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Appeal Reference: CH-2022-000137

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

CHANCERY APPEALS (ChD)

**ON APPEAL FROM THE ORDER OF DEPUTY MASTER RHYS DATED 21ST JUNE
2022 (Reference No. IL-2022-000013)**

Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL

25th April 2023

Before:

MR JUSTICE EDWIN JOHNSON

Between :

**SONY MUSIC ENTERTAINMENT UK
LIMITED**

**Defendant/
Appellant**

and

**(1) NOEL REDDING ESTATE LIMITED
(2) MITCH MITCHELL ESTATE LIMITED**

**Claimants/
Respondents**

Robert Howe KC (instructed by **Simkins LLP**) for the Defendant/Appellant
Simon Malynicz KC and Bruce Drummond (instructed by **Keystone Law Limited**) for the
Claimants/Respondents

Hearing date: 23rd March 2023

JUDGMENT

Remote hand-down: This judgment was handed down remotely at 10.30am on 25th April 2023 by circulation to the parties and their representatives by email and by release to the National Archives.

Mr Justice Edwin Johnson:

Introduction

1. This is my reserved judgment on the hearing of an application for permission to appeal/appeal against an order of Deputy Master Rhys made on 21st June 2022. By that order (“**the Order**”) the Deputy Master dismissed the application of the Defendants/Appellants, pursuant to CPR Part 11, for a setting aside or stay of this action on the grounds that this dispute should be heard in New York or, in the alternative, that this action should be stayed until proceedings in New York, involving what is said to be the same issue as arises in this action, have been determined.
2. Permission to appeal against the Order was refused by the Deputy Master. The application for permission was renewed before me, on the papers. By an order made on 4th November 2022, I directed that the application for permission to appeal should be considered at a hearing, with the hearing of the appeal to follow, if permission to appeal was granted. This hearing was therefore the hearing of the application for permission to appeal and, subject to the grant of permission, the appeal itself.
3. With the agreement of counsel, I heard the arguments on both sides in relation to the application for permission to appeal and (subject to the question of permission) in relation to the appeal. This is therefore my reserved judgment on the application for permission to appeal and, subject to my decision on that application, on the appeal itself. Unless it is necessary to distinguish between the two, I will use the general expression “**the Appeal**” to mean both the application for permission to appeal and the substantive appeal.
4. It is convenient to continue to refer to the Defendant in this action, which is the appellant in the Appeal, as “**the Defendant**”, and to continue to refer to the Claimants, who are the respondents in the Appeal, as “**the Claimants**”.
5. At this hearing Robert Howe KC, counsel, appeared for the Defendant. Simon Malynicz KC and Bruce Drummond appeared for the Claimants. I am grateful to counsel for their written and oral submissions, and to the legal teams for the parties for their work in preparing the documents for this hearing.
6. The Defendant’s application challenging jurisdiction was made by application notice issued on 16th March 2022 (“**the Application**”). The Deputy Master dismissed the Application for the reasons set out in his judgment, dated 21st June 2022. I will refer to the judgment of the Deputy Master as “**the Judgment**”. References to Paragraphs in this judgment are, unless otherwise indicated, references to the paragraphs of the Judgment. Italics have also been added to quotations in this judgment.

The background to the Application

7. In setting out the background to the Application I am deriving my information principally from the Judgment and the Claimants’ Particulars of Claim. By reason of the jurisdictional challenge to the action, the Defendant has yet to plead its case in response to the Particulars of Claim. I am of course making no final determination, in this judgment, on any facts and issues other than those necessary to the determination of the Appeal.

8. The case advanced by the Claimants in this action (“**the Action**”), which was commenced by Claim Form issued on 4th February 2022, is they are entitled to a share in the sound recording copyrights in certain recordings. The recordings in question were created and released as three studio albums of The Jimi Hendrix Experience band. The Claimants also claim to be entitled to performers’ rights in respect of these recordings.
9. Noel Redding and Mitch Mitchell were, with Jimi Hendrix, the members of the band known as The Jimi Hendrix Experience (“**JHE**”). The three studio albums released by JHE, prior to the death of Jimi Hendrix, were (i) Are You Experienced, (ii) Axis: Bold as Love, and (iii) Electric Ladyland. Jimi Hendrix died in 1970. Noel Redding died in 2003. Mitch Mitchell died in 2008. The Claimants’ case is that the First Claimant now owns a share of the sound recording copyrights and performers’ rights in relation to the three albums, which were previously vested in Noel Redding, and that the Second Claimant now owns a share of the sound recording copyrights and performers’ rights in the three albums, which were previously vested in Mitch Mitchell.
10. The Defendant’s case is that the worldwide copyright in the relevant sound recordings (“**the Recordings**”) is owned by two LLCs registered in the US state of Washington. They are Experience Hendrix LLC and Authentic Hendrix LLC (together “**the Hendrix Companies**”), which derive their title to the copyright in the Recordings from the estate of Jimi Hendrix (“**the Hendrix Estate**”). Strictly speaking, my understanding is that Experience Hendrix LLC is, on the Defendant’s case, the sole owner of the copyright in the Recordings, by assignment from the Hendrix Estate, while Authentic Hendrix LLC is the worldwide licensing arm of Experience Hendrix LLC. It is however convenient, at least for the purposes of this judgment, to refer to the Hendrix Companies as the parties claiming sole ownership of the copyright in the Recordings.
11. The Defendant, which is a company registered in this jurisdiction, has a sub-licence from Sony Music Entertainment (“**SME**”) to exploit the copyright in the Recordings. SME is a Delaware partnership, with its principal place of business in New York. SME is said to have the worldwide exclusive licence to exploit the copyright in the Recordings, granted by the Hendrix Companies.
12. The heads of relief sought in the Particulars of Claim are as follows (quoting directly from the prayer to the Particulars of Claim):
 - “(1) *A declaration as to ownership of the copyright in the Claimants’ Copyright Works* [The Claimants’ Copyright Works are defined in paragraph 10 of the Particulars of Claim to mean the sound recording copyrights subsisting in the three albums].
 - (2) *A declaration as the extent of their performer’s rights including any duty on the Defendant to pay to a relevant collecting society remuneration due under CDPA 1988, s 191HB.* [The statutory reference is to Section 191HB of the Copyright, Designs and Patents Act 1988 (“**the 1988 Act**”).]
 - (3) *A declaration as to any beneficial rights.*
 - (4) *An inquiry as to damages for infringement of copyright (including damages under reg.3 of the Intellectual Property (Enforcement etc.) Regulations), alternatively and at the Claimant’s option an account of profits, together with an order for the payment to the Claimants of all sums found due upon the making of the said inquiry or the taking of the said account together with*

interest pursuant to section 35A of the Senior Courts Act 1981 or under the equitable jurisdiction of the court.

- (5) *An order that the measures be taken at the Defendants' expense for the dissemination and publication of any judgment favourable in whole or in part to the Claimants or either of them herein.*
- (6) *Further or other relief.*
- (7) *Costs."*

13. The commencement of the Action is not the first occasion on which there has been litigation concerning the entitlement of Mr Redding and Mr Mitchell to payment in respect of their participation in JHE. In 1972 they commenced proceedings (strictly a Complaint) in New York ("**the 1972 Complaint**") against the Hendrix Estate, and a company known as Are You Experienced Limited (described by the Defendant as the corporate vehicle of the Hendrix Estate), seeking an account and payment of royalties said to be due to them. In 1973 Mr Redding entered into a settlement of his claim and executed a document described as a "*Release, assignment and covenant not to sue*", in consideration of a payment of US\$100,000. In 1974 Mr Mitchell entered into a settlement of his claim, and executed a similar document, in consideration of a payment of US\$247,500. I will refer to these settlement documents, collectively, as "**the Releases**". At Paragraph 5, the Deputy Master made the following observation on the Releases:

"On their face, they appear to be very comprehensive waivers of any present and future rights of action for copyright infringement. In consequence of the settlement embodied in these documents, both claims were discontinued "with prejudice", meaning that they could not be revived."

14. On 8th December 2021 the Claimants' solicitors sent a lengthy letter of claim to the Defendant. This was followed by further correspondence between the solicitors for the Claimant and the solicitors for the Defendant, but in the meantime, on 18th January 2022, the Hendrix Companies and SME commenced proceedings (again strictly a Complaint) in New York against the Claimants seeking a declaratory judgment. In very brief summary, what is sought by the Plaintiffs in those proceedings is declaratory relief to the effect that Mr Redding and Mr Mitchell surrendered any rights they had in the Recordings when they executed the Releases, and that the Releases now bar any claim to a share in the copyright in the Recordings or to performance rights in respect of the Recordings, including the Claimants' claims in what is now the Action. The Defendant is not a party to these proceedings in New York ("**the 2022 Complaint**").

15. It is in these circumstances that the Defendant has made the Application challenging jurisdiction in respect of the Action. The Defendant contends, for various reasons, that the claim made in the Action should be tried in New York, and not in this jurisdiction. As such the Defendant seeks a declaration that the English court will not exercise any jurisdiction which it has to hear the claim, and an order setting aside the Claim Form and Particulars of Claim in the Action. Further or alternatively, the Defendant contends that the Action should be stayed for case management reasons, pending the determination of the 2022 Complaint.

The Judgment and the decision of the Deputy Master

16. The Deputy Master commenced the Judgment by setting out the background to the Application. At Paragraphs 8-10 the Deputy Master then summarised the law in relation to the jurisdiction challenges made on the basis that the relevant claim could and should

more conveniently be tried in another jurisdiction. The Deputy Master summarised the law principally by reference to the commentary in the White Book (Volume 1 of Civil Procedure, White Book Service 2022) on CPR 6.37, at 6.37.22.

17. At Paragraphs 10-13 the Deputy Master set out criticisms made by Mr Howe of the pleading of the Claimants' claims in the Particulars of Claim. The Deputy Master reached the following conclusions, at Paragraph 13, in this respect:

“13. Mr Malynicz says that he has an answer to all the points made in the skeleton and, indeed, has taken me through some of the arguments he would deploy. In my view, however, this is not the occasion for the court to decide whether the Claimant or the Defendant will prevail on all or some of these particular points in issue, some of which involve quite complex areas of intellectual property law. For present purposes, therefore, I am entitled to and do assume that the claim form and particulars of claim disclose viable causes of action against the Defendant which, subject to the jurisdiction challenge, are properly justiciable in this court. The claims advanced subsist under the law of copyright and performers' rights applicable to the United Kingdom.”

18. At Paragraphs 14 and 15 the Deputy Master made reference to the importance of identifying, for the purposes of resolving a jurisdictional challenge, the real issues between the parties in the relevant action, as opposed to simply looking at the way the relevant claim is pleaded. In this context the Deputy Master made reference to the decision of the Court of Appeal in *Conversant Wireless Technologies Sarl v Huawei Technologies Co Ltd & Others* [2019] EWCA Civ 38 [2019] RPC 6, citing the decision of the Supreme Court in *VTB Capital plc v Nutritek International Corporation* [2013] UKSC 5 [2013] 2 AC 337.

19. At Paragraph 16 the Deputy Master commenced his consideration of the factors relevant to the question of whether the matter to be tried should be heard in New York or England, bearing in mind that the burden was on the Defendant to demonstrate that New York was clearly or distinctly the more appropriate forum. The Deputy Master's discussion of the rival arguments of the parties in relation to these factors occupied Paragraphs 16-24.

20. The Deputy Master reached his conclusion in this context at Paragraph 25, where he said this:

“Those are the rival arguments on this application and, in considering these submissions and the evidence, I return to the guidance given by Lord Goff in The Spiliada case which requires me to identify in which forum the case could most suitably be tried for the interests of all the parties and for the ends of justice. Specifically, it is for the Defendant to show not only that England is not the natural or appropriate forum for the trial but that there is another available forum which is clearly or distinctly more appropriate than the English forum. Having regard to all the evidence before me, and to the comprehensive submissions by leading counsel on both sides for which I am very grateful, I conclude that the Defendant has been unable to demonstrate that New York is the appropriate forum for the disposal of the dispute between the parties, principally but not exclusively for the following reasons:”

21. The Deputy Master then set out, helpfully and conveniently, his reasons for this conclusion, in a series of sub-paragraphs to Paragraph 25. It is easiest simply to quote these reasons in full:

- “(a) As the claim is presently constituted, it seems to me obvious that England is the most natural and appropriate forum i.e. the forum with which the claim has the most real and substantial connection. The Claimants and the Defendant are UK entities, UK and applicable EU law is the governing law of the claim and the acts complained of by the Claimants occurred in the UK.*
- (b) Looking through the pleaded claim and anticipating the defence, this will introduce consideration of the Releases which were executed in New York in proceedings in that jurisdiction. That clearly provides some connection with New York, albeit that it appears that none of the New York plaintiffs are actually registered or established in that jurisdiction. It is unlikely that much in the way of evidence would be required since the critical documents speak for themselves.*
- (c) However, although the Releases were executed in New York in the context of proceedings in that jurisdiction, their meaning and effect must be tested by reference to the claims actually being made in these UK proceedings. It makes no practical sense to construe them, albeit under New York law, in a vacuum. If the Claimant is right, and for these purposes I must assume that this is at least a possibility, their effect will or may be modified by the relevant UK and EU law relating to consent. It would be perverse to require the New York courts to deal with these issues of UK law. Essentially, indeed expressly, the New York court is being asked to determine whether Sony UK has a good defence to the claims brought in England by English Claimants.*
- (d) The New York claim, in the form that the New York Plaintiffs have chosen, namely seeking declaratory relief, deals only with one aspect of the dispute. If the Plaintiffs fail to obtain a declaration that has the effect of barring the Claimants from pursuing the claim, what is to happen to the claim itself? Either it must then be revived here or the Claimants would have to counter sue in New York for infringement in the UK of their copyright and ask a New York court to determine issues of UK law. I have no doubt the New York courts would do their utmost to apply this technical area of UK law in a competent fashion. with the assistance of UK law experts. but this is obviously an undesirable and unnecessarily back to front method of dispute resolution.*
- (e) If at some stage in the proceedings it proved necessary to join one or both of the Hendrix Companies, both registered in Washington State, this can be achieved by agreement if necessary or by an application for service out. I do not regard the failure to join them at this stage before the Defendant has formally pleaded reliance on the Releases as in any way culpable or fatally damaging to the claim as currently constituted.*
- (f) Accordingly, although there is, of course, a New York element to the claim as framed within its wider parameters, it cannot be said that New York is the natural or appropriate forum for the claim as a whole, and England is clearly the forum with the most real and substantial connection to it.*
- (g) It follows that the Defendant has failed to establish that there is another available forum, New York in this case, which is clearly or distinctly more appropriate than the English forum. The issue of the Releases can be pleaded*

by way of defence in the claim. If it is necessary to construe the meaning by reference to New York law, this can be done in the usual way with the assistance of foreign law experts but the effect as regards the instant claims is likely to be decided by reference to wider considerations and legal framework. I do not see that the Defendant is disadvantaged in any way. As it happens, it is not a party to the New York claim so will not have wasted any costs to date. If it is right about the defects in the claim as currently pleaded, it can take appropriate steps under the CPR to dispose of it at an early stage.”

22. The Deputy Master then turned to consider the Defendant’s alternative case that, as a matter of case management, there should be a stay of the Action. The Deputy Master considered that it followed from his earlier reasoning that there was no merit in this alternative submission. As the Deputy Master explained, at Paragraph 27:

“27 Since the Defendant is unable to show that New York is the forum conveniens and there is no basis for granting a stay, it is not necessary to consider Lord Goff’s final point (as cited above): namely, whether there are circumstances by reason of which justice requires that the stay should nevertheless not be granted. It also follows from the above that I do not consider that there is any merit in the Defendant’s alternative submission: namely, that the court should order a stay of the current claim for case management reasons. I therefore dismiss the Claimants’ application.”

The grounds of appeal

23. There are nine grounds of appeal. I will use the same numbering in this judgment to refer to these grounds of appeal; that is to say as “**Ground One**”, and so on. The Grounds are effectively split into two. Grounds One to Seven challenge the decision of the Deputy Master on the question of whether New York was clearly or distinctly the more appropriate forum for the resolution of the dispute than England. Grounds Eight and Nine challenge the decision of the Deputy Master on the question of whether the Action should be stayed pending the determination of the 2022 Complaint.
24. In summary, Grounds One to Seven, as they are asserted by the Defendant, are as follows:
- (1) Ground One – The Deputy Master gave insufficient weight to the existence and significance of the 2022 Complaint, which was commenced before the issue of the Claim Form by which the Action was commenced.
 - (2) Ground Two – The Deputy Master erred in law in holding that the effect of the Releases would or might be modified by UK or retained EU law on consent. The Releases are releases and covenants not to sue and cover all exploitation of the Recordings. There is a fundamental difference between (i) a release and covenant not to sue and (ii) a licence or consent. To the extent that the Deputy Master, in referring to “*EU law relating to consent*”, accepted the Claimants’ submissions that retained EU law on trade marks was applicable, he made a further error of law. There is no EU-wide doctrine of consent of the type asserted by the Claimants.
 - (3) Ground Three - Even if (contrary to Ground Two above) UK law (including retained EU law) on licences and consents is relevant to the effect of the Releases, the Deputy Master erred in holding that it would be “*perverse to require the New York courts to deal with these issues of UK law*”. It is trite law that foreign law can be dealt with by experts.
 - (4) Ground Four - The Deputy Master erred in finding that it was unlikely that “*much in the way of evidence*” would be required for the purposes of the determination of the

2022 Complaint. The Releases were executed almost 50 years ago and, as is apparent from the terms of at least parts of the New York Complaint, evidence as to their background and subsequent events may well be material.

- (5) Ground Five – The Deputy Master was correct to state that if the claim made in the Action was defective in some fundamental way, such as failing to disclose a cause of action, that would be a material factor in the context of a jurisdiction challenge. The Deputy Master then erred in failing to hold that the claim was fundamentally defective for a number of reasons. These reasons are organised into eight sub-grounds, on the basis of which it said that the Deputy Master should have found the claim to be fundamentally defective.
 - (6) Ground Six - The Deputy Master erred in holding that England was the most natural and appropriate forum for the claim as presently constituted, because the Deputy Master failed properly to characterise the true nature of the claim. The claim is not simply a claim between UK parties relating to acts complained of in the UK. It is also a claim to joint ownership of the copyright in the Recordings which is a matter of dispute between the Claimants and the successors in title to the Hendrix Estate. The Deputy Master gave insufficient weight to the fact that the joint ownership claim is the central issue to be tried, and did not take into account the fact that if the Claimants were found to be successful on that issue, they could subsequently seek to rely on issue estoppel, res judicata and analogous principles to extend and assert that finding worldwide, including in the US, under the principle of national treatment in relevant international instruments (such as the WIPO Performances and Phonograms Treaty) and/or local laws that implement that principle.
 - (7) Ground Seven - Having regard to (i) the central importance of the Releases to the claim made in the Action, and (ii) to the fact that they are very likely governed by New York law, and (iii) to the existence of the 2022 Complaint and (iv) to the risk of parallel proceedings and inconsistent findings, the Deputy Master ought to have found that New York was clearly and distinctly a more appropriate forum for the resolution of the dispute between the parties than England.
25. At the hearing of the Appeal Mr Howe made the decision not to pursue the bulk of the sub-grounds in Ground Five. Instead, and in relation to Ground Five, Mr Howe confined himself to maintaining sub-grounds seven and eight, which are as follows and which, so Mr Howe contended, remained relevant to the arguments in the Appeal:
- (1) The Claimants' claim under Section 191HB of the Copyright Designs and Patents Act 1988 is misconceived. Such a right would be enforceable only by a collecting society. Performers can make certain claims (under subsections (6) and (8) of Section 191HB) in the County Court or the Copyright Tribunal but no such claims are sought to be made in the Action.
 - (2) The Particulars of Claim do not plead a valid claim for relief because they fail to state what share of the copyright the Claimants are claiming.
26. Turning to the Grounds Eight and Nine, and the refusal of the Deputy Master to order a stay on case management grounds, Grounds Eight and Nine, as they are asserted by the Defendant, are as follows:
- (1) Ground Eight – The Deputy Master erred in law in:
 - (i) failing to advert to or refer to the test applicable to such applications, namely whether as a matter of discretion to grant a stay in the interests of justice;

- (ii) holding that the application for a stay on case management grounds was concluded by his decision on the application for a stay on forum grounds when in fact the question whether to grant a stay was a matter of discretion; and
 - (iii) failing to give proper reasons for his decision.
- (2) Ground Nine - As a result of those failings the Deputy Master failed to reach the correct conclusion on this application, which was that the claim ought to be stayed pending the determination of the 2022 Complaint for the following reasons:
- (i) the 2022 Complaint would determine the central issue in the Action, namely the effect of the Releases;
 - (ii) that determination of the effect of the Releases would be made in the most appropriate forum without the need for expert evidence of foreign law;
 - (iii) staying the Action pending the determination of the 2022 Complaint would prevent any risk of duplication and inconsistent judgments on the central issue in the Action; and
 - (iv) if the 2022 Complaint were stayed on jurisdiction grounds, the claim can be revived.

The law

27. There was no material dispute before me as to the applicable law, by which I mean the law governing the jurisdictional challenge and the application for a stay. Subject to one point to which I shall come, which concerns a recent authority on applications for a stay of the kind sought by the Application, the position appears to have been the same before the Deputy Master.
28. So far as the principles governing jurisdictional challenges on the basis of appropriate forum were concerned, and as I have said, the Deputy Master made reference to the commentary in the White Book (Volume 1 of Civil Procedure, White Book Service 2022) at 6.37.22. The editors refer to the leading speech of Lord Goff in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460. The editors of the White Book extract six principles from the relevant part of the speech of Lord Goff, which they introduce in the following terms:
- “Lord Goff’s six principles are summarised below, although they are not strictly relevant to a case where the claimant is applying to serve proceedings out of the jurisdiction (see para. 6.37.16 above). It is commonly said that his lordship formulated “a two-stage test” for the determination of the question whether proceedings should be stayed on forum non conveniens grounds. At the first stage, it is for the defendant to satisfy the court that there is another forum which is prima facie the “appropriate” forum for the trial of the action. If the defendant does so, then the second stage is to decide whether there are special circumstances by reason of which justice requires that the trial should, nevertheless, take place in England (476D to 476E). That test is apparent in the principles below.”*
29. The editors then set out the six principles, which the Deputy Master quoted at Paragraph 8. The six principles, the formulation of which in fact derives from the judgment of Henry Carr J at first instance in *Conversant Wireless Technologies*, are as follows:
- “1. The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other*

available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e., in which the case may be tried more suitably for the interests of all the parties and the ends of justice.

2. *In general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay. However, each party will seek to establish the existence of factors which it relies upon, and in respect of any such matter the evidential burden will rest on the party who asserts its existence. If the court is satisfied that there is another available forum which is prima facie the appropriate forum, the burden will shift to the claimant to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in England.*
3. *The defendant has the burden not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum.*
4. *Since the question is whether there exists some other forum that is clearly more appropriate for the trial of the action, the court will look first to see what factors there are which point in the direction of another forum. The natural forum is that with which the action has the most real and substantial connection. Connecting factors will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction, and the places where the parties respectively reside or carry on business.*
5. *If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay.*
6. *If, however the court concludes at that stage that there is some other available forum which prima facie is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless the circumstances by reason of which justice requires that the stay should nevertheless not be granted. In this inquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. One such factor can be the fact, if established objectively by cogent evidence, that the claimant will not obtain justice in the foreign jurisdiction, and the burden is on the claimant to prove this.”*

30. There are some points to bring out in relation to these principles.

31. First, the test established in the *Spiliada* case is essentially a two stage test. The two stages can be summarised in the following terms in a case, such as the present case, where the question is not whether permission should be granted to serve out of the jurisdiction, but rather whether jurisdiction can be challenged in circumstances where jurisdiction is established as of right.

- (1) At the first stage the burden is upon the defendant to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum. At this stage the court should look first to see what factors there are which point in the direction of another forum or, putting the matter another way, connect the relevant dispute to another forum. Equally, the court should look to see what factors there are which connect the dispute with England.

- (2) If the defendant discharges this burden, the court will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. At this stage the burden shifts to the claimant to demonstrate such circumstances. In considering whether there are any such circumstances, the court will consider all the circumstances of the relevant case.
32. Second, it will be noted that there are two distinct questions to be answered, in relation to the first stage of the test. If the defendant, on whom the burden rests, fails to demonstrate that the alternative forum is an available forum, the jurisdiction challenge falls at the first hurdle, and must fail. If the alternative forum is shown to be an available forum, the second question within the first stage of the test is whether the defendant has succeeded in demonstrating that the other available forum is clearly or distinctly more appropriate than the English forum. This is a question for the discretion of the court, or perhaps more accurately a question for the evaluation of the court. In the present case it appears to have been accepted before the Deputy Master that New York was an available jurisdiction for the determination of this dispute. The argument was concentrated upon the second question within the first stage of the test. This remained the position at the hearing of the Appeal. There was a suggestion, on the Claimants' side, that the Claimants did not have the means to pursue proceedings in New York, but even if this is a point capable of going to the question of the availability of the jurisdiction, which I doubt, I accept the submission of Mr Howe that the evidence before the court does not demonstrate that such lack of means actually exists.
33. Third, in order to apply the *Spiliada* test correctly, it is essential to identify the true dispute between the parties. In carrying out this exercise it is important to look to the substance of the dispute, or matter to be tried, and not to be misled by the particular nature of the claims made in this jurisdiction. The Deputy Master accepted Mr Howe's submission to this effect, at Paragraph 15, and made reference to the decision of the Court of Appeal in *Conversant Wireless Technologies*. As Floyd LJ noted in his judgment in that case (with which Flaux and Patten LJ agreed), at [32]:
- “32 *In identifying the forum in which the case can suitably be tried for the interests of all parties and for the ends of justice, it is important to recognise that the "case" is not restricted to an analysis of the claim and relief sought by the claimant. Mr Layton submitted, and I accept, that one must have regard to the totality of the dispute, including where necessary the defendant's answer to the claim. So much is clear from VTB Capital Plc v Nutritek International Corp [2013] UKSC 5, [2013] 2 AC 337, in particular from the speech of Lord Mance at [57], Lord Neuberger at [90]-[91] and Lord Clarke at [192].*”
34. Floyd LJ went on to refer to *Re Harrods (Buenos Aires) Ltd* [1992] Ch 72, by way of illustration of this point. The case is an important one, because it provides an apt warning as to how the court can go wrong in its approach to a jurisdictional challenge on the basis of appropriate forum. At [33] in his judgment in *Conversant Wireless* Floyd LJ summarised what happened at first instance in *Re Harrods* in the following terms:
- “33 *Further, the case must be characterised in a way which does not risk prejudging the analysis of where the appropriate forum lies. The appellants relied heavily on re Harrods (Buenos Aires) Ltd [1992] Ch 72, [1991] 3 WLR 317 to illustrate this point. In that case, a company registered under*

the English Companies Act, having its registered office in England, had carried on business for many years in Argentina. The company was regarded under Argentine law as an Argentine company. It was owned 49% by the claimant and 51% by the defendant. The claimant brought an unfair prejudice petition in England seeking an order under the English Companies Act requiring the defendant to buy out its minority share. Harman J. noted that the inquiry was into the appropriate forum to resolve "the action", and asked himself "what is this action?". He answered that question by defining "the action" as an unfair prejudice petition under the English Companies Act in respect of an English company. Having formulated the forum conveniens inquiry that way, he concluded that it was "blindingly obvious" that the appropriate forum was England. In the Court of Appeal Dillon L.J. said at p. 111 A-C:

"Harman J. plainly appreciated that the factual issues in dispute favoured trial in Argentina. ... But in considering which was the more appropriate forum he seems to have put the factual issues to one side, and concentrated only on the fact that the remedies sought by Ladenimor by the petition were remedies made available by English statutes in respect of a company incorporated in England."

35. The judgment of Bingham LJ (as he then was) in the Court of Appeal in *Re Harrods* repays study. It is however sufficient for present purposes to adopt the citations from this judgment included by Floyd LJ in his judgment, at [34] and [35]:

"34 As Bingham L.J. went on to explain at p. 111 E-G, Harman J.'s approach built the answer into the question:

*"With every respect to the judge, the answer is only "blindingly obvious" to him because of the premises which are built into the way he has posed his question.... in my judgment he has failed to keep in mind at this crucial stage in his judgment that this company is by Argentine law to be considered as a local, Argentinian company. I do not regard it as at all blindingly obvious that relief for the dishonest management of an Argentinian company in Argentina should be granted by a court other than the Argentinian court. That illustrates that the question formulated may by limiting the premises on which it is formulated dictate the answer. That is in my respectful view what the judge has done here, instead of concentrating on the question as put in *Spiliada Maritime Corporation v Cansulex Ltd.* [1987] A.C. 460."*

- 35 At p.123 F-G Bingham L.J. put the matter in this way:

*"Before applying The *Spiliada* ... test, the judge posed the question: "What is this action?" That was a very pertinent question. One cannot decide where a matter should be most appropriately and justly tried without being clear what is to be tried. But I do not think the question should be answered simply by reference to the relief claimed, since in an English action the relief claimed will almost inevitably be framed in English terms, particularly where it is statutory. An English leader will not claim triple damages or *dommage-interet*, appropriate as such relief may be elsewhere. Thus when the judge answered the question by quoting part of the language of section 459 of the*

Companies Act 1985 he was unconsciously building in a bias towards the choice of an English forum".

36. As Bingham LJ pointed out in his judgment in *Re Harrods*, one cannot decide where a matter should most appropriately and justly be tried without being clear what is to be tried. The answer to the question of what is to be tried is not provided simply by reference to the relief claimed in the relevant action. Paying attention only to the relief claimed in the action may build in an unconscious bias in favour of England and Wales as the appropriate forum.
37. In the remainder of this judgment I will use the neutral expression “**the Claim**” to mean the true dispute between the parties in this case; that is to say the substance of the dispute, or matter to be tried in this case, as this concept is defined and explained in *Conversant Wireless Technologies* and *Re Harrods*. It will be appreciated that the use of this expression is intended to avoid pre-judging the answer to the question of what the true dispute or matter to be tried is in the present case.
38. Turning to the Defendant’s alternative case that a stay of the Action should be ordered, pending the determination of the New York Complaint, I was referred to the decision, at first instance, of Moore-Bick J (as he then was) in *Reichhold Norway ASA v Goldman Sachs International* [1999] 1 All ER (Comm) 40. The case was concerned with the sale by a Norwegian company (J) of one of its subsidiaries to R, a leading manufacturer in synthetic materials. Goldman Sachs International, the defendant in the case, acted as financial advisor to J on the sale. Following the sale R claimed that the defendant had misrepresented the financial performance of the subsidiary. R, as joint plaintiff with the company which it had formed to hold the shares in the subsidiary of J, brought proceedings in England against the defendant, claiming damages for alleged negligent misstatement. R also gave notice of arbitration in Norway against J, in accordance with the terms of the sale agreement, which provided that disputes should be determined by arbitration in Norway. The defendant applied for a stay of the English proceedings until after the determination of the Norwegian arbitration between J and R.
39. For the reasons set out in his judgment Moore-Bick J accepted that he had jurisdiction to grant such a stay. He then went on to consider the competing factors for and against such a stay and ultimately arrived at the conclusion, in the particular circumstances of the case, that it was appropriate to grant such a stay. For present purposes it is sufficient to highlight what the judge had to say, at 51b-d, as to the relationship between a jurisdictional challenge on the basis of appropriate forum and an application for a stay pending the determination of proceedings in another jurisdiction.

“I fully recognise that the burden on the defendant who seeks a stay on the grounds of forum non conveniens is intended to reflect the fact that the plaintiff has founded jurisdiction here as of right. However, the situation which the court faces on an application of that kind is rather different from that which arises in this b case. In the case where a stay is sought on the grounds of forum non conveniens the availability of an alternative forum for the determination of the dispute means that the court is effectively being asked to decide in which of two competing forums the action shall proceed. In practical terms it is not a question of when but whether the plaintiff should be allowed to pursue the action here. To that extent the exercise of the court's discretion to stay the proceedings involves a

greater interference with the plaintiff's rights than the order sought in this case. Although I would accept that there is a very real burden on the defendant in this case to satisfy the court that the ends of justice would be better served by granting a stay, I do not accept that it is any greater than that which would arise on an application on the grounds of forum non conveniens. And of course the factors which the court has to take into consideration differ in certain important respects.”

40. The decision of Moore-Bick J in *Reichhold* to grant the stay was upheld in the Court of Appeal ([2000] 1 WLR 173). The Court of Appeal were pressed with the argument, on behalf of the plaintiff companies, that the grant of a stay would open the door to a flood of tactical applications made by defendants looking to obstruct and delay proceedings in this jurisdiction. The Court of Appeal were unimpressed by this argument. As Lord Bingham C.J. (as he then was), noted at 186C:

“I for my part recognise fully the risks to which Mr Carr draws attention, but I have no doubt that judges (not least commercial judges) will be alive to these risks. It will very soon become clear that stays are only granted in cases of this kind in rare and compelling circumstance. Should the upholding of the judge’s order lead to the making of unmeritorious applications, then I am confident that judges will know how to react.”

41. Lord Bingham, with whose judgment Otton and Robert Walker LJ agreed, then went on to conclude that the case was not one where it could be demonstrated that Moore-Bick J had gone wrong in any way, in the exercise of his discretion.
42. In an addendum to the Defendant’s skeleton argument, my attention was drawn to the recent decision of the Court of Appeal in *Athena Capital Fund SICAV-FIS S.C.A. v Secretariat of State for the Holy See* [2022] EWCA Civ 1051. Judgment in this case was handed down after the date of the Judgment, with the consequence that this decision was not before the Deputy Master. The case involved a transaction whereby the Secretariat acquired a valuable property in London from a company under the ultimate control of a Mr Mincione, who was a financial adviser to the Secretariat. The Secretariat is the Secretariat of State for the Holy See, which is a governmental unit of the Holy See, which is the jurisdiction of the Pope, as head of the Roman Catholic Church. The Holy See exercises sovereign jurisdiction over the Vatican City State and is recognised as foreign sovereign in international law. In criminal proceedings in the Vatican, it was alleged that Mr Mincione had misused his position as financial adviser to the Secretariat in order to defraud and embezzle money from the Secretariat over a period of some years. In particular, it was alleged that Mr Mincione had used his position to procure the purchase of the property by the Secretariat for a substantial overpayment, with the surplus diverted to the benefit of Mr Mincione and his associates. The transaction by which the property was acquired was implemented through various documents, including a framework agreement and a share purchase agreement, both of which contained clauses providing for the agreements to be governed by English law and for any dispute to be subject to the exclusive jurisdiction of the English courts.
43. The criminal investigations which resulted in the criminal proceedings against Mr Mincione in the Vatican were conducted by The Office of the Promoter of Justice, which was a separate emanation of the Holy See, and was responsible for investigating and prosecuting crimes on behalf of the Vatican State. Mr Mincione responded to the criminal

investigations by commencing proceedings in England, against the Secretariat, in which he and companies under his control, which had been involved in the transaction and were named in the criminal proceedings, sought a variety of declaratory relief. The overall purpose of the relief sought in these proceedings was to establish that the claimants had acted in good faith in relation to the transaction. The Secretariat made an application in these proceedings, challenging the jurisdiction of the English court to hear the proceedings and, in the alternative, seeking a stay of the proceedings until the conclusion of the criminal investigations into the transaction. At first instance Simon Salzedo KC, sitting as a Deputy Judge of the High Court, decided that a stay of the English proceedings should be granted, on case management grounds, pending a material change in circumstances. The essential basis for this decision was that the declarations sought in the English proceedings would serve no useful purpose because the Secretariat, which was not the prosecuting authority in respect of the criminal proceedings in the Vatican, held an essentially neutral position in relation to the criminal proceedings. The real dispute was not between the parties to the English proceedings, but between the claimants (Mr Mincione and the company claimants in the English proceedings) and the Vatican prosecuting authority.

44. The claimants in the English proceedings challenged this decision in the Court of Appeal. The Court of Appeal allowed the appeal, essentially on the basis that the judge at first instance had been in error in characterising the position of the Secretariat as neutral. The Secretariat was not neutral and, as such, the English proceedings did have a useful purpose and should be permitted to proceed.
45. In his judgment in the Court of Appeal, with which Birss and Peter Jackson LJJ agreed, Males LJ considered the nature of the jurisdiction to grant a stay on case management grounds. As he pointed out, at [48], the discretion to grant a stay is a wide one:

“48. The court has power to stay proceedings “where it thinks fit to do so”. This is part of its inherent jurisdiction, recognised by section 49(3) of the Senior Courts Act 1981. The statute imposes no other express requirement which must be satisfied. This is a wide discretion. The test is simply what is required by the interests of justice in the particular case.”
46. Males LJ went on to consider the *Reichhold* case. The judge described the decision of the Court of Appeal in that case in the following terms, at [51]:

“51. This court upheld Mr Justice Moore-Bick’s exercise of discretion. Despite dicta in Abraham v Thompson [1997] 4 All ER 362, a claimant does not have an unfettered right to pursue a claim to judgment, subject only to considerations of abuse of process, on a timetable of its own choosing; rather, the court has power to control its own business and there may be circumstances in which it is in the interests of justice for the pursuit of a claim to be deferred until something else has happened. Lord Bingham whom Lord Justices Otton and Robert Walker agreed) recognised that the court would need to bear in mind Article 6 ECHR. Referring to the risk that granting a stay would open the door to a flood of similar applications, he observed that:

“It will very soon become clear that stays are only granted in cases of this kind in rare and compelling circumstances. Should the upholding of the judge’s order lead to the making of unmeritorious applications, then I am confident the judges will know how to react.”

47. As Males LJ pointed out, at [52], the test applied by Moore-Bick J in *Reichhold* was not in fact whether there were rare and compelling circumstances, but whether a stay was in the interests of justice. Following a review of further cases involving applications for a stay, in order to await the outcome of proceedings in another jurisdiction, Males LJ concluded as follows, at [58] and [59]:

“58. *It is interesting to see how an observation by Lord Bingham that there was no need to be concerned about a "floodgates" argument because in fact it would only be in rare cases, where there was a compelling reason to do so, that a stay of English proceedings would be granted in order to await the outcome of proceedings abroad has been elevated almost into a legal test that "rare and compelling circumstances" must exist before the apparently unfettered jurisdiction to grant such a stay can be exercised.*

59. *There is, as it seems to me, no reason to doubt that it is only in rare and compelling cases that it will be in the interests of justice to grant a stay on case management grounds in order to await the outcome of proceedings abroad. After all, the usual function of a court is to decide cases and not to decline to do so, and access to justice is a fundamental principle under both the common law and Article 6 ECHR. The court will therefore need a powerful reason to depart from its usual course and such cases will by their nature be exceptional. In my judgment all of the guidance in the cases which I have cited is valuable and instructive, but the single test remains whether in the particular circumstances it is in the interests of justice for a case management stay to be granted. There is not a separate test in "parallel proceedings" cases. Rather, considerations such as the existence of an exclusive English jurisdiction clause and the danger of circumventing a statutory scheme for the allocation of jurisdiction (such as the Judgments Regulation) will be weighty and often decisive factors pointing to where the interests of justice lie.”*

48. Mr Howe’s primary position in the Appeal was that the Deputy Master had, in the relevant part of the Judgment, failed to apply any independent test to the question of whether a stay should be granted on case management grounds, but instead had wrongly concluded that a stay was precluded by his decision on the appropriate forum. The Defendant had however, in its argument before the Deputy Master, submitted to the Deputy Master that the test for the grant of a stay on case management grounds included the need for rare and compelling circumstances. If the Deputy Master had, in his decision on whether to grant a stay on case management grounds, in fact applied that test of rare and compelling circumstances, the alternative submission of Mr Howe was that the Deputy Master had thereby made an inadvertent error of law, given the subsequent decision in *Athena Capital*.

49. I will need to come back, later in this judgment, to what the Deputy Master did and did not decide in this context. I would however be cautious in dealing with this alternative submission of Mr Howe. I do not detect any change in the law, as between *Reichhold* and *Athena Capital*. In relation to an application for a stay of proceedings in this jurisdiction, to await the outcome of proceedings in another jurisdiction, the single test “remains” whether, in the particular circumstances of the relevant case, it is in the interests of justice for a stay to be granted on case management grounds. For the reasons explained by Males LJ, this test is not easily satisfied in the context of applications for a stay of the kind which

were made in *Reichhold* and *Athena Capital*. The court will need a powerful reason to depart from its usual course and such cases will, by their nature, be exceptional.

The jurisdiction in relation to the Appeal

50. So far as the application for permission to appeal is concerned, and subject to one point which I deal with later in this judgment, the position is straightforward and is governed by CPR 52.6. The appeal for which permission is sought is a first appeal. The court may therefore grant permission to appeal where the court considers that the appeal would have a real prospect of success or where there is some other compelling reason for the appeal to be heard.

51. Assuming that permission to appeal is granted, the position in relation to the substantive appeal requires a little more analysis. Starting with the decision of the Deputy Master on appropriate forum, Mr Howe accepted, correctly in my view, that the Defendant was seeking to challenge a decision which was one of evaluation. As such, the appeal court should be slow to interfere unless the Deputy Master made a significant or material error of principle (such as taking into account irrelevant or mistaken material or omitting relevant material) or reached a decision that was plainly wrong. A number of statements to this effect can be found in the judgments of the Supreme Court in *VTB Capital*. I refer in particular, to what was said by Lord Neuberger PSC, at [96] and [97]:

“96 Lord Mance JSC in paras 41 and 42. of his judgment has set out the passages in the judgments of Arnold J and the Court of Appeal respectively, which contain the centrally relevant reasoning of those tribunals on the first question which we have to decide. At least on the face of it, those passages each involve a classical interlocutory weighing up exercise with which an appellate court should be slow to interfere. Of course, that does not detract from the point that the Court of Appeal will consider any argument that the judge took into account any irrelevant or mistaken material, or omitted some relevant material, which could well have influenced the conclusion reached, or that the case is one of those even more unusual cases where the judge's conclusion was one that no reasonable judge could have reached.

*97 It is worth emphasising that, as Lord Wilson JSC says, the exercise carried out by the judge and by the Court of Appeal on the first question was not the exercise of a discretion but an evaluative, or a balancing, exercise, with which, as Lord Goff said in *The Spiliada* at p 465, an "appellate court should be slow to interfere" (also reflected in Lord Bingham's observation in *Lubbe* quoted in para 92 above).”*

52. I also refer to what was said by Lord Wilson JSC, at [156]:

*“156 The forum issue required Arnold J not (in my view) to exercise a discretion but, rather, to reach an evaluative judgment upon whether, in the light of these and the many other points pressed upon him by each side, England was clearly the more appropriate forum. "The appellate court should be slow to interfere" (Lord Goff in *The Spiliada* [1987] AC 460, 465); and I agree with Lord Mance JSC at para 68 and with Lord Neuberger PSC at para 98 that the errors which the Court of Appeal identified in the judgment of Arnold J (in particular his adoption of the two-part test apt to an application for stay) were, on analysis, of materiality insufficient to justify a re-evaluation of its own. Furthermore, notwithstanding its own error about the governing law of the torts, alongside which, however, one must weigh its assertion that an English governing law*

would not have led it to a different conclusion, I agree with Lord Neuberger PSC's alternative conclusion at para 96 that there are no grounds for interfering with the Court of Appeal's own evaluative conclusion."

53. In relation to the decision of the Deputy Master to refuse a stay on case management grounds, Mr Howe made three points, in the context of the appeal jurisdiction.
54. First and in the context of the application for permission to appeal, Mr Howe referred me to CPR PD52A, at paragraph 4.6, which provides as follows in relation to case management decisions:
- "Where the application is for permission to appeal from a case management decision, the court dealing with the application may take into account whether—*
- (a) the issue is of sufficient significance to justify the costs of an appeal;*
 - (b) the procedural consequences of an appeal (e.g loss of trial date) outweigh the significance of the case management decision;*
 - (c) it would be more convenient to determine the issue at or after trial.*
- Case management decisions include decisions made under rule 3.1(2) and decisions about disclosure, filing of witness statements or experts' reports, directions about the timetable of the claim, adding a party to a claim and security for costs."*
55. Second, and in the context of the substantive appeal, Mr Howe drew my attention to the notes in the White Book at 52.21.7, which explain the duty of a court to give adequate reasons for its decision. This related to the submission of Mr Howe that the Deputy Master failed to give adequate reasons for his decision to refuse the application for a stay on case management grounds.
56. Third, and subject to this second point, Mr Howe accepted, correctly in my view, that the ability of an appeal court to interfere with a case management decision is limited. The relevant principles governing the approach to applications for permission to appeal and appeals against case management decisions was explained by Coulson LJ in *Jalla v Shell International Trading and Shipping Ltd* [2021] EWCA Civ 1559, at [27] and [28]:
- "27. The starting point is that this was a case management decision, reached after a full day's argument. In Mannion v Ginty [2012] EWCA Civ 1667 at [18], Lewison LJ said that it was "vital for the Court of Appeal to uphold robust, fair case management decisions made by first instance judges". That point was reiterated in Abdulle v Commissioner of Police of the Metropolis [2015] EWCA Civ 1260; [2016] 1 WLR 898, where it was made plain that this principle applied, even if the case management decision in question had a very significant impact upon the proceedings.*
- 28. In such a case, this court can only interfere with the decision of the lower court if the judge had regard to a factor that was irrelevant or failed to have regard to a factor that was relevant, or if the judge's discretion was "clearly wholly wrongly exercised": see Eagil Trust Co Ltd v Pigott-Brown [1985] 3 All ER 119 and Royal and Sun Alliance Insurance PLC v TeCEN Ltd [2002] EWCA Civ 1964, at [38] and [47]. That is, on any view, a high hurdle for the claimants to overcome in this case. This was a decision of the judge in charge of the TCC, with considerable experience of case-managing challenging claims through to a conclusion."*
57. In summary, the hurdle is a high one for the Defendant in the present case. In relation to the decision of the Deputy Master on the question of appropriate forum and in relation to

the decision of the Deputy Master on the question of a stay on case management grounds, it is not open to me to interfere with the decisions of the Deputy Master on the basis that I may simply disagree with those decisions. More is required. It needs to be demonstrated that something went wrong in the evaluative exercise carried out by the Deputy Master and/or in the exercise of the Deputy Master's case management discretion, which was sufficiently fundamental to the relevant exercise to justify my interference. The ways in which this can occur are set out in the authorities referred to above, including the possibilities of (i) a decision having been reached on the basis of a matter or matters wrongly taken into account or wrongly left out of account, (ii) a decision having been reached which no reasonable judge could have reached, (iii) a decision having been reached without the relevant exercise having been carried out at all and (iv) a decision having been reached for which no adequate reasons are given. I mention the third and fourth possibilities because, in the present case, the Defendant's primary case, in relation to the application for a stay on case management grounds, is that the Deputy Master's case management discretion was not exercised at all, and that no proper reasons were given for the decision of the Deputy Master to refuse the application.

Discussion – overall structure

58. In my discussion of the arguments in the Appeal I will adopt the following structure:
- (1) I will deal separately with the Appeal so far as it concerns (i) the decision of the Deputy Master in relation to the question of the appropriate forum (“**the Forum Decision**”) and (ii) the decision of the Deputy Master in relation to the application for a stay on case management grounds (“**the Case Management Decision**”).
 - (2) In relation to the Forum Decision I will consider first, and individually, the relevant grounds of appeal. I will then consider the overall position.
 - (3) I will then consider the Case Management Decision. Given that there are only two grounds of appeal to consider, it seems to me that it is not necessary to separate out my discussion of these grounds of appeal from my discussion of the overall position.

Discussion – the Forum Decision

(i) The Forum Decision - Ground One

59. I can take Ground One very shortly. The argument is that the Deputy Master gave insufficient weight to the existence and significance of the 2022 Complaint. If Ground One is taken in isolation, I cannot see that it has merit. The Deputy Master clearly took the 2022 Complaint into account. He introduced the 2022 Complaint at Paragraph 6. At Paragraph 17 the Deputy Master summarised Mr Howe's argument in relation to the 2022 Complaint. In the discussion which followed Paragraph 17 the Deputy Master made further references to the 2022 Complaint, which was part and parcel of what was clearly the central argument of Mr Howe; which was to the effect that the Claim was concerned with the Releases, and the Releases were the subject of, and were properly the subject of the 2022 Complaint. In Paragraph 25, as I have noted, the Deputy Master set out his reasons for the Forum Decision. Those reasons included consideration of the 2022 Complaint. Beyond this, the Deputy Master considered the problem of having two “*to some extent parallel claims on foot in two different jurisdictions*”, at Paragraph 26, but the Deputy Master was not persuaded that this was sufficient to establish New York as clearly or distinctly the more appropriate forum for the Claim.
60. If Ground One is looked at in isolation, it seems to me that the Ground runs into the problem that the Deputy Master was carrying out an evaluative exercise. Things might

have been different if the Deputy Master had left the 2022 Complaint out of account, but the Deputy Master did not do this. The Deputy Master took the 2022 Complaint into consideration. Thereafter the weight and significance which the Deputy Master gave to the 2022 Complaint was a matter for the Deputy Master.

61. The position may be different if it can be demonstrated that the Deputy Master went wrong in some way in the carrying out of the required evaluative exercise, which impacted upon his treatment of the 2022 Complaint. If, however, Ground One is taken in isolation it seems to me, as I have said, that it lacks merit.

(ii) The Forum Decision - Ground Two

62. Ground Two seems to me to require more discussion. At Paragraph 25(c) the Deputy Master accepted that, although the Releases were executed in New York, there was at least a possibility that their effect would or might be modified by the relevant UK and EU law relating to consent. At this hearing Mr Malynicz renewed his argument that the Releases functioned as consents, the effect of which had to be determined by reference to EU law.

63. I found this argument, and the reasoning of the Deputy Master in Paragraph 25(c) somewhat difficult to accept, essentially for three reasons.

64. First, I was taken through the terms of the Releases in some detail. As the Deputy Master correctly observed, at Paragraph 5, they are very comprehensive documents. Both Releases were entered into for the purposes of settling the 1972 Complaint and, in the case of Mr Redding (and by reference to recitals to the relevant Release), for the purposes of settling other claims against Warner Brothers companies arising out of a proposed documentary film on the life of Jimi Hendrix.

65. In the case of the Release signed by Mr Redding clause 1 provides as follows:

“1. I hereby release the Estate of JIMI HENDRIX, deceased, “ARE YOU EXPERIENCED”, a corporation, the stock of which is owned by the Estate of JIMI HENDRIX, deceased, Warner Brothers Records, and any and all other record companies throughout the world with whom JIMI HENDRIX in his lifetime, or the Estate of JIMI HENDRIX, deceased, have entered into contracts or agreements for the distribution and sale of recordings of JIMI HENDRIX on which I performed, from any and all liability or responsibility to me to account for any royalties [royalties?] or compensation to me in connection with said recordings. I further covenant not to sue any such record companies for compensation arising out of distribution of such recordings. By this release I acknowledge full settlement of any compensation which I may claim in connection with earnings on said recordings in the past, as well as any earnings which might result in the future, both in the United States and throughout the rest of the world.”

66. In the case of the Release signed by Mr Mitchell clauses 1 and 2 provide as follows:

“1. I hereby release the Estate of JIMI HENDRIX, deceased, its successors and/or assigns, Are You Experienced, Ltd., its successors and/or assigns and any and all record companies and other entities with whom said JIMI HENDRIX, his Estate, or their successors or assigns may have contracted in the past, or may contract in the future (excepting those reservations which are specifically set forth in paragraph 6 below) for the distribution and sale of records embodying

performances of JIMI HENDRIX on which I performed, including any soundtrack recordings from any and all liability or responsibility to account to me for or pay royalties or other compensation to me in connection with any such recordings.

Further, I covenant, promise and agree not to sue the ESTATE OF JIMI HENDRIX, its successors and/or assigns, Are You Experienced, Ltd., its successors and/or assigns nor any such entities or record companies for compensation arising out of the distribution of any recordings made pursuant to such contracts or agreements.

2. By this release, I acknowledge full settlement of any compensation which I may have claimed, now claim or in the future may claim in connection with earnings on said recordings in the past, as well as any earnings which might result in the future from the sale of such recordings.

67. It will be noted that in both Releases there are both words of release and covenants not to sue. It is hard to see how this wording or indeed the remainder of each of the Releases can be classified simply as a consent. For the purposes of the Appeal, it does not seem to me that I can or should make any final determination of the ultimate meaning and effect of the Releases. What however does seem clear to me is that the Releases are not correctly classified as simple consents. That is not what they say.
68. Second, it seems clear to me, at least as matters stand, that the Releases are governed by New York law. The Releases were entered into in New York, for the purposes of settling proceedings in New York; specifically, the 1972 Complaint. It is true that in the case of Mr Redding there appear to have been other proceedings in Los Angeles which were also settled by the relevant Release, but this does not alter the fact that the Release in relation to Mr Redding was entered into in New York, for the purposes of settling the 1972 Complaint. The associated court documents entered into for the purposes of discontinuing the 1972 Complaint were documents in the 2022 Complaint; that is to say documents in New York proceedings. I am of course not an expert in New York law, but the language of the Releases is language which is apt to the law of an American jurisdiction. It is certainly not apt to this jurisdiction. The sums payable to Mr Redding and Mr Mitchell pursuant to the Releases were denominated in US dollars.
69. In oral submissions Mr Malynicz did not submit that the Releases were governed by the law of some jurisdiction other than New York. His position, as I understood it, was that the governing law of the Releases remained an open question. I do not agree. At least as matters stand, and on the basis of the materials before me on the Appeal, I cannot see any viable candidate for the governing law of the Releases other than New York law.
70. Third, the legal materials to which I have been directed by the Claimants did not seem to me demonstrate that the status, meaning and effect of the Releases all depend upon a particular doctrine of retained EU law or, for that matter, English law. In this context I was referred to several European cases by counsel. In particular, Mr Malynicz referred me to *Zino Davidoff SA v A&G Imports Levi Strauss & Co. and Levi Strauss (UK) Ltd v Tesco Stores, Tesco PLC and Costco Wholesale UK Ltd* (Joined Cases C-414/99, C-415/99 and C-16/99) [2002] RPC 20. The issues in the cases before the court, very broadly, included questions relating to the circumstances in which the consent of the proprietor of a trade mark could be taken to have been given, in relation to parallel imports from outside the EEA into the EEA. In considering the concept of consent, the court said this, at [42] and [43]:

- “42. *If the concept of consent were a matter for the national laws of the Member States, the consequence for trade mark proprietors could be that protection would vary according to the legal system concerned. The objective of "the same protection" under the legal systems of all the Member States set out in the ninth recital in the preamble to Directive 89/104, where it is described as "fundamental", would not be attained.*
- 43 *It therefore falls to the Court to supply a uniform interpretation of the concept of "consent to the placing of goods on the market within the EEA" as referred to in Article 7(1) of the Directive.”*

71. The court continued, at [45]-[47] in the following terms:

- “45. *In view of its serious effect in extinguishing the exclusive rights of the proprietors of the trade marks in issue in the main proceedings (rights which enable them to control the initial marketing in the EEA), consent must be so expressed that an intention to renounce those rights is unequivocally demonstrated.*
- 46 *Such intention will normally be gathered from an express statement of consent. Nevertheless, it is conceivable that consent may, in some cases, be inferred from facts and circumstances prior to, simultaneous with or subsequent to the placing of the goods on the market outside the EEA which, in the view of the national court, unequivocally demonstrate that the proprietor has renounced his rights.*
- 47 *The answer to the first question referred in each of Cases C-414/99 to C-416/99 must therefore be that, on a proper construction of Article 7(1) of the Directive, the consent of a trade mark proprietor to the marketing within the EEA of products bearing that mark which have previously been placed on the market outside the EEA by that proprietor or with his consent may be implied, where it is to be inferred from facts and circumstances prior to, simultaneous with or subsequent to the placing of the goods on the market outside the EEA which, in the view of the national court, unequivocally demonstrate that the proprietor has renounced his right to oppose placing of the goods on the market within the EEA.”*

72. In relation to the question of whether consent could be implied from silence, the court said this, at [53]-[60]:

- “53. *It follows from the answer to the first question referred in the three cases C-414/99 to C-416/99 that consent must be expressed positively and that the factors taken into consideration in finding implied consent must unequivocally demonstrate that the trade mark proprietor has renounced any intention to enforce his exclusive rights.*
- 54 *It follows that it is for the trader alleging consent to prove it and not for the trade mark proprietor to demonstrate its absence.*
- 55 *Consequently, implied consent to the marketing within the EEA of goods put on the market outside that area cannot be inferred from the mere silence of the trade mark proprietor.*
- 56 *Likewise, implied consent cannot be inferred from the fact that a trade mark proprietor has not communicated his opposition to marketing within the EEA or from the fact that the goods do not carry any warning that it is prohibited to place them on the market within the EEA.*

- 57 *Finally, such consent cannot be inferred from the fact that the trade mark proprietor transferred ownership of the goods bearing the mark without imposing contractual reservations or from the fact that, according to the law governing the contract, the property right transferred includes, in the absence of such reservations, an unlimited right of resale or, at the very least, a right to market the goods subsequently within the EEA.*
58. *A rule of national law which proceeded upon the mere silence of the trade mark proprietor would not recognise implied consent but rather deemed consent. This would not meet the need for consent positively expressed required by Community law.*
- 59 *In so far as it falls to the Community legislature to determine the rights of a trade mark proprietor within the Member States of the Community it would be unacceptable on the basis of the law governing the contract for marketing outside the EEA to apply rules of law that have the effect of limiting the protection afforded to the proprietor of a trade mark by Articles 5(1) and 7(1) of the Directive.*
- 60 *The answer to be given to the second question and to question 3(a)(i), (vi) and (vii) in Cases C-415/99 and C-416/99, and to the second question in Case C-414/99, must therefore be that implied consent cannot be inferred: from the fact that the proprietor of the trade mark has not communicated to all subsequent purchasers of the goods placed on the market outside the EEA his opposition to marketing within the EEA; from the fact that the goods carry no warning of a prohibition of their being placed on the market within the EEA; from the fact that the trade mark proprietor has transferred the ownership of the products bearing the trade mark without imposing any contractual reservations and that, according to the law governing the contract, the property right transferred includes, in the absence of such reservations, an unlimited right of resale or, at the very least, a right to market the goods subsequently within the EEA.”*

73. I have quoted at some length from the *Davidoff* decision, which was concerned with trade mark rights, because I find it difficult to see how what was said by the court in this case, so far as it might apply at all in a non-trade mark case, could have any material effect upon the meaning and effect of the Releases. If one assumes, which itself seems to me to be wrong, that the Releases are correctly construed as consents, I find it hard to see how anything said in the *Davidoff* case would cause the Releases not to take effect as consents in this jurisdiction, if they did take effect as consents as a matter of New York law. Putting the matter another way, I find it difficult to discern, in what was said about consent in the *Davidoff* case, some special concept of consent which would produce a different result to that reached by simply reading the Releases and deciding whether Mr Redding and Mr Mitchell had thereby consented to their rights in the Recordings, such as they may have been, being exploited by the parties identified as taking the benefit of the releases, covenants not to sue and other forms of concession expressed in the Releases.
74. Much the same points seem to me to apply to the case of *Soulier and Doke v Premier Ministre and Ministre De La Culture Et De La Communication (Societe Francise Des Interets Des Auteurs De L'Ecrit (Sofia) and Others, Intervening* (Case C-301/15) [2017] 2 CMLR 9, to which I was also referred by Mr Malynicz. This case concerned The French Intellectual Property Code, which established a legal framework which was intended to

provide access to books which were out of print by organising their commercial exploitation in digital form. This was challenged by two authors. For present purposes the relevant decision of the court was that the rights guaranteed to authors by the relevant articles of the Information Society Directive were preventive in nature, in the sense that any reproduction or communication to the public of a work by a third party required the prior consent of its author. At [33]-[40], the court said this:

- “33. *Next, it is important to emphasise that the rights guaranteed to authors by art.2(a) and art.3(1) of Directive 2001/29 are preventive in nature, in the sense that any reproduction or communication to the public of a work by a third party requires the prior consent of its author (concerning the right of reproduction, see, to that effect, Infopaq International EU:C:2009:465 at [57] and [74], and Football Association Premier League Ltd v QC Leisure (C-403/08 & C-429/08) EU:C:2011:631; [2012] 1 C.M.L.R. 29 at [162], and, concerning the right of communication to the public, see, to that effect, Societa Consortile Fonografici (SCF) v Del Corso (C-135/10) EU:C:2012:140 at [75], and Svensson v Retriever Sverige AB (C-466/12) EU:C:2014:76; [2014] 3 C.M.L.R. 4 at [15]).*
- 34 *It follows that, subject to the exceptions and limitations laid down exhaustively in art.5 of Directive 2001/29, any use of a work carried out by a third party without such prior consent must be regarded as infringing the copyright in that work (see, to that effect, UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH (C-314/12) EU:C:2014:192 at [24] and [25]).*
- 35 *Nevertheless, art.2(a) and art.3(1) of Directive 2001/29 do not specify the way in which the prior consent of the author must be expressed, so that those provisions cannot be interpreted as requiring that such consent must necessarily be expressed explicitly. It must be held, on the contrary, that those provisions also allow that consent to be expressed implicitly.*
- 36 *Thus, in a case in which it was questioned about the concept of a "new public", the Court held that, in a situation in which an author had given prior, explicit and unreserved authorisation to the publication of his articles on the website of a newspaper publisher, without making use of technological measures restricting access to those works from other websites, that author could be regarded, in essence, as having authorised the communication of those works to the general internet public (see, to that effect, Svensson [2014] 3 C.M.L.R. 4 at [25]—[28] and [31]).*
- 37 *However, the objective of increased protection of authors to which recital 9 of Directive 2001/29 refers implies that the circumstances in which implicit consent can be admitted must be strictly defined in order not to deprive of effect the very principle of the author's prior consent.*
- 38 *In particular, every author must actually be informed of the future use of his work by a third party and the means at his disposal to prohibit it if he so wishes.*
- 39 *Failing any actual prior information relating to that future use, the author is unable to adopt a position on it and, therefore, to prohibit it, if necessary, so that the very existence of his implicit consent appears purely hypothetical in that regard.*
- 40 *Consequently, without guarantees ensuring that authors are actually informed as to the envisaged use of their works and the means at their*

disposal to prohibit it, it is de facto impossible for them to adopt any position whatsoever as to such use.”

75. Finally, I refer in this context to the case of *Sebago Incorporated and Ancienne Maison Dubois Et Fils SA v GB-UNIC SA* (Case C-173/98) [2000] RPC 63. This was another trade mark case, which was cited in *Davidoff*. At [18]-[22] the court said this:

- “18. Next, it should be noted that, by its last two questions, the national court is asking essentially whether there is consent within the meaning of Article 7 of the 15 Directive where the trade-mark proprietor has consented to the marketing in the EEA of goods which are identical or similar to those in respect of which exhaustion is claimed or if, on the other hand, consent must relate to each individual item of the product in respect of which exhaustion is claimed.
19. The text of Article 7(1) of the Directive does not give a direct answer to that 20 question. Nevertheless, the rights conferred by the trade mark are exhausted only in respect of the individual items of the product which have been put on the market with the proprietor's consent in the territory there defined. The proprietor may continue to prohibit the use of the mark in pursuance of the right conferred on him by the Directive in regard to individual items of that product which have 25 been put on the market in that territory without his consent.
20. That is the interpretation of Article 7(1) that the court has already adopted. Thus, the court has already held that the purpose of that provision is to make possible the further marketing of an individual item of a product bearing a trade mark that has been put on the market with the consent of the trade-mark 30 proprietor and to prevent him from opposing such marketing (Case C-337/95 *Parfums Christian Dior v. Evora* [1997] E.C.R. I-6013, paragraphs 37 and 38, and Case C-63/97 *BMW v. Deenik* 19 paragraph 57). That interpretation is, moreover, confirmed by Article 7(2) of the Directive which, in its reference to the "further commercialisation" of goods, shows that the principle of exhaustion concerns only 35 specific goods which have first been put on the market with the consent of the trade-mark proprietor.
21. Furthermore, in adopting Article 7 of the Directive, which limits exhaustion of the right conferred by the trade mark to cases where the goods bearing the mark have been put on the market in the Community (in the EEA since the EEA 40 Agreement entered into force), the Community legislature has made it clear that putting such goods on the market outside that territory does not exhaust the proprietor's right to oppose the importation of those goods without his consent and thereby to control the initial marketing in the Community (in the EEA since the EEA Agreement entered into force) of goods bearing the mark. That 45 protection would be devoid of substance if, for there to be exhaustion within the meaning of Article 7, it were sufficient for the trade-mark proprietor to have consented to the putting on the market in that territory of goods which were identical or similar to those in respect of which exhaustion is claimed.
22. In the light of the foregoing, the answer to the questions referred must be that Article 7(1) of the Directive must be interpreted as meaning that:
- the rights conferred by the trade mark are exhausted only if the products have been put on the market in the Community (in the EEA

since the EEA Agreement entered into force) and that provision does not leave it open to the Member States to provide in their domestic law for exhaustion of the rights conferred by the trade mark in respect of products put on the market in non-member countries; — for there to be consent within the meaning of Article 7(1) of that directive, such consent must relate to each individual item of the product in respect of which exhaustion is pleaded.”

76. As in *Davidoff*, I do not find, either in *Sebago* or in *Soulier* anything to support the proposition that what would otherwise be the effect of the Releases falls to be modified by EU or English law relating to consent in intellectual property cases, even if it is assumed, contrary to my view, that the Releases are correctly treated as being consents for this purpose.
77. I was referred to other legal materials in this context, but it suffices to say that I have not found anything in the other legal materials to which I have been referred to support the proposition referred to in my previous paragraph.
78. So far as Ground Two is concerned, it is important to keep in mind that, in the relevant part of the Judgment, at Paragraph 25(c), the Deputy Master did no more than assume a possibility that the effect of the Releases would or might be modified by the relevant UK and EU law relating to consent. Nevertheless, it does seem to me that the Deputy Master made an error in this respect. On the basis of all the materials to which I have been referred, I cannot see that this possibility has been demonstrated. The effect of this error on the overall evaluative exercise is a matter to which I will return when I come to consider the overall position in relation to the challenge to the Forum Decision.
- (iii) The Forum Decision - Ground Three
79. I can take this Ground shortly. In Paragraph 25(c) the Deputy Master expressed the view that it would be perverse to require the New York courts to deal with the issues of UK law; being the question of whether the effect of the Releases was modified by the relevant UK and EU law relating to consent. It seems to me to follow from my discussion of Ground Two that the Deputy Master made an error in this respect. As I have said, it seems to me that it has not been demonstrated that this question actually arises or, at the very least, that it arises in a manner which would render it perverse to require a New York court to deal with this question. As with Ground Two, the effect of this error on the overall evaluative exercise is a matter to which I will return when I come to consider the overall position in relation to the challenge to the Forum Decision.
- (iv) The Forum Decision - Ground Four
80. The argument under Ground Four is that the Deputy Master was wrong to find, at Paragraph 25(b), that it was unlikely that much in the way of evidence would be required “*since the critical documents speak for themselves*”.
81. It seems to me that this was a view which the Deputy Master was entitled to take. Indeed, and for what it is worth, I am inclined to agree with the Deputy Master. It does seem to me that the Releases do speak for themselves. It seems likely to me that the dispute over the status, meaning and effect of the Releases will be concentrated on their construction. I doubt that much, if anything, is going to turn on particular concepts of intellectual property law, or particular concepts of either English or New York law, or detailed

examination of the history behind the Releases. I anticipate that the essential argument is going to turn largely on the language of the Releases, and how one reads that language.

82. In this context I accept that attention needs to be paid to the letter of claim from the Claimants' solicitors, which is dated 8th December 2021. The Releases are dealt with in paragraph 20 of the letter of claim. It is however instructive to read the arguments which are actually advanced in paragraph 20. Those arguments, as I read them, are arguments going to the meaning and effect of the Releases which, it seems to me, would fall to be determined principally by construction of the Releases. I can see that context may well be relevant, but in overall terms I cannot see that the Deputy Master was wrong to take the view that it was unlikely that much in the way of evidence was going to be required in relation to the exercise of considering the Releases. I would also add this point. Ground Four is framed on the basis that the Deputy Master made a finding in the relevant part of Paragraph 25(b). I do not think that the Deputy Master did make a finding, in the strict sense of this word. All that the Deputy Master did was to take a view on how likely it was that much in the way of evidence would be required, in relation to consideration of the Releases and their meaning and effect.

83. In summary, I do not think that there is merit in Ground Four.

(v) The Forum Decision - Ground Five

84. As I have explained, Ground Five was largely abandoned at the hearing of the Appeal. I will however consider, at this stage, the two sub-grounds which were maintained by Mr Howe.

85. Dealing with the first of these sub-grounds, paragraph 28 of the Particulars of Claim in the Action pleads a claim to remuneration under Section 191HB of the 1988 Act, in the following terms:

“28. Further and in the alternative, should NR and/or MM be found to have assigned, transferred, waived, released or otherwise be precluded from enforcing their rights (either copyright or performers' property rights), the Claimants are entitled to claim remuneration under CDPA 1988, s. 191HB (being 20% of the revenue from the exclusive rights of distribution, reproduction and making available), and the owners or exclusive licensees to the sound recordings are obliged to pay that remuneration to PPL. This right was introduced by the Copyright and Duration of Rights in Performances Regulations 2013, SI 2013/1782, regs 3, 9 to implement Directive 2011/77/EU (amending Directive 2006/116/EC, by introducing into the latter Directive Art. 3(2b)- 3(2d)). This right 'may not be waived by the performer' (Directive, Art 3(2)(b)): or as CDPA, s191HB (7) puts it, 'an agreement is of no effect in so far as it purports to exclude or restrict the entitlement' (a provision applicable to pre-existing agreements under SI 2013/1782, reg 26). The right arises where there is an agreement or contract relating to a transfer or assignment which provides for a 'non-recurring' payment or remuneration. The duty of the phonogram producer/owner of the sound recording copyright/exclusive licensee to pay this remuneration became due at the end of the 50th year following the release of the recordings, that is, from 1 January 2018 (in relation to Are You Experienced? And Axis: Bold as Love, and 1 January 2019 for Electric Ladyland, and continues for the remainder of the period of protection of copyright in the sound recording.”

86. Section 191HB of the 1988 Act provides as follows:

- “(1) A performer who, under an agreement relating to the assignment of rights referred to in section 191HA(1) (an "assignment agreement"), is entitled to a non-recurring payment in consideration of the assignment, is entitled to an annual payment for each relevant period from—*
- (a) the producer, or*
 - (b) where the producer has granted an exclusive licence of the copyright in the sound recording, the licensee under the exclusive licence (the "exclusive licensee").*
- (2) In this section, "relevant period" means—*
- (a) the period of 12 months beginning at the end of the 50-year period, and*
 - (b) each subsequent period of 12 months beginning with the end of the previous period, until the date on which copyright in the sound recording expires.*
- (3) The producer or, where relevant, the exclusive licensee gives effect to the entitlement under subsection (1) by remitting to a collecting society for distribution to the performer in accordance with its rules an amount for each relevant period equal to 20% of the gross revenue received during that period in respect of—*
- (a) the reproduction and issue to the public of copies of the sound recording, and*
 - (b) the making available to the public of the sound recording by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them.*
- (4) The amount required to be remitted under subsection (3) is payable within 6 months of the end of each relevant period and is recoverable by the collecting society as a debt.*
- (5) Subsection (6) applies where—*
- (a) the performer makes a written request to the producer or, where relevant, the exclusive licensee for information in that person's possession or under that person's control to enable the performer—*
 - (i) to ascertain the amount of the annual payment to which the performer is entitled under subsection (1), or*
 - (ii) to secure its distribution by the collecting society, and*
 - (b) the producer or, where relevant, the exclusive licensee does not supply the information within the period of 90 days beginning with the date of the request.*
- (6) The performer may apply to the county court, or in Scotland to the sheriff, for an order requiring the producer or, where relevant, the exclusive licensee to supply the information.*
- (7) An agreement is of no effect in so far as it purports to exclude or restrict the entitlement under subsection (1).*
- (8) In the event of any dispute as to the amount required to be remitted under subsection (3), the performer may apply to the Copyright Tribunal to determine the amount payable.*
- (9) Where a performer is entitled under an assignment agreement to recurring payments in consideration of the assignment, the payments must, from the end of the 50-year period, be made in full, regardless of any provision in*

the agreement which entitles the producer to withhold or deduct sums from the amounts payable.

- (10) *In this section—
"producer" and "50-year period" each has the same meaning as in section 191HA,
"exclusive licence" has the same meaning as in section 92, and
"collecting society" has the same meaning as in section 191G."*

87. It will be seen that Section 191HB creates a right, in subsection (4), for the collecting society to recover, as a debt, an amount required to be remitted pursuant to subsection (3). It will also be seen that Section 191HB creates certain rights, in subsections (6) and (8), for the performer to make applications, respectively, to the County Court and to the Copyright Tribunal. Those rights are not however rights to make a claim for actual remuneration. Claims for remuneration due under subsection (3) fall to be made by the collecting society pursuant to subsection (4). A collecting society is defined in Section 191G(6). The definition does not appear to be capable of including either of the Claimants.
88. On this basis Mr Howe submitted that the Claimants could not themselves have any claim under Section 191HB, even if they could establish any title to copyright and/or performers' rights in respect of the Recordings. On the face of it this submission, which did not receive any specific rebuttal from Mr Malynicz, appeared to be well-founded. I use this qualified form of words for two reasons. First, it does not seem to me to be appropriate for me to make any final decision on this point. Second, what is actually being claimed under Section 191HB is somewhat opaque in the Particulars of Claim. Paragraph 28 of the Particulars of Claim asserts a right in the Claimants to claim remuneration under Section 191HB, but it is then asserted that "*the owners or exclusive licensees to the sound recordings are obliged to pay that remuneration to PPL*". It is not clear whether any claim to such remuneration is carried over into the Prayer to the Particulars of Claim. The Prayer, at (4), includes a generalised claim to an inquiry as to damages or an account of profits, and also includes, at (2), a declaration as to the extent of the Claimants' performer's rights "*including any duty on the defendant to pay a relevant collecting society remuneration due under CDPA 1988, s 191HB*".
89. What it seems to me can be said, in relation to the claim under Section 191HB and in the context of the Application, is this. If part of the justification for England being the appropriate forum for the Claim is that a claim is being made in the Action under Section 191HB, which it is not appropriate for the New York court to try, it seems to me that it has yet to be demonstrated that the Claimants do have a viable or meaningful claim of their own under Section 191HB. At least as matters stand, this particular claim appears to be either misconceived or of little actual utility.
90. I am however doubtful that this particular point is or was a material one in the dispute over the appropriate forum. The Deputy Master considered the Defendant's criticisms of the way in which the claims in the Action are pleaded in Paragraphs 11-13. The Deputy Master accepted that if a pleaded claim could be shown to be defective in some fundamental way, such as failing to disclose a cause of action, that would doubtless be regarded as a material factor in the context of a jurisdiction challenge; see the beginning of Paragraph 12. The Deputy Master then went on however, in Paragraph 13, to conclude that the hearing of the Application was not "*the occasion for the court to decide whether*

the Claimant or the Defendant will prevail on all or some of these particular points in issue, some of which involve quite complex areas of intellectual property law.”. The Deputy Master proceeded on the assumption that the Claim Form and the Particulars of Claim disclosed viable causes of action against the Defendant which, subject to the jurisdiction challenge, were properly justiciable in this court.

91. In relation to the claim under Section 191HB, it can be said that the Deputy Master should have concluded that, on the materials which I assume were before him, this particular claim had not been shown to be viable or of any actual utility. It seems to me however that this is a minor point, which was not particularly material to the evaluation exercise which the Deputy Master had to carry out. The position might have been different if the claim under Section 191HB had been the only claim pleaded in the Action, but this was not the position. This claim seems to me, reading the Particulars of Claim as a whole, to be a subsidiary claim to the principal claims of infringement of what are said to be the Claimants’ copyright and performers’ rights in the Recordings.
 92. This leaves the point that the Particulars of Claim do not plead a valid claim for relief because they fail to state what share of the copyright in the Recordings the Claimants are claiming. This does seem to me to be valid criticism of the pleading of the Claimants’ claims in the Particulars of Claim, but it does not seem to me that the criticism affects the dispute over the appropriate forum. Assuming that I am right in regarding this point as a valid criticism it goes to the pleading of the claims in the Action, and could no doubt be cured by amendment or by the provision of further information. I cannot see that it goes to the question of the appropriate forum for the Claim.
 93. In summary, it does not seem to me that these remaining sub-grounds, whether treated as part of what was Ground Five or as general points in the Appeal, have merit as grounds in support of the challenge to the Forum Decision.
- (vi) The Forum Decision - Ground Six
94. Ground 6 seems to me to be at the centre of the Appeal, at least so far as the challenge to the Forum Decision is concerned. The reason for this is that Ground 6 asserts that the Deputy Master failed properly to characterise the true nature of the Claim. If this assertion is well-founded, it seems to me that this would constitute a very material factor in the question of whether the Deputy Master carried out the required evaluation exercise in the correct manner. As Bingham LJ explained in *Re Harrods*:
“One cannot decide where a matter should be most appropriately and justly tried without being clear what is to be tried. But I do not think the question should be answered simply by reference to the relief claimed”.
 95. In oral submissions Mr Howe contended that the Deputy Master had failed to identify the matter to be tried; that is to say what I am referring to as the Claim. If, in the alternative, he did identify the Claim, Mr Howe contended that he wrongly accepted the Claimants’ characterisation of the Claim.
 96. I do not think that it is right to say that the Deputy Master failed to identify the Claim at all. It is clear from Paragraphs 14 and 15 that the Deputy Master had well in mind the need to identify the Claim, and also had well in mind the importance of recognising that the Claim was not restricted to an analysis of the claim made in the Action and the relief sought in the Action; see in particular the Deputy Master’s quotation, in Paragraph 14, of

paragraph 28 of Mr Howe's skeleton argument submitted for the hearing before the Deputy Master.

97. As I read the Deputy Master's discussion of the forum question which followed Paragraphs 14 and 15, the Deputy Master did not, in express terms, make a distinct identification of what he regarded as the true nature of the Claim. That said, I do not think that it is fair to say that the Deputy Master failed to make an identification of the Claim. The Deputy Master clearly understood and took on board the Defendant's case that the Claim was essentially concerned with the Releases. This is most apparent from Paragraph 21, where the Deputy Master said this:

"21 The essence of the jurisdiction argument for the Defendant is this. Since the Releases are central to the issues in the claim and since they were executed by way of settlement of New York proceedings, New York is clearly or distinctly the appropriate forum. Although he says, the Claimants have attempted to frame their case as exclusively involving UK law and UK parties, the court must look through that tactical formulation and see the real dispute as existing between the Hendrix companies in the United States and the Claimants, by reference to the effect of the Releases."

98. At Paragraph 24 the Deputy Master then quoted paragraph 3 from Mr Malynicz's skeleton argument submitted for the hearing before the Deputy Master. While Paragraph 24 took the point on consent under EU law, which I have already considered, and in respect of which it seems to me that the Deputy Master was in error, the Paragraph also made the point that the Releases were one element in a dispute concerning the alleged infringement of copyright and performers' rights, alleged to have been held by British citizens and now alleged to be held by English companies, by the Defendant, also an English registered company. The Deputy Master brought out this point when he came to set out his reasons for the Forum Decision. At sub-paragraphs (d) and (f) of Paragraph 25 the Deputy Master said this:

"(d) The New York claim, in the form that the New York Plaintiffs have chosen, namely seeking declaratory relief, deals only with one aspect of the dispute. If the Plaintiffs fail to obtain a declaration that has the effect of barring the Claimants from pursuing the claim, what is to happen to the claim itself? Either it must then be revived here or the Claimants would have to counter sue in New York for infringement in the UK of their copyright and ask a New York court to determine issues of UK law. I have no doubt the New York courts would do their utmost to apply this technical area of UK law in a competent fashion. with the assistance of UK law experts. but this is obviously an undesirable and unnecessarily back to front method of dispute resolution."

"(f) Accordingly, although there is, of course, a New York element to the claim as framed within its wider parameters, it cannot be said that New York is the natural or appropriate forum for the claim as a whole, and England is clearly the forum with the most real and substantial connection to it."

99. While it does seem to me, with due respect to the Deputy Master, that a clearer identification of the Claim could have been made, I do not think, as I have said, that there was a failure to identify the Claim. As I read the reasoning of the Deputy Master, particularly at sub-paragraphs (d) and (f) of Paragraph 25, the Deputy Master was accepting the Claimants' case that the Claim was correctly characterised as a claim for the

infringement of copyright and performers' rights of the kind referred to in my previous paragraph. The Releases were one element of the Claim and were "*a New York element*" of the Claim, but they were not the whole of the Claim.

100. It seems to me that it is open to me to interfere with the characterisation of the Claim made by the Deputy Master, if I disagree with that characterisation. It seems to me that the exercise of characterising the Claim is not, in itself, an evaluative exercise in the same way that the overall question of the appropriate forum is an evaluative exercise. Characterisation of the Claim is an essential component of the evaluative exercise which, if wrongly made, may skew the evaluative exercise in the same way as occurred in *Re Harrods*.
101. The question therefore becomes whether I do consider that the Deputy Master did go wrong in his characterisation of the Claim. In my judgment he did not. I say this essentially for one reason.
102. I can see that the Releases are or are likely to be a central issue in the Claim. It seems obvious to me that, if the Claimants cannot find a way round the Releases, their claims in the Action are unlikely to be viable. I have already expressed the view that it has not been demonstrated that the effect of the Releases falls to be modified by EU or English law relating to consent in intellectual property cases, even if it is assumed, also contrary to my view, that the Releases are correctly treated as being consents for this purpose. The problem seems to me to be that the Releases, while a central issue in the Claim, are not the entirety of the Claim. In the identification of the Claim, I do not think that it is permissible to ignore the fact that the claims made in the Action include claims for infringement of copyright and performers' rights in the Recordings. Putting the matter more simply, the Claim involves a claim for infringement of copyright and performers' rights, made in this jurisdiction and involving parties based in this jurisdiction. At least as matters stand, it does not seem to me to be possible to say that the Claim is essentially about the Releases, and nothing else. The Claim is about infringement of copyright and, at least potentially, involves issues going beyond the meaning and effect of the Releases.
103. This can, I think, be tested fairly simply. If one assumes an order being made, setting aside the Claim Form and Particulars of Claim, or staying the Action, on the basis that New York is clearly or distinctly the more appropriate forum for the Claim, this produces the following result. If one assumes that the Hendrix Companies and SME are successful in the 2022 Complaint, it seems likely to me that this will mean that the Claimants are unable to pursue the claims which they have made in the Action. If, however, one assumes that the Hendrix Companies and SME are unsuccessful in the 2022 Complaint, what then? It seems to me, on that hypothesis, that the claims of infringement of copyright and performers' rights which are currently pleaded in the Action would be available to be pursued and would need to be tried. I am in no position to predict what the outcome of the 2022 Complaint might be, but what is apparent is that on at least one possible outcome to the 2022 Complaint, the claims in the Action would still need to be tried, between the parties to the Action. Given that position I find it difficult to see how the Claim is correctly characterised as concerning the status, meaning and effect of the Releases, and nothing else. This characterisation of the Claim seems to me to be too narrow, and misses out a substantial part of what is, at least as matters stand, in dispute between the parties.

104. Given this analysis, I do not think that the Deputy Master can fairly be faulted for characterising the Claim as a claim for the infringement of copyright and performers' rights, of which one element comprised the status, meaning and effect of the Releases. As matters stand, it seems to me that the Deputy Master was right to view the Releases as one element of the Claim, and was right to view the Releases as "*a New York element*" of the Claim, but was also right to take the view that the Releases were not the whole of the Claim.
105. Ground 6 includes what may be said to be the further argument that if the Action is allowed to proceed, there is a risk of the Claimants using a favourable outcome in this jurisdiction as a means of arguing for a similar result in other jurisdictions, relying on issue estoppel or res judicata or other analogous principles for this purpose. It seems to me however that this is a different category of point. I can see that this point is one which can be said to be a factor in the evaluation exercise. I cannot see that this point either demonstrates that the Deputy Master went wrong in his characterisation of the Claim, or demonstrates that the Claim is correctly analysed as being concerned with the Releases and nothing else. In my view this point, if it has weight, falls to be considered in my review of the overall position in relation to the Forum Decision.
106. In summary, I do not think that Ground 6 has merit. It seems to me that the Deputy Master did not go wrong in his identification of the Claim or, at the very least, did not go wrong in his rejection of the Defendant's characterisation of the Claim.
- (vii) The Forum Decision - Ground Seven
107. Ground 7 is essentially a drawing together of the previous Grounds and the Defendant's arguments on the question of appropriate forum. As such, it seems to me that discussion of this Ground can conveniently be included in my discussion of the overall position in relation to the challenge to the Forum Decision.
- (viii) The Forum Decision - the overall position
108. I now come my overall consideration of the position, following my review of the individual Grounds. In arriving at the Forum Decision, the Deputy Master was carrying out an evaluative exercise, with which I can only interfere on the grounds identified earlier in this judgment. I have decided that the Deputy Master did go wrong in one part of that evaluative exercise, at Paragraph 25(c). In my judgment the Deputy Master was wrong to accept the possibility that the effect of the Releases would or might be modified by the relevant UK and EU law relating to consent.
109. In my judgment this error is not one which should cause me to overturn the Forum Decision. I say this for two reasons.
110. First, although it can be said that, in making this error, the Deputy Master took a matter into account which he should not have taken into account, I do not think that this error vitiates the overall evaluative exercise carried out by the Deputy Master. As I have already noted, the argument below appears to have concentrated upon the second limb of the first stage of the *Spiliada* test. As such, the burden was upon the Defendant to demonstrate that New York was clearly or distinctly the more appropriate forum for the determination of the Claim than England. In deciding that this burden had not been discharged the Deputy Master relied upon a variety of factors.

111. In particular, the Deputy Master took account of the facts (i) that the Claimants and the Defendant are all UK entities, (ii) that the governing law of the claims is English law, (iii) that the acts complained of by the Claimants took place in the UK, (iv) that the Releases largely speak for themselves, (v) that the 2022 Complaint deals with only one aspect of the dispute; namely the Releases, (vi) that if the Claimants were successful in the 2022 Complaint, the claims of infringement would still have to be dealt with, and (vii) that if reference was required to New York law in order to construe the Releases, this could be done in the usual way with assistance from experts in foreign law, and (viii) that if the Defendant was right in its criticisms of the claims made in the Action, it could take appropriate steps under the CPR to seek the early disposal of the Action by application for summary judgment and/or a strike out order. It does not seem to me that the Deputy Master went wrong in placing reliance upon these various factors. The only point I would make is that the Releases, at least as matters stand, seem to me to be governed by New York law. That is however, as the Deputy Master pointed out, one aspect of the dispute. I anticipate that the Releases will be a central aspect in the dispute, if not the central aspect in the dispute, but my point about the application of New York law goes only to the Releases, and not to the entirety of the claims made in the Action or, as it seems to me, to the entirety of the Claim. The application of New York law also has to be viewed in the context of the point which I have already made in this context. As I have already said, it seems likely to me that the dispute over the status, meaning and effect of the Releases will be concentrated on their construction. I doubt that much, if anything, is going to turn on particular concepts of intellectual property law, or particular concepts of either English or New York law, or detailed examination of the history behind the Releases. I anticipate that the essential argument is going to turn largely on the language of the Releases, and how one reads that language.
112. There is the Defendant's further argument, incorporated into Ground 6, that if the Action is allowed to proceed, there is a risk of the Claimants using a favourable outcome in this jurisdiction as a means of arguing for a similar result in other jurisdictions, relying on issue estoppel or res judicata or other analogous principles for this purpose. I have already accepted that this is a point which falls to be considered in the overall review of the position in relation to the Forum Decision. I am not however persuaded that this factor is sufficient to justify setting aside the evaluative exercise carried out by the Deputy Master. The further argument seems to me to assume that the decision of an English court on the status, meaning and effect of the Releases will work an injustice in other jurisdictions, if it can be relied upon in other jurisdictions. I am doubtful that this is correct. The risk, if it does actually exist, does not seem to me sufficient to make good the inability of the Defendant to demonstrate that New York is clearly or distinctly the more appropriate forum for the determination of the Claim than England.
113. Beyond all this, I come back to my earlier discussion of the identification of the Claim in this case. If the Claim is correctly characterised as a dispute over the status, meaning and effect of the Releases, then it seems to me that the landscape of the evaluative exercise changes substantially. For the reasons which I have previously set out however, I am not persuaded that this is the correct, or complete (which may be the better word to use) characterisation of the Claim.
114. In summary, it seems to me that the Deputy Master was entitled to rely on all but one of the factors on which he did rely, in carrying out the evaluative exercise which resulted in the Forum Decision. The factors on which the Deputy Master did rely were, as it seems to

me, ample to justify the Forum Decision. I do not think that the error which I have identified in the evaluative exercise had the consequence that the evaluative exercise was fatally flawed, and should be set aside.

115. Second, and if I am wrong in the view which I have just expressed, so that the Deputy Master's evaluative exercise does fall to be set aside, the position becomes one where it falls to me to carry out the evaluative exercise for myself. On that hypothesis I would not reach a different decision to the Deputy Master. The burden, on this hypothesis, lies upon the Defendant to demonstrate that New York is clearly or distinctly the more appropriate forum for the determination of the Claim than England. On this hypothesis my evaluation is that the Defendant has failed to discharge his burden. I can state my reasons for this conclusion very shortly. In carrying out the evaluative exercise, I take into account all the circumstances of this case and all the written and oral arguments which I have received. I also base my evaluation on what I have determined to be the correct characterisation of the Claim. I consider the important factors in the evaluation exercise to be those factors on which I have concluded that the Deputy Master was entitled to rely. I also refer the view which I have expressed in relation to the further argument contained in Ground 6. Putting all of these matters together, I find it impossible to conclude that the Defendant has discharged the burden of demonstrating that New York is clearly or distinctly the more appropriate forum for the determination of the Claim than England.

116. I therefore conclude that the Forum Decision should stand.

Discussion – the Case Management Decision

117. In relation to the Case Management Decision the attack is made on a more fundamental level. For ease of reference, I repeat the relevant part of the Judgment, at Paragraph 27:

“27 Since the Defendant is unable to show that New York is the forum conveniens and there is no basis for granting a stay, it is not necessary to consider Lord Goff's final point (as cited above): namely, whether there are circumstances by reason of which justice requires that the stay should nevertheless not be granted. It also follows from the above that I do not consider that there is any merit in the Defendant's alternative submission: namely, that the court should order a stay of the current claim for case management reasons. I therefore dismiss the Claimants' application.”

118. The Defendant's case is that the Deputy Master, in Paragraph 27, failed to apply any independent test to the question of whether a stay should be granted on case management grounds, but instead wrongly concluded that a stay was precluded by the Forum Decision. As such, so it is submitted, the Deputy Master failed to exercise the case management discretion which he had, and/or failed to apply the correct test for the grant of a stay of the kind sought by the Defendant, and/or failed to give proper reasons for the Case Management Decision.

119. I do not think that it can be said that the Deputy Master failed to exercise his discretion at all, in arriving at the Case Management Decision. I accept that the application for a stay on case management grounds required separate consideration to the application on the question of appropriate forum. I also accept that consideration of the application for a stay on case management grounds engaged the case management discretion of the Deputy Master which did not, or at least did not necessarily engage the same factors as the evaluative exercise required on the question of appropriate forum. As Moore-Bick J

pointed out, in his judgment at first instance in *Reichhold*, the factors which the court has to take into consideration when considering whether to grant a stay on case management grounds differ in certain important respects from the factors to be taken into account when considering the question of appropriate forum. Looking at Paragraph 27 however, it seems to me that the Deputy Master did two things:

- (1) The Deputy Master stated, correctly given his decision on the first stage of the *Spiliada* test, that it was not necessary to consider the second stage of the *Spiliada* test.
- (2) The Deputy Master stated that it followed “*from the above*” that he did not consider that there was any merit in the application for a stay on case management grounds. The reference to “*the above*” must, in my view, be taken to mean the reasoning of the Deputy Master on the question of the appropriate forum, which resulted in the Forum Decision, including the Deputy Master’s remarks on parallel proceedings in Paragraph 26.

120. It seems to me that the Deputy Master was, in the second part of Paragraph 27, considering the question of whether he should, in the exercise of his case management discretion, grant a stay. The Deputy Master simply considered that the same reasons on which he had relied in making the Forum Decision could also be relied upon in relation to the question of whether a stay should be granted on case management grounds. Those same reasons resulted in the conclusion that there was no merit in the application for a stay on case management grounds. While it may be said that the Deputy Master should have been more rigorous, and more clear in spelling out this process of reasoning, both as an independent process of reasoning and as the independent exercise of his case management discretion, I consider that this independent process of reasoning and this independent exercise of the Deputy Master’s case management discretion can, on a fair reading, be found in the second half of Paragraph 27. The reality is that in both the evaluative exercise and the exercise of his case management discretion, the Deputy Master considered that the same reasons dictated the answer to each question.

121. This analysis also seems to me to answer the criticism of the Deputy Master that he failed to give proper reasons for the Case Management Decision. On my analysis the Deputy Master did give his reasons. He did not need to spell them out, because they were the same reasons on which he had relied in reaching the Forum Decision, and so could be read in the previous parts of the Judgment.

122. What is not clear is quite what test the Deputy Master applied, in reaching the Case Management Decision. As the addendum to the Defendant’s skeleton argument in the Appeal points out, the Deputy Master was referred to *Reichhold* in this context, in the Defendant’s skeleton argument submitted for the hearing before the Deputy Master. At paragraph 31 of that skeleton argument, the Deputy Master was told that the power to stay proceedings in order to avoid concurrent proceedings in different jurisdictions was:

“not readily exercised and should be exercised only in “rare and compelling circumstances” and account is always taken of the legitimate interests of claimants which are to be prejudiced no more than the interests of justice require (Reichhold Norway ASA v Goldman Sachs International [2000] 1 WLR 173 CA, at 186 per Lord Bingham CJ).”

123. It seems reasonable to assume that this was the test which the Deputy Master applied in reaching the Case Management Decision.

124. Given my analysis thus far, it seems to me that the question which I have to answer is whether there are grounds for interfering with the case management discretion, which was exercised by the Deputy Master, and resulted in the Case Management Decision.
125. The first point to consider in this context is whether the Deputy Master, albeit inadvertently, applied the wrong test, for the reason identified in the Defendant's addendum skeleton argument. The argument is that the Deputy Master was relying upon a test of rare and compelling circumstances being required, as in *Reichhold*, when in fact the test was whether in the particular circumstances of this case, it was in the interests of justice for a case management stay to be granted; see Males LJ in *Athena Capital* at [59].
126. I do not think that this first point is a material one. In one sense it can be said that the Deputy Master applied the wrong test, in that he could not have had in mind what Males LJ said in *Athena Capital*. In reality, I do not think that this was the position. I refer to my earlier discussion of this point, when dealing with the law. As I have already said, I do not detect any change in the law, as between *Reichhold* and *Athena Capital*. In relation to an application for a stay of proceedings in this jurisdiction, to await the outcome of proceedings in another jurisdiction, the single test "*remains*" whether, in the particular circumstances of the relevant case, it is in the interests of justice for a stay to be granted on case management grounds. As Males LJ explained, this test is not easily satisfied in the context of applications for a stay of the kind which were sought in *Reichhold* and *Athena Capital*. The court will "*need a powerful reason to depart from its usual course and such cases will by their nature be exceptional*". In the light of statements of this kind, I do not accept that the Deputy Master went wrong in the exercise of his discretion simply because he was relying on *Reichhold* rather than *Athena Capital* for the applicable test. Whether the test is taken from *Reichhold* at first instance, or *Reichhold* in the Court of Appeal, or *Athena Capital*, a powerful reason is required before a court should grant a stay in order to await the outcome of proceedings in another jurisdiction. The case must be an exceptional one, and it is only in rare and compelling circumstances that it will be in the interests of justice to grant a stay on case management grounds in order to await the outcome of proceedings in another jurisdiction. Given this position, I do not think that the Deputy Master's exercise of his case management discretion can be said to be flawed, let alone fatally flawed, simply because the Deputy Master relied upon *Reichhold* for the relevant test to apply.
127. This clears the way for consideration of whether the Deputy Master went wrong in the exercise of his discretion by his reliance upon the same reasons which resulted in the Forum Decision. In order to answer this question, I find it instructive to look again at the reasoning of Males LJ in *Athena Capital*.
128. I have already explained the facts of *Athena Capital*. The essential reason for the imposition of the stay at first instance was the conclusion of the Deputy Judge that the declaratory proceedings commenced in this jurisdiction by Mr Mincione and his fellow claimants served no useful purpose; the position of the Secretariat being a neutral one. The conclusion of Males LJ was that the position of the Secretariat was not neutral, with the consequence that the proceedings did serve a useful purpose, and with the further consequence that the justification for the case management stay ordered by the Deputy Judge fell away. In his judgment Males LJ reviewed a number of authorities. All of those authorities stress the exceptional nature of cases in which it is appropriate to order a stay

on case management grounds, by reason of proceedings in another jurisdiction. This includes the following statement, at Supreme Court level, in *Unwired Planet International Ltd v Huawei Technologies (UK) Co Ltd* [2020] UKSC 37, [2020] Bus LR 242, quoted by Males LJ in his judgment, at [56]:

“56. *The Supreme Court discussed briefly the court's power to order a stay where there are proceedings in another jurisdiction in Unwired Planet International Ltd v Huawei Technologies (UK) Co Ltd* [2020] UKSC 37, [2020] Bus LR 2422:

“99. We therefore turn to case management. The English courts have wide case management powers, and they include the power to impose a temporary stay on proceedings where to do so would serve the Overriding Objective: see CPR 1.2(a) and 3.1(2)(f). For example a temporary stay is frequently imposed (and even more frequently ordered by consent) in order to give the parties breathing space to attempt to settle the proceedings or narrow the issues by mediation or some other form of alternative dispute resolution. A temporary stay may be ordered where there are parallel proceedings in another jurisdiction, raising similar or related issues between the same or related parties, where the earlier resolution of those issues in the foreign proceedings would better serve the interests of justice than by allowing the English proceedings to continue without a temporary stay: see Reichhold Norway ASA v Goldman Sachs International [2000] 1 WLR 173. *But this would be justified only in rare or compelling circumstances: see per Lord Bingham CJ* [2000] 1 WLR 173 at 185-186, and *Klockner Holdings GmbH v Klockner Beteiligungs GmbH* [2005] EWHC 1453 (Comm).”

129. As was stated in *Unwired*, the court can order a temporary stay where there are parallel proceedings in another jurisdiction, raising similar or related issues between the same or related parties, where the earlier resolution of those issues in the foreign proceedings would better serve the interests of justice than by allowing the English proceedings to continue without a temporary stay, but “*this would be justified only in rare and compelling circumstances*”.
130. In the light of this and other statements in the authorities reviewed by Males LJ in *Athena Capital*, it is not surprising that Males LJ, in identifying the true nature of the test in his judgment, at [59], thought it appropriate to stress the need for exceptional circumstances, in a parallel proceedings case. For ease of reference, I repeat what Males LJ said, at [59]:

“59. *There is, as it seems to me, no reason to doubt that it is only in rare and compelling cases that it will be in the interests of justice to grant a stay on case management grounds in order to await the outcome of proceedings abroad. After all, the usual function of a court is to decide cases and not to decline to do so, and access to justice is a fundamental principle under both the common law and Article 6 ECHR. The court will therefore need a powerful reason to depart from its usual course and such cases will by their nature be exceptional. In my judgment all of the guidance in the cases which I have cited is valuable and instructive, but the single test remains whether in the particular circumstances it is in the interests of justice for a case management stay to be granted. There is not a separate test in "parallel proceedings" cases. Rather, considerations such as the existence of an exclusive English jurisdiction clause and the danger of circumventing a statutory scheme for the allocation of jurisdiction (such as the Judgments*

Regulation) will be weighty and often decisive factors pointing to where the interests of justice lie.”

131. Turning to the reasoning of the Deputy Master I have already considered the matters taken into account by the Deputy Master in arriving at the Forum Decision. For ease of reference, I repeat my earlier summary of those matters. The Deputy Master took account of the facts (i) that the Claimants and the Defendant are all UK entities, (ii) that the governing law of the claims is English law, (iii) that the acts complained of by the Claimants took place in the UK, (iv) that the Releases largely speak for themselves, (v) that the 2022 Complaint deals with only one aspect of the dispute; namely the Releases, (vi) that if the Claimants were successful in the 2022 Complaint, the claims of infringement would still have to be dealt with, and (vii) that if reference was required to New York law in order to construe the Releases, this could be done in the usual way with assistance from experts in foreign law, and (viii) that if the Defendant was right in its criticisms of the claims made in the Action, it could take appropriate steps under the CPR to seek the early disposal of the Action by application for summary judgment and/or a strike out order. The only qualifying point I repeat, in this context, is that the Releases, at least on the basis of the evidence and submissions before the court as matters stand, seem to me to be governed by New York law. That is however, as the Deputy Master pointed out, one aspect of the dispute. As I have also stated, I am doubtful that the application of New York law will be all that significant in the determination of the status, meaning and effect of the Releases. I am also unpersuaded that there is a material risk of injustice if the Claim is determined in England, in terms of the application of that determination in other jurisdictions.
132. I have also decided that the Deputy Master did go wrong in one part of the evaluative exercise which resulted in the Forum Decision, at Paragraph 25(c). As I have said, in my judgment the Deputy Master was wrong to accept the possibility that the effect of the Releases would or might be modified by the relevant UK and EU law relating to consent.
133. The present case is not one where it can be said that the claims in the Action lack utility, or are pointless. It may be that the Releases offer a complete answer to the claims in the Action. That however remains to be seen, and was not a decision which the Deputy Master was in a position to make at the hearing below. With the exception of the claim under Section 191HB of the 1988 Act, which on its face appears to be misconceived, it seems to me that the Deputy Master was entitled to approach the application for a stay on case management grounds on the basis, as set out in Paragraph 13, that the Claim Form and Particulars of Claim disclose viable causes of action against the Defendant which, subject to the jurisdiction challenge, are justiciable in this court. As Males LJ explained in *Athena Capital*, at [59], the usual function of a court is to decide cases and not to decline to do so, and access to justice is a fundamental principle under both the common law and Article 6 ECHR. This particular statement was clearly engaged in the present case. As such, the Deputy Master needed a powerful reason to stay the Action pending the determination of the 2022 Complaint. Looking at the matters taken into account by the Deputy Master, which I have summarised above, I find it difficult to see how the Deputy Master went wrong in arriving at the conclusion, implicitly even if not expressly, that the required powerful reason did not exist in the present case.
134. To this must be added the point that the Deputy Master took full account, at Paragraph 26, of the fact there were, “*to some extent*”, parallel claims on foot in two different

jurisdictions. The Deputy Master was not prepared to characterise the commencement of the 2022 Complaint in New York as a deliberate tactical move by the Defendant, but it seems to me that he was entitled to take the view that the commencement of the 2022 Complaint had the potential effect of obstructing the Action and using up the Claimants' resources. It seems to me that the Deputy Master was also entitled to take into account the fact that there was a jurisdiction challenge by the Claimants, in their capacity as defendants to the 2022 Complaint, in New York. The relevant point is that the Deputy Master was fully alive to the potential problems created by having parallel proceedings in England and New York. As such, it seems to me that this point was not left out of account. The point was taken into account but was insufficient to persuade the Deputy Master to grant the stay on case management grounds.

135. In summary, I conclude that the Deputy Master did not go wrong, in the exercise of his case management discretion, in a manner which would justify my interfering with the Case Management Decision. As the case law demonstrates, the hurdle is a high one for a party seeking to challenge the exercise of a case management discretion. While I have identified one error, in terms of the matters which the Deputy Master took into account in reaching the Case Management Decision, I am not persuaded that the error is one which requires or justifies my interfering with the Case Management Decision.
136. If I am wrong in that decision, and the exercise by the Deputy Master of his case management discretion does fall to be set aside, the position becomes one where it falls to me to exercise the case management discretion for myself. On that hypothesis, and as with the Forum Question, I would not reach a different decision to the Deputy Master. On this hypothesis I have to consider whether, in the particular circumstances of this case, it is in the interests of justice for a case management stay to be granted. In answering that question I have to consider whether the present case is an exceptional case, where a powerful reason exists for the court departing from its usual course, which would be to hear the Action. I can see the case for staying the Action, and awaiting the outcome of the 2022 Complaint, on the basis that the decision of the New York court on the status, meaning and effect of the Releases will resolve what may turn out to be the central issue in the Action. The present case is however nowhere near as simple as that.
137. If one has regard to the matters taken into account by the Deputy Master, save in so far as I have identified error on the part of the Deputy Master, and if one has regard to what I consider to be the correct characterisation of the Claim, it can be seen that a stay of the Action, pending the outcome of the 2022 Complaint, is potentially problematic. The outcome of the 2022 Complaint will not necessarily resolve the claims in the Action, and may turn out not to have achieved the desired result. Beyond this, I find it difficult to accept that the status, meaning and effect of the Releases cannot be resolved in the Action, with such expert assistance on New York law as may be required.
138. There is the problem, which is created by the denial of the stay, of having proceedings in England and New York which are, to some extent although not completely, parallel proceedings. As the case law demonstrates however, this is not necessarily a decisive factor. I do not consider that it is a decisive factor in the present case.
139. Weighing up all the relevant factors, and taking into account all the circumstances of this case and all the written and oral arguments which I have received, and applying the guidance in *Athena Capital*, it seems to me that the present case is not one where it can be

said to be in the interests of justice that the Action should be stayed pending the determination of the 2022 Complaint. If therefore, contrary to my view, it falls to me to exercise the case management discretion on the question of whether a stay should be granted, I reach the same conclusion as the Deputy Master.

140. I therefore conclude that the Case Management Decision should stand.

The application for permission to appeal – final conclusions

141. So far as the Forum Decision is concerned, and subject to one exception, it seems to me that there is sufficient in Grounds One to Seven to justify the conclusion that these Grounds had a real prospect of success. This seems to me to follow from my discussion of the Grounds. While it is true that I have found less merit in some Grounds than others, it seems to me that it would be wrong to differentiate between the Grounds, inter-connected as they are, in relation to the question of permission to appeal.
142. The exception is Ground Five which was largely not pursued. In relation to the two sub-grounds which were pursued; namely sub-grounds seven and eight (paragraphs 7.7 and 7.8 of the grounds of appeal attached to the Defendant's appellant's notice) it seems to me that the same reasoning applies to them as set out in my previous paragraph.
143. Turning to the Case Management Decision it seems to me, again, that there is sufficient in Grounds Eight and Nine to justify the conclusion that these Grounds had a real prospect of success. Again, this seems to me to follow from my discussion of these Grounds. In this context it is also necessary to consider the factors in paragraph 4.6 of CPR PD52A, which the court may take into account. So far as those factors are concerned, my briefly stated conclusions are as follows:
- (1) The issue in the Appeal, so far as concerned with the Case Management Decision, seems to me to be a significant one, which justified the costs of the Appeal, independent of the point that the Appeal also involved, in any event, the challenge to the Forum Decision.
 - (2) The challenge to the Case Management Decision is of course concerned with bringing the Action to a halt. The present case is not one however where the challenge to the Case Management Decision entails the risk of losing a trial date or otherwise disrupting the procedural course of the Action. By reason of the challenge to the Forum Decision, the Action is still at the stage of statements of case.
 - (3) The challenge to the Case Management Decision, in common with the challenge to the Forum Decision, is not one which can or should be left to determination at or after the trial of the Action.
144. I therefore conclude that permission should be granted for the substantive appeal on all of Grounds One to Nine, save for Ground Five, where permission to appeal should only be granted for sub-grounds seven and eight (paragraphs 7.7 and 7.8 of the grounds of appeal attached to the Defendant's appellant's notice).

The substantive appeal – final conclusions

145. For the reasons which I have set out in my discussion above, I conclude that the appeal should be dismissed, both in relation to the challenge to the Forum Decision and in relation to the challenge to the Case Management Decision.

Overall outcome

146. The overall outcome of the Appeal is as follows:

- (1) Permission to appeal is granted in respect of all the grounds of appeal (Grounds One to Nine), with the exception of Ground Five, where permission to appeal is only granted for sub-grounds seven and eight (paragraphs 7.7 and 7.8 of the grounds of appeal attached the Defendant's appellant's notice).
- (2) The substantive appeal is dismissed.

147. I will hear the parties further, as necessary, on the terms of the order to be made consequential upon this judgment. In the usual way the parties are encouraged to agree as much as they can in this respect, subject to my approval of such agreed terms.