITED	**Appellant**
- and -	
(1) BARRY MANILOW **(2) HASTINGS, CLAYTON, TUCKER, INC DBA STILETTO ENTERTAINMENT**	**Respondents**

- -
- -

Edmund Cullen KC (instructed by **Clintons**) for the **Appellant**
Andrew Sutcliffe KC and William Day (instructed by **Wiggin LLP**) for the **Respondents**

Hearing date: 11 April 2025

- -

Approved Judgment

This judgment was handed down remotely at 10.00am on Thursday 17 April 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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Sir Julian Flaux C:

Introduction and factual background

1. The appellant, the claimant in these proceedings, appeals with permission granted by Phillips LJ against paragraph 2 of the Order of Marcus Smith J dated 27 February 2025 by which the judge stayed claims against the respondents (who were respectively the first and third defendants to the proceedings, the claim against the second defendant having been struck out) for declarations in relation to the additional purchase price. The appellant also appeals the consequential costs order in paragraph 5 of the Order of the judge that there be no order as to costs.

2. The claim is made by the appellant under a Music Catalogue Agreement dated 20 March 2020 between the appellant and the respondents which made provision for the payment of certain receivables, including royalties, from the recordings of the first respondent, the well-known singer-songwriter, to the appellant, in return for payment of an initial purchase price. An additional purchase price was payable in certain circumstances.

3. Clause 14 of the Agreement, headed "Governing Law and Jurisdiction", provides as follows:

> "This Agreement and any related dispute or claim (contractual or non-contractual) shall be governed by, and construed in accordance with, English law. Each party irrevocably submits for all purposes of this Agreement (including any such dispute or claim) to the exclusive jurisdiction of the English courts. Any judgment obtained in the English courts may be enforced in any other jurisdiction. Notwithstanding the foregoing, any claims made by BM against Hipgnosis related to the Purchase Price may be brought by BM in the courts of Los Angeles, California or New York City, New York and solely in connection with such claims, Hipgnosis hereby agrees to submit to the jurisdiction of the courts located in Los Angeles, California and New York City, New York."

4. The nature of the dispute between the parties in broad terms is that the appellant contends that the respondents have failed to pay the so-called Sony Receipts (royalties received from Sony Records) that they are obliged to pay to the appellant pursuant to the Agreement, and that the respondents hold such of the Sony Receipts as have been received by them on trust for the appellant and are obliged to pay them over to the appellant without set-off or counterclaim. The appellant made repeated demands for payment between August 2023 and March 2024.

5. The respondents contend that the additional purchase price stated in the Agreement is due and payable to them, that the appellant has not paid this additional consideration, and that this justified the retention of the Sony Receipts by the respondents that would otherwise be payable by them to the

appellant under the Agreement. The appellant denies that any additional purchase price is payable in any event.

6. On 2 May 2024, a US attorney acting for the respondents wrote to the appellant's New York attorney demanding payment of the additional purchase price of some US$1,500,000. The letter referred to the fourth sentence of clause 14 of the Agreement and said:

> "This gives my client the [right] to bring a civil action for those payments in Los Angeles, but does not allow your client to bring any claims in that forum. Should we proceed to litigation, my client can and will pursue $1,500,000 plus its attorney's fees in Los Angeles, while your client can pursue a claim for peanuts in the United Kingdom."

7. These proceedings were issued on 12 August 2024. In the Particulars of Claim, the appellant seeks declarations that (1) the Sony Receipts are held by the respondents on trust for the appellant and that the respondents are liable to pay them to the appellant without deduction of any kind; (2) in order for the additional purchase price to be payable under the Agreement, the cash income for Year 1 was required to be at least 10% in excess of the cash income for the year to the Closing Date (i.e. the date on which the initial purchase price was paid by the appellant); (3) the respondents are not entitled to payment of any additional purchase price under the Agreement. The appellant also seeks an order that the respondents pay the Sony Receipts to the appellant and an account of all sums received by the respondents from Sony Records and an order for payment of sums shown by the account to be payable to the appellant.

8. The proceedings were served on the respondents out of the jurisdiction without permission to serve out from the Court being required, since the appellants certified that the claim was subject to a jurisdiction clause conferring jurisdiction on the English Courts. There is a dispute as to whether the claim form was served on the third respondent on 12 August 2024 or, as the respondents contend, deemed served on that company on 23 August 2024. It is agreed that the date of deemed service on the first respondent was 9 October 2024. The respondents both filed Acknowledgments of Service indicating that they intended to challenge the jurisdiction.

9. The respondents issued proceedings in Los Angeles on 28 August 2024 (16 days after the present English proceedings were issued) in which they make claims in respect of the additional purchase price. The Los Angeles proceedings also have a wider ambit and include claims that there was fraudulent or negligent misrepresentation by the appellant in the pre-contractual negotiations. The appellant contends that those additional claims are brought in breach of clause 14 which requires that they be brought before the English court. The respondents seek jury trial in Los Angeles. The Los Angeles proceedings were served on the appellant on 18 October 2024.

10. On 13 November 2024 the respondents issued an application before the English court for an order that the Court has no jurisdiction to hear the claims

in respect of the purchase price included in the Claim Form and Particulars of Claim. This was the application which was heard by the judge on 21 February 2025. He noted that a jurisdiction application was due to be heard by the Los Angeles court in March, hence he produced a judgment with commendable speed on 27 February 2025, in which he concluded that in so far as the English proceedings commenced by the appellants were concerned, there should be a stay of the claims relating to the purchase price.

11. Following the judgment, there have been developments so far as concerns that part of the claim before the English court which is not stayed. The respondents have not served a Defence, but on 18 March 2025, their solicitors wrote to the appellant's solicitors giving notice in writing pursuant to CPR 14.2(2)(c) admitting liability for the appellant's claim for the Sony Receipts and inviting them to send a draft order to that effect. In reply on 19 March 2025, the appellant's solicitors asked the respondents to admit that they had received US$243,804.77 and US$259,812.27 from Sony Music on 31 March 2023 and 30 September 2023 respectively. The appellant had also learnt from Sony Music that the respondents had instructed them not to pay over two further sums of US$290,563.52 and US$336,782.71 with due accounting dates of 31 March 2024 and 30 September 2024. The appellant's solicitors asked the respondents to acknowledge that, as a result of their instructions, Sony Music had withheld payment of those sums to the appellant and asked for an undertaking from the respondents that they had not received any other sums which were payable to the appellant.

12. In reply on 26 March 2025, the respondent's solicitors denied that they had instructed Sony Music to withhold payments and asserted that the request in relation to an undertaking was not relief sought in the Particulars of Claim, so they did not address the point. On 1 April 2025, the appellant's solicitors wrote saying that they had been informed by Sony Music that, contrary to previous information, it had in fact paid the sum of US$290,563.52 due on 31 March 2024 to the respondents. The offer to agree an Order in these proceedings was withdrawn until the matter was resolved. On 2 April 2025, the respondents' solicitors said that the respondents had paid the sum of US$502,233.15 across two transfers and then, on 3 April 2025, they asked for clarification in relation to the third sum said to have been received from Sony Music. It is apparent that the appellant's claim in relation to Sony Receipts has not been entirely resolved and, as matters stand, it does appear that an account will need to be taken.

13. The jurisdiction application is now due to be heard by the Los Angeles court on 18 April 2025. Having granted permission to appeal on 25 March 2025, Phillips LJ then made a further order on 27 March 2025 for this appeal to be expedited. We heard the appeal on 11 April 2025. At the end of the hearing we indicated that the appeal would be allowed with the judgment setting out the reasons for our decision to follow. This is that judgment.

The judgment below

14. After setting out the background, which I have summarised above, the judge said at [9] that he was proceeding on the basis that, for the purposes of clause

14, the Los Angeles courts had before them claims by the respondents relating to the purchase price. Whether the claims there went wider was not a matter which concerned him but was a matter for the Los Angeles courts.

15. At [10] the judge recorded the appellant's submission that, since the English proceedings not only relate to the question of payment of receivables, but also plead a case regarding the purchase price, the English courts have jurisdiction over these claims also by virtue of the second sentence of clause 14 and that the respondents have, therefore, by virtue of that second sentence, irrevocably submitted to the jurisdiction of the English courts, so that their application must accordingly fail. That meant that there would be parallel proceedings with the risk of inconsistent outcomes, but the appellant submitted that dealing with the inconsistency was a matter for case management by the courts in the two jurisdictions.

16. At [11] he recorded the respondents' submission that, so far as the purchase price claims are concerned, the courts of Los Angeles have exclusive jurisdiction over those claims and that the appellant has submitted to that jurisdiction by virtue of the terms of the fourth sentence of the clause. The respondents accepted that the other claims in the English proceedings should be tried in England, hence the terms of their application for an Order under CPR Part 11 that the English court has no jurisdiction over the purchase price claims, alternatively should not exercise any jurisdiction it has over such claims. The judge noted that the application made specific reference to paragraphs 7 to 12 and 13.2 to 13.3 of the Particulars of Claim, pleading a positive case on behalf of the appellant that no additional purchase price is payable. At [13] he rejected the respondents' case that the appellant was acting tactically in including those claims in the English proceedings for reasons he set out in detail but on which it is not necessary to elaborate for present purposes.

17. At [14] the judge contrasted the approach of most civil jurisdictions which is only to permit a court to take jurisdiction in an international case where specific connective factors exist with the position in English law where jurisdiction turns on service. He then stated:

> "Considerable weight is attached to party autonomy and agreements as to jurisdiction. Indeed, it has been suggested (e.g, Peel, Exclusive Jurisdiction Agreements: Purity and Pragmatism in the Conflict of Laws, [1998] LMCLQ 182) that where a jurisdiction clause is valid and enforceable it should not be overridden at the discretion of the courts."

18. He noted at [15] that, although there is a discretion in the courts to decline to enforce an exclusive jurisdiction clause, that discretion was rarely exercised.

19. At [16] he said that the starting point was to construe the jurisdiction clause and give it due effect and that it was common ground that, by virtue of the first sentence of clause 14, construction was a matter of English law. He accepted that very considerable importance attached to party agreement, the question being what the clause actually provides in terms of that agreement.

20. He referred at [17] to the appellant's argument that because the second sentence is an exclusive jurisdiction clause, the court is precluded from declining jurisdiction (even as a matter of discretion) by virtue of article 5 of the Hague Convention on Choice of Court Agreements 2005 ("the Hague Convention"). As to that, he set out his conclusions in a series of sub-paragraphs which I will quote in full. The reference to Phrase 2 and Phrase 4 is to the second and fourth sentences of the clause respectively:

> "(i) The words used in Phrase [2] are wide words and clearly can embrace claims relating to the Purchase Price. Indeed, Phrase [2] is the only means by which C can commence proceedings in relation to disputes (of whatever sort) concerning the Agreement. Where this occurs, D can perfectly easily accede to a claim so brought: indeed, Phrase [2] provides for irrevocable submission to the jurisdiction by both C and D.
>
> (ii) The fact that Phrase [2] bites on both C and D highlights an obvious, but important, point. Viewing Phrase [2] purely on its own terms, it confers precisely the same jurisdictional rights and obligations on both C and D. It is, viewed in this way, a symmetric jurisdiction clause, and an exclusive one. Phrase [2] viewed on its own does fall within article 5 of the Hague Convention and – on this (blinkered) basis – the Application would fail.
>
> (iii) But it is obviously necessary to eschew a blinkered approach and to construe the Agreement as a whole, and in particular clause 14 as an internally consistent, single, contractual agreement between C and D as to jurisdiction, applicable law and enforcement of judgments. I remind myself that the "phrases" I am referring to in this Judgment are no more than an ex post label, used for convenience only. Clause 14 must be read as a whole.
>
> (iv) The opening words of Phrase [4] obviously derogate from what has gone before. The opening words of the phrase, "[n]otwithstanding the foregoing" can mean nothing else. More to the point, because Phrase [4] accords a limited jurisdiction to United States' courts, it is in particular a derogation from Phrase [2].
>
> (v) The nature of that derogation from or qualification of the rights contained in Phrase [2] is as follows:
>
> a) So far as claims brought by C against D relying on Phrase [2] are concerned, the clause is conferring of an exclusive jurisdiction in the sense that C cannot contend for any other contractually conferred jurisdiction.
>
> b) However, that is not the case where C is claiming against D. In such a case, D may (but need not) sue C in the courts of Los Angeles or New York, but solely in connection with Purchase

> Price claims. In short, so far as Purchase Price claims are concerned, D has a choice as to whether to litigate in England pursuant to Phrase [2] or in Los Angeles/New York pursuant to Phrase [4]. Obviously, so far as C is concerned, clause 14 is not an exclusive jurisdiction clause at all.
>
> c) The question is whether D's choice as to where to litigate Purchase Price claims is eliminated where C have themselves commenced proceedings pursuant to Phrase [2]. Put another way, the question is whether the effect of the combination of Phrases [2] and [4] is to create – as regards disputes regarding the Purchase Price – a "first-past-the-post" jurisdictional race, whereby the party that commences proceedings first obtains the other party's submission to that particular jurisdiction.
>
> d) In my judgement this is an incorrect construction of clause 14. Not only do courts – for good reason – frown on parallel proceedings and the risk of inconsistent outcomes in different jurisdictions, this construction disregards and gives no meaning to the opening words of Phrase [4], "[n]otwithstanding the foregoing". If all that was intended was a limited jurisdictional choice in D, eliminated the moment C articulated a Purchase Price claim against D pursuant to Phrase [2], these words would not be necessary. That outcome – limited choice and jurisdictional race – would be achieved without these words.
>
> e) It might be said that D would retain a choice of litigating Purchase Price claims in two jurisdictions (England and one of Los Angeles or New York) rather than just one, but this is an absurd construction. The result is a positive encouragement to parallel proceedings in relation to Purchase Price claims; and this construction disregards the significance of the submission to jurisdiction contained in both Phrase [2] and Phrase [4].
>
> f) In my judgement, the purpose of these words is to enable Purchase Price claims to be litigated in one of England or the United States (specifically, Los Angeles/New York) at D's choice. That choice is unaffected by the commencement of Purchase Price claims by C in England pursuant to Phrase [2]. The effect of the words "[n]otwithstanding the foregoing" is to preserve that choice and to retract D's otherwise irrevocable submission to the English jurisdiction pursuant to Phrase [2]."

21. The judge set out his conclusion from that analysis at [18], saying:

> "It follows that although the English Proceedings were properly commenced by C and that service out was regular, that was only because D had not, at this stage, made their choice as to jurisdiction, which choice was conferred on D (but not on C) by Phrase [4]. Exercising that choice – by commencing the Los Angeles Proceedings within a reasonable time of the

> commencement of English Proceedings by C and by making the Application – crystallised the floating jurisdiction between England on the one hand and Los Angeles/New York on the other in favour of Los Angeles. I conclude that D is entitled to a stay as of right, but if I am wrong on this, I consider that this court should not exercise any jurisdiction which it may have."

22. At [19] the judge said that some form of stay of the English proceedings with liberty to apply was the appropriate order, going on to indicate that he would order the stay of all the paragraphs of the Particulars of Claim relating to purchase price claims.

The grounds of appeal and Respondent's Notice

23. The appellant pursues four related grounds of appeal:

    (1) The judge's construction of clause 14 of the agreement between the parties dated 20 March 2020 was erroneous and not one which was reasonably capable of being adopted. The Grounds then set out detailed reasons supporting this ground, but the thrust of the points made is that the judge was wrong to conclude that, as a matter of construction of clause 14, the commencement of the Los Angeles proceedings had any effect on the English court's jurisdiction.

    (2) The judge ought to have concluded that, properly construed, clause 14 conferred jurisdiction for the appellant's claim in its entirety on the English court from the outset (as he did conclude) and that the English court continued to have such jurisdiction throughout.

    (3) On that basis, there were no grounds for ordering a stay of any part of the appellant's claim. No other grounds (whether by reference to *forum non conveniens* or otherwise) were advanced by the respondents before the judge and the judge did not suggest any other grounds existed.

    (4) If the judge had construed clause 14 as he should have done (i.e., not as creating a "floating jurisdiction" but as an exclusive jurisdiction clause as regards any claims by the appellant), he would, or ought to, have concluded that clause 14 is an exclusive jurisdiction clause within the meaning of the Hague Convention, and that, as a result, the English court was prohibited by Article 5(2) from declining jurisdiction on the ground that the dispute should be decided in a court of another state.

24. In the Respondent's Notice the respondents seek to uphold the judge's order on different or additional grounds:

    (1) The Hague Convention does not apply to the Agreement.

    (2) The Court should not exercise any jurisdiction given the risk of parallel, duplicative proceedings and inconsistent judgments, especially given that risk has been brought about by the conduct of the appellant who (having been told in correspondence that proceedings would be

commenced in Los Angeles) pre-emptively began proceedings in England seeking negative declarations.

(3) The judge should have awarded the respondents their costs rather than making no order as to costs.

Summary of the submissions of the parties

25. On behalf of the appellant, Mr Edmund Cullen KC submitted that clause 14 was a so-called "asymmetric jurisdiction clause" under which both the appellant and the respondents submitted irrevocably "for all purposes of this Agreement", including any dispute or claim (contractual or non-contractual) related to the Agreement, to the exclusive jurisdiction of the English courts, with a limited exception or carve-out in the fourth sentence which gave the respondents the option to commence proceedings in respect of purchase price claims in California or New York. This limited carve-out does nothing to detract from the fact that the English court has jurisdiction over all and any disputes in relation to the Agreement. The fourth sentence gives the respondents limited freedom to commence proceedings in California or New York "notwithstanding" the exclusive effect of the second sentence. That fourth sentence has no application to and says nothing about claims brought by the appellant, including claims related to the purchase price, which are subject to the exclusive jurisdiction of the English court. Any other conclusion would mean that the appellant had contracted out of the right to bring any claim related to the purchase price, since the fourth sentence only applies to such claims by the respondents.

26. He submitted that the judge had approached the issue of purchase price claims on the basis that there had to be one jurisdiction for such claims, either England or California or New York which was not what the clause says. The judge's interpretation overlooked that the fourth sentence only applied to claims by the respondents.

27. Mr Cullen KC noted that, at [18] of the judgment, the judge had found that the English proceedings were properly commenced by the appellant. The judge's analysis appeared to be that the appellant could commence proceedings here, including in relation to the purchase price, but that if the respondents then exercised their option and commenced proceedings in respect of the purchase price in California, that English jurisdiction was somehow lost. Hence the judge's reference in [18] to a "floating jurisdiction". If, for example, the appellant had a claim in restitution because it had overpaid the purchase price by mistake, on the judge's analysis its entitlement to bring the claim here was lost. The respondents sought to argue that, in those circumstances, the appellant could bring a counterclaim in Los Angeles, but that overlooked that such a counterclaim would be a breach by the appellant of the exclusive jurisdiction clause in the second sentence.

28. He submitted that, even if such a counterclaim were possible, the parties cannot possibly have intended such a baroque structure under which the appellant could properly commence proceedings here but then had to wait to see if the respondents pursued a claim for negative declaratory relief in California, at which point the appellant would have to switch to a counterclaim in California. The respondents relied heavily on the "one-stop shop" principle confirmed by the House of Lords in *Fiona Trust v Privalov* [2007] UKHL 40; [2007] 4 All ER 951, but Mr Cullen KC

submitted that, if that baroque structure as he described it was a consequence of the application of *Fiona Trust*, something had gone badly wrong.

29. As Mr Cullen KC pointed out, asymmetric jurisdiction clauses are in regular use in the case of financial instruments and transactions which provide the exclusive jurisdiction of the English courts but give the lender the option to sue the borrower in other jurisdictions, the obvious purpose of which is to enable the lender to sue the borrower wherever the latter may have assets. The jurisdiction clause of the Loan Market Association ("LMA") is often used. That typically provides as follows:

> "Jurisdiction
>
> (a) The courts of England have exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement (including a dispute regarding the existence, validity or termination of this Agreement) (a 'Dispute').
>
> (b) The Parties agree that the courts of England are the most appropriate and convenient courts to settle Disputes and accordingly no Party will argue to the contrary.
>
> (c) This is for the benefit of the Lender only. As a result the Lender shall not be prevented from taking proceedings related to a Dispute in any other courts in any jurisdiction. To the extent allowed by law the Lender may take concurrent proceedings in any number of jurisdictions."

30. Mr Cullen KC referred to two decisions of the Commercial Court which dealt with the LMA wording (both of which were cited to the judge in this case but which he does not refer to in his judgment). In *Lornamead Acquisitions Limited v Kaupthing Bank HF* [2011] EWHC 2611 (Comm), the borrower commenced proceedings in England seeking declarations that certain agreements made with the defendant bank had the effect of discharging it from liability under various hedging agreements. The bank challenged the jurisdiction of the English court on various grounds. At [111] the judge, Gloster J, dealt with the bank's argument that because the jurisdiction clause was for its benefit, it could "renounce" the clause. It relied on Article 17 of the Lugano Convention. The judge rejected that argument at [112]:

> "This [Article 17] does not confer on Kaupthing an entitlement to "renounce" a jurisdiction clause in its entirety and to dispute the jurisdiction of proceedings properly brought by the other party in accordance with the clause. The article merely provides that the beneficiary of the clause is permitted to elect to bring proceedings arising out of, or in connection with, those agreements in another court of competent jurisdiction, in addition to England. But that provision is clearly, given the wording "in any other court which has jurisdiction by virtue of this Convention" without prejudice to the "first seised" rules of Article 21. It does not entitle Kaupthing unilaterally to challenge proceedings previously brought by Lornamead against Kaupthing in England in accordance with the terms of the English jurisdiction clause and in conformance with Lornamead's contractual obligation thereunder.

> Nor do the English jurisdiction clauses confer any such right. They make it clear that Kaupthing can take concurrent proceedings in other jurisdictions only "to the extent permitted by law." It was not disputed by Kaupthing, that if the English Court was indeed entitled to maintain jurisdiction, it was the Court first seised, and that accordingly it was no longer open to Kaupthing to bring proceedings against Lornamead in relation to the same cause of action in Iceland by virtue of Article 21."

31. In *Mauritius Commercial Bank v Hestia Holdings Ltd* [2013] EWHC 1328 (Comm); [2013] 2 All ER (Comm) 898, the lending bank had brought proceedings in England and the defendant borrower challenged the jurisdiction. One of its arguments was that, because the jurisdiction clause was for the lender's benefit, it was entirely one-sided so was incompatible with fundamental principles regarding equal access to justice. Popplewell J rejected that argument at [40]:

> "The argument is that clause 24.1(c) operates defensively to enable MCB to resist any suit brought by Hestia or Sujana in England because it provides that 24.1(a) is only for MCB's benefit. Accordingly, it is said, the clause is entirely one-sided because it confers no rights on Hestia or Sujana to sue in any forum whilst subjecting them to any forum at the suit of MCB. That too is, in my view, an erroneous reading of the clause. Clause 24.1(c) refers to the lender taking proceedings. Clause 24.1 is for the benefit of MCB in the sense that Hestia and Sujana are obliged to sue in England but MCB is not. But that does not disapply clause 24.1(a) to MCB completely. Where it is Hestia or Sujana which brings suit against MCB in England, clause 24.1(a) is not disapplied by the operation of clause 24.1(c). MCB is thereby agreeing to be sued in England subject to the liberty conferred by clause 24.1(c). In those circumstances MCB has agreed to be subjected to the exclusive jurisdiction of the English courts, subject to its right to bring claims (which may overlap) abroad pursuant to clause 24.1(c). Were it otherwise, clause 24.1(a) would be superfluous: if clause 24.1(c) permitted MCB to insist on suing or being sued anywhere, or anywhere of competent jurisdiction, that would include England (given that this is an English law agreement and forum conveniens is conclusively determined by sub-clause (b))."

32. Mr Cullen KC submitted that the argument of the respondents here was precisely the argument Popplewell J was rejecting for good reasons. He recognised that the jurisdiction clause operated differently depending on who was the claimant. The English court had exclusive jurisdiction in this case and the appellant had to sue here.

33. Mr Cullen KC submitted that no case had been advanced by the respondents before the judge that, if the English court continued to have jurisdiction over the claims made by the appellant relating to the purchase price, the court should decline to exercise its jurisdiction as a matter of discretion. However, in this Court, the respondents did want to argue that, even if the court had jurisdiction, it should exercise its discretion to grant a stay on the grounds that if the proceedings continued there would be parallel proceedings in two jurisdictions. Mr Cullen KC asked rhetorically why should the

English court stay its proceedings? The Agreement is governed by English law and the English court is the obvious court to determine the dispute. The money claim for the Sony Receipts was within the exclusive jurisdiction provision in the second sentence of clause 14. Likewise, the fraud and misrepresentation allegations being pursued by the respondents in California were within that second sentence and should be pursued here. The English court is the only court which can deal with everything which is in dispute.

34. Mr Cullen KC did not press his fourth ground of appeal concerning the Hague Convention in his oral submissions. He recognised that there was an academic debate as to whether the Hague Convention applies to asymmetric jurisdiction clauses, with Professor Adrian Briggs considering that it should. He referred to [12.090] and [12.091] in *Dicey, Morris and Collins on the Conflict of Laws* (16th edition), the relevant passages having been edited by Professor Briggs. However, he submitted that, even if the Hague Convention did not apply, as a matter of the common law, there was no basis for a challenge to the exclusive jurisdiction of the English court under the second sentence of clause 14 and no grounds for a stay of the English proceedings.

35. On behalf of the respondents, Mr Andrew Sutcliffe KC submitted that the fourth sentence of clause 14 should be interpreted as an option given to the respondents to require purchase price disputes to be determined in California or New York. The option overrides the obligation in the second sentence to litigate in England, which avoids duplicative proceedings. The words at the beginning of the fourth sentence "Notwithstanding the foregoing" mean that the second sentence is subordinate to the fourth sentence and, once the respondents have exercised the option, the appellant cannot bring a claim in respect of the purchase price in England. This is confirmed by the crucial words at the end of the fourth sentence: "Hipgnosis hereby agrees to submit to the jurisdiction of the courts located in Los Angeles, California and New York City, New York."

36. He submitted that, where the option was exercised, the effect was to create two exclusive jurisdictions, one in relation to purchase price disputes in the fourth sentence and the other in respect of other disputes in the second sentence. He submitted that this was the correct construction of the clause, alternatively there was an implied term to that effect, in order to avoid mirror image proceedings.

37. Mr Sutcliffe KC referred to various provisions of the Agreement which had a US perspective: under clause 2.5. the respondents waived rights to terminate under US copyright law; under clause 9 notices to the respondents were to be served at their addresses in the US. He submitted that clause 14 strikes a balance reflecting that wider context between English law and jurisdiction and, at the respondents' election, purchase price claims in the US. The first respondent bargained to be paid at home and to receive communications at home.

38. He submitted that, when the appellant commenced the English proceedings, it knew from the letter of 2 May 2024 cited at [6] above that the respondents were going to exercise their option to litigate the purchase price dispute in California. It commenced the English proceedings without warning, without complying with the pre-action protocol and did so because it was seeking to seize the English courts with the dispute in order to undermine the respondents' option. As the Court pointed out in argument,

however, the judge had found that the English proceedings were properly commenced and it is difficult to see what was wrong with the appellant having done so. There were only duplicative proceedings because the respondents chose to sue in Los Angeles, but they did not have to. On being pressed by the Court, Mr Sutcliffe KC accepted that the appellant was entitled to bring the English proceedings until the option was exercised.

39. Mr Sutcliffe KC took the Court to the appellant's Motion to Dismiss the Californian proceedings, the grounds of which were: (i) that clause 14 and the appellant's first-filed action in England dictate that the action must be litigated in England; (ii) England is the more convenient forum under the doctrine of *forum non conveniens*; and (iii) international comity counsels the California court to abstain from adjudicating on the matter. The comity aspect effectively replicated the *forum non conveniens* arguments and is premised on the fact that proceedings were commenced in England first.

40. Mr Sutcliffe KC referred to the decision of the House of Lords in *Fiona Trust*, in particular [6] to [8] and [13] in the speech of Lord Hoffmann. At [13] he said:

> "In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. As Longmore LJ remarked, at para 17: "if any businessman did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so.""

41. Mr Sutcliffe KC submitted that this one-stop shop presumption applied in a modified form where there are multiple fora, as under clause 14. The presumption remains that the parties did not intend that the same dispute should be pursued in parallel proceedings, but that it should be determined in one forum. He repeated that the appellant could bring a claim for a negative declaration in respect of the purchase price in England but, if the respondents exercised the option, then that claim must be stayed. Phillips LJ asked him if he was saying that the English court had had jurisdiction when the proceedings were commenced but it had somehow been lost or that, although the proceedings were properly commenced, once the option was exercised, the English court should stay its proceedings which was a discretionary question.

42. Mr Sutcliffe KC originally answered that he did say that the exercise of the option meant that the jurisdiction was lost, but when the Court pressed him repeatedly as to how the jurisdiction was lost, given that jurisdiction is determined on the date that the proceedings are commenced, he accepted that the English court had jurisdiction, but said that once the option was exercised, the court should exercise its discretion to stay its proceedings. However, as the Court pointed out, that was not the basis on which the judge decided the case. He decided it on the basis that the exercise of the

option to sue in California had crystallised what had previously been a "floating jurisdiction".

43. He submitted that the respondents had not submitted to the jurisdiction of the English courts by appearing in the proceedings, but had exercised the option under the fourth sentence, the effect of which was that their contractual submission to the English jurisdiction was revoked in respect of claims in relation to the purchase price. This was because the combined effect of "Notwithstanding the foregoing" at the beginning of the fourth sentence, together with the appellant's submission to the jurisdiction of the California court in the second part of that sentence, was to override the second sentence.

44. In support of his submission that the one-stop shop presumption still applies where there is a single contract with multiple fora identified in the jurisdiction agreement, Mr Sutcliffe KC relied on the decision of the Court of Appeal in *BNP Paribas SA v Trattamento Rifiuti Metropolitani SpA* [2019] EWCA Civ 768; [2020] 1 All ER 762. In that case, the finance agreement provided for jurisdiction of the courts of Turin. The related swap transaction was on the terms of the ISDA Master Agreement which included an English law and jurisdiction clause. Claims for declaratory relief were made in English proceedings which the defendants contended fell within the Italian jurisdiction clause. The judge and the Court of Appeal held that the claims fell within the English jurisdiction clause.

45. Mr Sutcliffe KC referred to [66]-[67] and [76] in the judgment of Hamblen LJ (as he then was):

> "66. As stated in the passage from *Dicey, Morris and Collins* at §12–110 cited above, where there are interlinked contracts between the same parties, each containing its own jurisdiction clause, "the point of departure will be that it is improbable that a jurisdiction clause in one contract, even expressed in ample terms, was intended to capture disputes more naturally seen as arising under a related contract." As Lord Collins said in *UBS v HSH Nordbank* at [84], "sensible business people" are unlikely to intend that disputes between them should fall within the scope of two inconsistent jurisdiction clauses. As Longmore LJ observed in *Savona* at [1], where there are theoretically competing jurisdiction clauses, "one's natural reaction is that it should be possible to assign any particular dispute to one or other such clause and that there should be no overlap between them".
>
> 67. In *Savona* the Court cited with approval the following passage from the judgment of Popplewell J in *Monde Petroleum S.A. v Westernzagros Ltd* [2015] 1 Lloyd's Rep 330 at [35]-[36]:
>
> > "35. Where there is more than one agreement between the same parties, and they contain conflicting dispute resolution provisions, the presumption of one-stop adjudication dictates that the parties will not be taken to have intended that a particular kind of dispute will fall within the scope of each of two inconsistent jurisdiction agreements. They will fall to be

> construed on the basis that they are mutually exclusive in the scope of their application, rather than overlapping, if the language and surrounding circumstances so allow …
>
> 36. Nevertheless the possibility of fragmentation may be inherent in the scheme of the parties' agreements and clear agreements must be given effect to even if this may result in a degree of fragmentation in the resolution of disputes between the parties."
>
> 76. This conclusion is further borne out by the implausibility of sensible business people agreeing inconsistent jurisdiction clauses and the presumption of mutual exclusivity. As discussed further below, there is no clear language displacing that presumption."

46. Mr Sutcliffe KC also referred to the judgment of Males J (as he then was) in *BNP Paribas SA v Anchorage Capital Europe LLP* [2013] EWHC 3073 (Comm). The contract in that case contained a jurisdiction clause in these terms:

> "This Agreement shall be governed by, and construed in accordance with, English Law and you irrevocably submit to the jurisdiction of the English courts in respect of any matter arising out of this Agreement, or our services to or Transactions with you under this Agreement."

47. There were proceedings in England and Anchorage had also commenced proceedings in New York. In relation to the bank's application for an anti-suit injunction, Males J said at [88] that the relevant question was whether the commencement and pursuit of the foreign proceedings was something which Anchorage had promised not to do. In concluding that Anchorage was in breach of the jurisdiction clause and granting the anti-suit injunction, the judge said at [91]:

> "It would make no sense, in my judgment, to construe the clause as permitting Anchorage, so long as it submits to the jurisdiction of the English court, also to bring a claim of its own in New York in respect of essentially the same matters as arise here. It cannot sensibly be supposed that the parties would have regarded such a prospect as acceptable. On the contrary they would rightly have regarded it as a procedural nightmare."

Mr Sutcliffe KC pointed out that *BNP Paribas v Anchorage* had been followed in three later cases. He placed emphasis on the judge's point that parallel proceedings would be a procedural nightmare.

48. He then engaged in a comparison between the LMA wording and the clause in the present case, identifying seven distinctions which he submitted were individually and cumulatively material differences:

    (1) The LMA wording does not require the borrower to submit to the jurisdiction of any other court where the lender brings proceedings. This was a point made by

Popplewell J in *Mauritius Commercial Bank* at [37]. In contrast the second part of the fourth sentence in clause 14 is an express and mandatory promise by the appellant to submit to the jurisdiction of the courts of Los Angeles or New York.

(2) The LMA wording provides that the exclusive clause is wholly for the benefit of the lender, so that the lender is not bound by it. It thus reflects the wording of what was Article 17 of the 1968 Brussels convention.

(3) The LMA wording expressly refers to the possibility of concurrent proceedings in a number of jurisdictions, without qualification, which would rebut the one-stop shop presumption. There is no equivalent in clause 14 so that the starting point was that the parties here were unlikely to have intended that there would be the same dispute about the purchase price on both sides of the Atlantic.

(4) The LMA wording permits the lender to litigate in any jurisdiction worldwide. In contrast the fourth sentence of clause 14 simply allows the respondents to sue in Los Angeles or New York. This was a point made by Popplewell J in *Mauritius Commercial Bank* at [38].

(5) The LMA wording does not limit the types of action which can be brought outside England. Here the fourth sentence only dealt with purchase price claims. It was in effect saying that the parties intended purchase price claims to be litigated in Los Angeles or New York if that is what the respondents want. If that was not express it was implicit as if the officious bystander had asked if that was what was intended, the parties would have answered; "Of course".

(6) The LMA wording contains an express confirmation that the courts of England are the most convenient forum and a promise not to argue the contrary.

(7) The LMA wording contains an express provision for service in England, lacking in the Agreement here.

49. Submissions on the question of discretion were made by Mr William Day. The Court indicated that it did not need to hear submissions as to why the respondents contended that the Hague Convention did not apply to asymmetric jurisdiction clauses. In relation to the respondents' case that it was correct of the judge to have granted a stay as a matter of discretion, he submitted that the avoidance of parallel proceedings was not just about the convenience of the parties but the risk of inconsistent judgments which raised issues of public policy and the interests of justice.

50. He referred to the judgment of Brandon LJ in *The El Amria* [1981] 2 Lloyd's Rep 119. In that case the plaintiff cargo owners whose cargo was discharged damaged in Liverpool commenced proceedings in rem against the ship and also in personam against the Mersey Docks and Harbour Board since the shipowners alleged that slow discharge had led to deterioration of the cargo of potatoes. The Court of Appeal dismissed an appeal against the judge's refusal of the shipowners' application for a stay of the proceedings in rem on the grounds that the bills of lading contained an Egyptian jurisdiction clause. Mr Day relied on what Brandon LJ said at 128 (right hand column):

> "I do not regard it merely as convenient that the two actions, in which many of the same issues fall to be determined, should be tried together; rather that I regard it as a potential disaster from a legal point of view if they were not, because of the risk inherent in separate trials, one in Egypt and the other in England, that the same issues might be determined differently in the two countries."

51. Mr Day also relied on the judgment of Colman J in *Citi-March Limited v Neptune Orient Lines Ltd* [1996] 1 WLR 1367. That was a case where the jurisdiction clause was asymmetric, but the judge allowed proceedings to continue in England because of the risk of inconsistent decisions on the facts if there were proceedings in two jurisdictions. Mr Day submitted that the risk of irreconcilable judgments was more than just a question of convenience but a strong reason for granting a stay. If parallel proceedings continued there could be judicial stalemate with no available mechanism to resolve the conflict.

52. In submissions in reply, Mr Cullen KC submitted that the way that Mr Sutcliffe KC had put his case on construction was that the parties must be taken to have intended a clear dividing line between purchase price disputes and anything else. That was not a safe assumption. One could see that from the fraud and misrepresentation claims brought by the respondents before the court in Los Angeles which sought not rescission but damages consisting of the additional purchase price which would have become payable. That was one example of how compartmentalisation of claims does not work and how disputes about the purchase price cannot be hermetically sealed from other disputes.

53. Mr Cullen KC submitted that all Mr Sutcliffe KC's restatements as to the construction of clause 14 ignore the critical point that the fourth sentence only applies to claims by the respondents in relation to the purchase price which is a common feature with the LMA wording and what Popplewell J relied upon in *Mauritius Commercial Bank.* In relation to the word "notwithstanding" on which Mr Sutcliffe KC placed so much reliance, it would not do the heavy lifting he wanted. It could not apply to claims by the appellant within the second sentence of clause 14. Mr Sutcliffe KC had also relied on the second half of the fourth sentence but had omitted that this is solely in connection with purchase price claims by the respondents. The effect for which the respondents contend is ridiculous: the appellant cannot pursue a claim in relation to the purchase price for example a claim in restitution, which if commenced here, could be stopped by a claim by the respondents in California for negative declaratory relief. To seek to advance that claim in restitution by way of a counterclaim in California would be a breach of the jurisdiction provision in the second sentence.

54. In relation to the discretion points raised by Mr Day, Mr Cullen KC submitted that this was not a case of multi-party litigation in different jurisdictions like the cases Mr Day had relied upon, but litigation between the same parties where the ordinary rules of issue estoppel will apply so the risk of irreconcilable judgments is unlikely. He submitted that the English court was seized of disputes properly brought here and the rest of the claims other than purchase price claims should be here, so granting a stay made no sense.

Discussion

55. As the judge found at [18] of his judgment, these proceedings were properly commenced in England. Indeed, the clear effect of the exclusive jurisdiction provision in the second sentence of clause 14 is that the appellant could not bring any of its claims in the English proceedings (including those related to the purchase price) anywhere other than in England. The fourth sentence only provides a limited carve-out, giving the respondents the option to pursue a claim in respect of the purchase price in Los Angeles or New York. It does not permit the appellant to bring such a claim in either US jurisdiction. The attempt by Mr Sutcliffe KC in his submissions to criticise the appellant for bringing the proceedings in England when it knew the respondents intended to litigate their purchase price claims in Los Angeles is misplaced. There was nothing wrong in the appellant bringing its claim for negative declaratory relief in respect of the purchase price in the English courts. On the wording of the second sentence of clause 14, the appellant could not bring that claim in any other jurisdiction.

56. The consequence of the respondents bringing the claim in Los Angeles after the appellant had commenced the present proceedings first in England is that there are parallel overlapping proceedings on foot. However, that is a possibility which is inherent in an asymmetric jurisdiction clause, as Popplewell J recognised in *Mauritius Commercial Bank* in the passage quoted at [31] above when he said: "MCB has agreed to be subjected to the exclusive jurisdiction of the English courts, subject to its right to bring claims (which may overlap) abroad pursuant to clause 24.1(c)." The same point about the possibility of parallel proceedings was made by Henderson LJ in *Etihad Airways PJSC v Flöther* [2020] EWCA Civ 1707; [2022] QB 303 at [4]:

> "The result [of the clause] is that Air Berlin was bound to invoke the exclusive jurisdiction of the English courts in order to settle any dispute arising from the Facility Agreement, but Etihad was free to take proceedings in any other (i.e. non-English) courts with jurisdiction. That is the nature of the asymmetry. So far as Air Berlin was concerned, it had entered into a choice of jurisdiction agreement which compelled it to litigate any disputes in England, but the same was not true of Etihad, which on the face of it reserved an unfettered freedom to 'take concurrent proceedings in any number of jurisdictions.'"

Furthermore, there are only parallel proceedings because the respondents chose to exercise the option in the fourth sentence when they did not have to do so and then included in the California proceedings the fraud and misrepresentation claims in breach of the exclusive jurisdiction provision in the second sentence.

57. The judge's analysis was that, even though the proceedings had been properly brought in England, when the respondents exercised the option, in so far as the claim in England related to the purchase price, the exclusive jurisdiction of the English court conferred by the second sentence was somehow lost. This explains his reference in [17(v)(f)] of the judgment to the respondents' irrevocable submission being retracted and at [18] to there being a "floating jurisdiction" which crystallised in favour of California when the option was exercised. The judge did not identify anything in the wording of clause 14 which justified that conclusion and did not cite any authority to support the conclusion. This is scarcely surprising since the concept that the English court had jurisdiction when the proceedings were issued, but that was

only "floating" and was lost in favour of California when the option was exercised, is heretical and contrary to authority. As Phillips LJ pointed out several times in argument, the jurisdiction of the English court is determined at the date of issue of proceedings: see Phillips LJ's own judgment in *CA Indosuez (Switzerland) SA v Afriquia Gaz SA* [2023] EWCA Civ 1072; [2024] KB 243 at [83]-[84] which in turn referred to the decision of the House of Lords in *Canada Trust v Stolzenberg (No. 2)* [2002] 1 AC 1.

58. As already noted in [41]-[42] above, when the court pressed Mr Sutcliffe KC repeatedly on the question how the jurisdiction which the English court had when the proceedings were issued had been "lost", he vacillated somewhat between saying that the effect of the exercise of the option was that English jurisdiction over purchase price claims was lost and that the effect of the exercise of the option was that the English court should exercise its discretion to stay the proceedings. However, whichever approach he advocated involves distortion of the language and meaning of clause 14 or rewriting the clause.

59. His submission, as set out in [43] above, was that the respondents had not submitted to the jurisdiction of the English court when the proceedings were commenced but had exercised the option. That submission is flatly contrary to the express words of the second sentence: "Each party irrevocably submits for all purposes of this Agreement (including any such dispute or claim) to the exclusive jurisdiction of the English courts." He then contended that the effect of the words "Notwithstanding the foregoing" at the beginning of the fourth sentence together with the appellant's submission to the jurisdiction of the California court in the second part of the fourth sentence was that the jurisdiction of the English court was revoked and the fourth sentence overrode the second sentence.

60. However, in my judgment, it is impossible to construe the two sentences together as having that meaning. The words "Notwithstanding the foregoing" are doing no more than providing a limited qualification to the otherwise exclusive nature of the respondents' submission to the jurisdiction of the English courts in the second sentence so as to permit purchase price claims to be brought by the respondents in the US. They cannot be construed as revoking the irrevocable submission by the respondents to the jurisdiction of the English court or otherwise extinguishing in some way the jurisdiction which the English court already had over all the claims made by the appellant when the English proceedings were issued and to which the respondents had irrevocably submitted. Likewise, the words: "Hipgnosis hereby agrees to submit to the jurisdiction of the courts located in Los Angeles" are only referrable to claims in Los Angeles in respect of the purchase price brought by the respondents. They do not deal at all with claims brought by the appellant in respect of the purchase price, which are subject to the exclusive jurisdiction of the English court and which the appellant therefore has undertaken to bring only before the English court.

61. The attempt by the respondents to avoid the consequence of the fourth sentence only relating to purchase price claims by the respondents by suggesting that the appellant could bring a counterclaim in California if, for example, it wished to bring a claim in restitution for overpayment of the purchase price is hopeless. Such a counterclaim would be directly contrary to the exclusive jurisdiction clause in the second sentence. Moreover, and in any event, the carve-out in the fourth sentence was only for the

benefit of the respondents, not the appellant. Since it is impossible to construe "Notwithstanding the foregoing" as extending to claims by the appellant, it is equally impossible to construe it as revoking the jurisdiction of the English court over the purchase price claim brought by the appellant. The consequence of that construction would be the wholly unreasonable one that the appellant could not bring any claim in respect of the purchase price in any jurisdiction. Nothing in the wording of clause 14 supports such a surprising and unreasonable result. Specifically, there is nothing in the second sentence which suggests that jurisdiction which the English court had when the proceedings were issued was lost when the option given to the respondents was exercised and nothing in the fourth sentence which suggests that the one-sided jurisdiction it grants is exclusive in relation to both parties.

62. The respondents' argument that the exercise of its option to sue in California somehow trumps the exclusive jurisdiction clause in the second sentence for all purposes, which is the argument which seems to have found favour with the judge in [17(v)] of the judgment, completely overlooks the one-sided nature of the option, which is only in favour of the respondents and says nothing about claims in respect of purchase price disputes by the appellant. It also overlooks that, by the second part of the fourth sentence, the appellant did not agree that the California or New York court would have exclusive jurisdiction over any claims related to the purchase price. The respondents' construction involves reading into the fourth sentence some element of exclusive jurisdiction which is completely absent from the express words. The implication into that sentence of words to the effect that the jurisdiction of the California court was exclusive would be contrary to the interests of justice, since as just noted, the effect of the respondents' construction would be that once the option was exercised, the appellant would be deprived of the ability to bring any claims it had in respect of the purchase price at all.

63. Mr Sutcliffe KC's reliance on the one-stop shop presumption derived from *Fiona Trust* and his assertion that the parties cannot have intended the same issue to be litigated in two jurisdictions are misplaced. As the passages in the judgment of Popplewell J in *Monde Petroleum S.A. v Westernzagros Ltd* cited with approval by this Court in *BNP Paribas SA v Trattamento* and set out at [45] above make clear, whether or not the presumption applies will depend on the express provisions of the relevant jurisdiction clause or clauses. If the wording of the clause(s) clearly provides for disputes to be submitted to more than one jurisdiction, as Popplewell J put it: "clear agreements must be given effect to even if this may result in a degree of fragmentation in the resolution of disputes". The same point was made by Hamblen LJ in *BNP Paribas SA v Trattamento* at [76] also quoted at [45] above.

64. In this case the clear language of clause 14 is to the effect that, so far as any claim by the appellant is concerned, including claims in respect of the purchase price, the English court has exclusive jurisdiction and so far as claims by the respondents are concerned, the English court has exclusive jurisdiction save for the limited carve-out in respect of purchase price claims provided for in the fourth sentence.

65. So far as the detailed comparison which Mr Sutcliffe KC sought to make with the LMA wording highlighting the distinctions between that wording at clause 14 is concerned, whilst it is correct that there are differences between the two wordings, there is nothing which detracts from the correct interpretation of clause 14 being that it contemplates expressly that there may be parallel proceedings in England and the

US. The fact that, unlike the LMA wording, the fourth sentence includes the provision that the appellant agrees to submit to the jurisdiction of the courts in Los Angeles or New York in respect of purchase price claims by the respondents does not advance the respondents' argument. What is missing from that provision is any agreement by the appellant that the courts of Los Angeles or New York will have exclusive jurisdiction over such claims and the provision simply does not address at all purchase price claims by the appellant.

66. Nor is the respondents' argument advanced by Mr Sutcliffe KC's second ground of distinction, that the LMA wording provides that the exclusive clause is wholly for the benefit of the lender, so that the lender is not bound by it. If anything, the fact that the second sentence of clause 14 is even-handed and not said to be for the benefit of one party rather than the other and that the option in the fourth sentence is only given to the respondents strengthens the appellant's argument that under clause 14 the English court has exclusive jurisdiction over all claims other than purchase price claims by the respondents which can also be brought in the US.

67. As for the respondents' third ground of distinction, that the LMA wording expressly refers to concurrent proceedings and rebuts the one-stop shop presumption, the issue for this Court is whether, on its proper construction, clause 14 contemplates parallel or concurrent proceedings at least in respect of purchase price claims. For the reasons I have set out in detail above, I consider that is what the clause contemplates on its proper construction.

68. The fourth and fifth grounds of distinction are that the LMA wording permits the lender to litigate anywhere worldwide where it can found jurisdiction and that the LMA wording does not limit the types of action the lender can bring elsewhere. Whilst these are obvious grounds of distinction from clause 14, if anything they highlight that in this clause the derogation from the exclusive jurisdiction provision in the second sentence which appears in the fourth sentence is much narrower than in the case of the LMA wording.

69. The sixth ground of distinction is that the LMA wording contains an express provision that it is agreed that England is the most appropriate forum. Such an express provision was probably not necessary in the case of clause 14 given the wording of the second sentence: "Each party irrevocably submits for all purposes of this Agreement…" which would preclude any attempt to run an argument of *forum non conveniens*. The seventh ground of distinction concerns the LMA wording containing a service provision which can have no bearing on the width and scope of the jurisdiction clause. In any event, Mr Sutcliffe KC stated in argument that his sixth and seventh grounds of distinction were not determinative.

70. Much was sought to be made by Mr Sutcliffe KC and Mr Day of the "procedural nightmare" (*Anchorage*) or "potential disaster" (*El Amria*) which concurrent proceedings in respect of the same dispute would allegedly entail. However, this has been somewhat exaggerated. For example, as Mr Cullen KC pointed out, the risk of irreconcilable judgments may be avoided through the application of the rules of issue estoppel. In any event, if there were such a nightmare or disaster, it will have been caused not by the appellant commencing proceedings in England, which, as the judge found, were properly brought, but by the respondents choosing to exercise the option in the fourth sentence, when they did not have to do so, since the English court would

have had jurisdiction over all the claims. In my judgment, what the respondents cannot do is rely upon that choice to exercise the option to press for their construction of clause 14 which involves a distortion of its language or rewriting the clause.

71. On the issue whether, if the English court continues to have jurisdiction over purchase price claims even after the option has been exercised, which I have found to be the case, the court should exercise its discretion nonetheless to grant a stay, this alternative argument was not dealt with by the judge in his judgment, but the respondents raise the issue in their Respondent's Notice. I agree with Mr Cullen KC that, if the question for the court is one of discretion rather than jurisdiction, there is no basis for a stay. The Agreement is governed by English law and contains an exclusive jurisdiction provision in the second sentence covering all claims and which provides for irrevocable submission to the jurisdiction for all purposes. The English court is the one court where all the issues between the parties can be determined in a single jurisdiction and it is the obvious court to determine the overall dispute. Accordingly, this is not a case where any of the common law grounds for granting a stay, such as that there is another convenient forum where the dispute can be tried, could be relied upon by the respondents.

72. Given that conclusion, it is not necessary to decide whether or not Article 5(2) of the Hague Convention applies to asymmetric jurisdiction clauses and I consider it better to leave that question for decision in a case where it matters. In this context, I have in mind the salutary observation of Mummery LJ in *Housden v The Conservators of Wimbledon and Putney Commons* [2008] EWCA Civ 200; [2008] 1 WLR 1172 at [30]:

> "It is unnecessary to decide the issue for the purpose of disposing of the appeal. In general, it is unwise to deliver judgments on points that do not have to be decided. There is no point in cluttering up the law reports with obiter dicta, which could, in some cases, embarrass a court having to decide the issue later on."

Conclusion

73. For all the above reasons, I consider that the appeal must be allowed and the stay granted by the judge must be lifted.

Lord Justice Phillips

74. I agree.

Lord Justice Snowden

75. I also agree.