



Neutral Citation Number: [2024] EWHC 793 (Comm)

Case No: CL-2023-000768

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**COMMERCIAL COURT**

Royal Courts of Justice, Rolls Building  
Fetter Lane, London, EC4A 1NL

Date: 15/04/2024

**Before :**

**MR JUSTICE ANDREW BAKER**

**Between :**

**MOONBUG ENTERTAINMENT LIMITED** **Claimant**  
**- and -**  
**(1) CCM TOURING LLC** **Defendants**  
**(2) S2BN ENTERTAINMENT CORPORATION**

**Ian Mill KC & Marlana Valles** (instructed by **Reed Smith LLP**) for the **Claimant**  
**Douglas Campbell KC** (instructed by **Fladgate LLP**) for the **Defendants**

Hearing dates: 18, 19 March 2024

**Approved Judgment**

This judgment was handed down remotely at 9.30am on 15 April 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....  
MR JUSTICE ANDREW BAKER

**Mr Justice Andrew Baker :**

**Note:**

Judgment was given orally on 19 March 2024 after argument on 18 March 2024, but the court equipment failed to record the judgment hearing. In the circumstances, no judgment transcript could be created and in its place, this judgment was handed down remotely on 15 April 2024. It is approved as an accurate record of the substance of the judgment given on 19 March 2024:

**Introduction**

1. By an Application Notice dated 24 January 2024, the defendants apply for an Order that would:
  - i) grant permission, if required, for some of the evidence filed in the application to be relied on as expert evidence of New York law;
  - ii) grant retrospectively an extension of time, with relief from sanctions, to allow the defendants to challenge jurisdiction under CPR Part 11;
  - iii) declare that the court has no jurisdiction to try the claimant's claim or that the court should not exercise jurisdiction over it, pursuant to CPR Part 11(1)(a) or 11(1)(b) respectively;
  - iv) alternatively grant a stay of the claimant's claim as a matter of case management pursuant to CPR rule 3.1(2)(f) pending final resolution (including any appeals) of proceedings brought by the first defendant against the claimant in the United States District Court for the Southern District of New York, case no. 1:23-cv-07116;
  - v) if the claim is to proceed here, without a stay, an extension of time for any Defence.
2. I grant the first order sought, the permission, if required, relating to expert evidence. That will cover paragraphs 27 to 30 of the first witness statement of Jonathan Evans reporting matters of New York law advised to him by the defendants' New York attorneys, Pryor Cashman LLP, the statement dated 21 February 2024 of Jordan Siev of Reed Smith LLP, who is counsel of record for the claimant in the New York claim, to the extent it consists of expert opinion of New York law, and to like extent the statement dated 6 March 2024 of James Sammataro of Pryor Cashman, lead attorney for the first defendant in the New York claim. Since Messrs Sammataro and Siev have conducted the New York proceedings for the first defendant and the claimant respectively, their statements also include matters of non-expert fact and matters of comment, that is to say argument, that are correspondingly admissible and inadmissible irrespective of the permission concerning expert evidence.
3. All other parts of the application are resisted by the claimant, save that it accepts as inevitable reality that if the jurisdiction challenge and stay applications fail, a fresh deadline for Defence has to be set.
4. Helpfully, and without prejudice to this application, the defendants submitted with it, in draft form, the Defence that Mr Evans said they would be minded to file if the

claimant's claim here were defended on the merits. That allowed the court to have a good idea of the nature of the issues that it seemed would arise for determination on the merits, if tried here, for the purpose of considering the defendants' application, to the extent relevant to it, and to inform case management directions that might be given now if that application did not result in a rejection of jurisdiction or a stay of the proceedings here.

5. Less helpfully, and although Mr Evans filed a witness statement in reply in the application as recently as 6 March 2024 that does not include any evidence to this effect, Mr Campbell KC said in oral argument that the defendants' intentions now are different. He said that if the defendants defend on the merits here, any Defence would seek to incorporate the substance of the claim the first defendant has put before the New York court. The suggestion was that there might now be asserted a defence that the claimant cannot rely on or enforce the reversion of rights to it in early November 2023 that its claim asserts, because to do so would involve the claimant in relying on its own breach of the parties' contract.
6. At 10.53 pm last night [*viz.*, 18 March 2024], the argument of the application having occupied a full court day yesterday, the defendants submitted via CE-File for filing a revised draft Defence, again without prejudice to the application. The revised draft Defence was also attached to an email to the Listing Office sent at 10.59 pm identifying it as an "*urgent filing in relation to a hearing listed at 9.30 am on 19 March 2024*". The case had been listed, as I said at the end of the hearing it would be, for judgment at 9.30 am. Without objection on behalf of the claimant, on the basis that it is said only to reflect in pleaded form the submissions made yesterday, I have now considered also that revised draft Defence. Though I offered them the opportunity, neither side sought to supplement their argument in the light of it.
7. The claimant commenced these proceedings under the Shorter Trials Scheme established by CPR PD 57AB, justifiably so on its assessment of what would be likely to be involved. Had it not been for the defendants' initial delay in pleading to the claim, and then the need to deal with this application, the parties could and should have been in court for case management either before Christmas or early in the New Year, enabling a trial to be fixed for this summer, if the case is indeed suitable for that Scheme.
8. For the reasons I shall now give, in my judgment the defendants' application is not well founded, and relatively plainly so. Whether this was the defendants' intention or not, the application's only likely effect was to create delay through an interlocutory process calculated to frustrate the claimant's contractual right to have its claim determined in this court under English law. On the basis of the draft Defence that until oral argument was said to reflect how the defendants would seek to defend this claim, if the jurisdiction challenge failed, there was no reason why the claim should not be ready for trial in the week commencing 10 June 2024, when by good fortune the court has availability. It is not possible, on the material I have considered for this application, including now the revised draft Defence, to see any basis for pleading the different sort of defence intimated in oral argument by Mr Campbell KC. That is not a final determination that no such defence can be put forward, but it does lead me to accept the case management submission of Mr Mill KC, which was that if the defendants' application failed, the chance of an early trial pursuant to the Shorter

Trials Scheme should not be lost through a failure at this stage to give directions that would allow for it, subject if appropriate to review hereafter.

9. I shall therefore direct that the claim is retained in the Shorter Trials Scheme, that it is listed for trial with a time estimate of 3 to 4 days, including reading time, starting on 10 June 2024, and I shall set dates for Defence, Reply (if any), and an exchange of factual witness statements (if any) for trial, with simultaneous disclosure by list and production of copies of documents on which the disclosing party wishes to rely at trial other than documents that have been annexed to a statement of case. The directions should provide, finally, for a case management and pre-trial review hearing at which either party will be at liberty to apply, if so advised, for the trial listing to be revisited in the light of the statements of case and evidence then served, and for the parties to apply jointly on paper to the judge in charge of the Commercial Court for the appointment of a designated judge to conduct that hearing and the trial, as required by the Shorter Trials Scheme.

### **The Parties**

10. The claimant, Moonbug Entertainment Ltd, is a company registered in this jurisdiction which creates and produces animated and live action audiovisual content for children. With its affiliates, the claimant owns all intellectual property rights associated with the “CoComelon” YouTube channel.
11. The second defendant, S2BN Entertainment Corp, is a Delaware company that develops, produces and promotes touring exhibitions, events and live shows. The first defendant, CCM Touring LLC, also a Delaware entity, is said to be an affiliate of the second defendant.

### **The Licence Agreement**

12. By a written licence agreement dated 5 February 2021, the claimant licensed the first defendant to produce, promote and present CoComelon live touring shows (the “CoComelon Tour”). The second defendant was party to the licence agreement as guarantor of the first defendant.
13. Clause 3.1 of the licence agreement founds the claim that the claimant makes in these proceedings. It provides as follows:

*“LICENSEE shall present LICENSOR with a preliminary international roll out plan for the CoComelon Tour in respect of all countries within Territory within nine (9) months of the date of execution hereof. Subject to the Covid or Force Majure [sic] provisions hereof, LICENSEE shall use best endeavours to commence to exploit the rights no later than nine (9) months after presenting and parties agreeing such plan and in the event that the LICENSEE takes more than twenty-four (24) months (which for the avoidance of doubt shall be thirty three (33) months from execution of this Agreement) to commence the CoComelon Tour in a particular country, the rights for the particular country immediately revert to LICENSOR who is then free to present or enter into an exclusive agreement with a third party for that respective country. For the purposes of this clause, exploitation of the rights shall mean that there has been a meaningful ticketed presentation of the CoComelon Tour. For the avoidance of doubt, and notwithstanding anything to the contrary contained in this Agreement*

*(including, without limitation, clauses 1, 2 and 4A), where the rights in respect of a particular country revert back to Licensor in accordance with this clause ‘Reversions’ contained in clause 3, such country shall be automatically excluded from the definition of Territory ...’.*

14. The licence agreement having been executed on 5 February 2021, on the face of things the latest date on which any rights reverted to the claimant under clause 3.1, if any did, will have been 6 November 2023, since 33 months from 5 February 2021 will have ended on 5 November 2023.
15. The claimant’s position is that on or before 5 November 2023, there had been a “*meaningful ticketed presentation of the CoComelon Tour*” by the first defendant only in the United States of America and Argentina. The defendants’ position is or may be that there was also a meaningful ticketed presentation in Canada, alternatively that the claimant cannot deny that because if there was no meaningful ticketed presentation in Canada by then, that was caused by breaches of contract by the claimant.

### **The Application**

16. The claimant commenced these proceedings on 26 October 2023, and served Particulars of Claim on the Defendants in the US on 31 October 2023. By the claim, the claimant seeks declaratory relief to the effect that clause 3.1 operated in such a way that the first defendant’s licensed rights terminated and reverted to the claimant. The declaration is sought in respect of all countries worldwide other than the US, Argentina and Canada. The exception of Canada from the scope of the claim was by amendment on 1 March 2024 after it became clear that the defendants would contend that Canada gave rise to different issues that might not be suited to resolution under the Shorter Trials Scheme. It does not mean the claimant accepts that rights in relation to Canada have not reverted to it, only that this court is not now being asked to consider that aspect in this claim, or at all events is not being asked to do so by the claimant.
17. Assessing the matter provisionally at this stage by reference to the draft Defence, the issues likely to arise on the claimant’s claim seemed to be only these:
  - i) possibly, whether the 33-month period referred to in clause 3.1 was varied by agreement or cannot now be invoked by the claimant because of an estoppel by representation; and
  - ii) possibly, whether, if not, clause 3.1 on its proper construction has the meaning and effect asserted by the claimant.
18. I say ‘possibly’ as to the first indicated defence because the draft Defence asserted those conclusions – a variation by agreement, alternatively estoppel by representation – but set out no factual basis for them. It is therefore presently obscure whether there is an arguable such defence to be considered, and the revised draft Defence provided overnight does not improve that position. Any Defence in final form would have to particularise the alleged variation agreement or the elements alleged to give rise to an estoppel, if a defence of either variety is to be pursued.

19. I say ‘possibly’ as to the second indicated defence because the draft Defence identified the factual case about Canada and the un-particularised plea of variation or estoppel as the sole reason for denying the allegation that rights reverted in respect of countries other than the US, Argentina and Canada. It therefore seemed possible that there would be no dispute as to the meaning and effect of clause 3.1, but rather only (a) a dispute about its operation in relation to Canada, which was irrelevant to the claimant’s claim as now amended, and (b) a possible case of variation or estoppel. The plea about Canada intimated by the draft Defence is irrelevant to the claim as now amended because it would concern only whether clause 3.1 operated to cause rights to revert to the claimant in relation to Canada, and in its factual content, consistent with the case pleaded by the first defendant in New York, it would allege only that breach of the licence agreement by the claimant prevented the first defendant from doing enough in Canada to avoid that reversion.
20. On that basis, in my view the claimant was justified in continuing to think, in the context of this application, that if litigated here its claim should be suitable for the Shorter Trials Scheme.
21. To understand the defendants’ application, then, and to consider the impact, if any, of the revised draft Defence provided overnight, it is necessary to introduce more fully the New York claim.
22. It was filed by the first defendant against the claimant on 11 August 2023, alleging breach of the licence agreement by the claimant by the grant of rights to a third party that the first defendant alleges were within the scope of the rights granted exclusively to it under the licence agreement. The claimant will defend that claim *inter alia* on the basis, as to liability, that the rights it granted to the third party formed no part of the first defendant’s licence. The only material consequence of the claimant’s alleged breach averred by the first defendant in New York is that it caused, so the first defendant alleges, the cancellation of what would have been a Canadian leg of the CoComelon Tour in, or starting in, the autumn of 2023.
23. Clause 8.3 of the licence agreement includes the following governing law and jurisdiction provisions:

*“This Agreement and any related dispute or claim (contractual or non-contractual) shall be governed by, and construed in accordance with, the law and jurisdiction of the party bringing a claim. Each party irrevocably submits for all purposes in connection with this Agreement (including, without limitation, any such dispute or claim) to the exclusive jurisdiction of the courts of the party bringing the claim.”*
24. Applying that language straightforwardly, since the claimant is the party bringing this claim and the claimant is an English company, other things being equal the claimant can say that the defendants have agreed that the claim is to be determined under English law and that the defendants have by contract submitted irrevocably to the exclusive jurisdiction of the English courts for that determination. The defendants wish to say that other things are not equal, because of the earlier commencement by the first defendant of the New York claim. The argument is that under clause 8.3, because of the New York claim, the claim brought here by the claimant is not subject to English law or jurisdiction after all. The defendants seek an extension of time, and relief from sanctions, in order on that basis to challenge this court’s jurisdiction.

25. The claimant says that the defendants are not merely pursuing a jurisdiction challenge brought out of time, so as to require an extension of time and relief from sanctions in order to do so. Rather, the claimant submits, the defendants submitted to this jurisdiction at common law, by steps taken here prior to issuing this application, so as to lose any right they might otherwise have had to challenge the court's jurisdiction, with the result that the jurisdiction challenge must fail come what may and no question of an extension of time or relief from sanctions arises.
26. The claimant does not need the argument of submission at common law unless the premise of the defendants' proposed challenge might be correct. The claimant says it is plainly not correct, because the claim it has brought here is not before the New York court as part of the New York claim. It is therefore not arguable, the claimant says, that clause 8.3 does not apply English law and an irrevocable, contractual submission exclusively to this court, to the claim it has brought here. If that is right, then the claimant submits further that there is no reason why the court might contemplate staying these proceedings, in what is then *ex hypothesi* the contractually agreed exclusive venue for this claim, pending the conclusion of the New York proceedings in respect of a different claim.
27. I agree with that last submission, if the premise for it is correct. If the New York proceedings do not concern the question raised by this claim, then there is indeed no reason why this claim should defer to the New York claim, whether finally, or temporarily by way of case management. That would mean that proceedings take their normal course both here and in New York, but *ex hypothesi* about different subject matters under or arising out of the licence agreement. However, that is what the parties bargained for by their unusual law and jurisdiction agreement. On the terms of clause 8.3, different claims under or arising out of the licence agreement might be governed by different governing laws and subject to different exclusive jurisdiction obligations. Neither side argued that clause 8.3 was not effective, or should not be given effect in accordance with its plain terms; and those plain terms clearly allow for the effect I have just described.

### **Claim Overlap?**

28. As I have said, the claim asserted in these proceedings, as amended, concerns every country in the world other than the US, Argentina and Canada. The claim is that for each such country, upon the expiry of the 33-month period referred to in clause 3.1, the licensed rights in respect of that country reverted to the claimant by operation of that clause, because the first defendant had not yet commenced the CoComelon Tour there. The defendants have not accepted that to be the position, so the claimant seeks declaratory relief, and might ask also for injunctive relief if a need for such relief, in the claimant's submission, were to become apparent from the defendants' response to the claim on the merits.
29. The New York claim is a claim for breach of contract, alleging that an interactive, play-based character experience, developed by the third party licensed by the claimant and marketed as "*CoComelon Party Time*", falls within the scope of the events that the licence agreement supposedly gave the first defendant the exclusive right to develop, produce, promote and present. The first defendant alleges that CoComelon Party Time was launched in Atlanta, Georgia, during the "*Initial NA Exploitation Period*", a term I shall explain in a moment, that it was successful there, and that

subsequent CoComelon Party Time events took place in or were marketed for other locations in the US, and Canada.

30. As I have mentioned already, the first defendant goes on to plead in the New York claim that the emergence of CoComelon Party Time, in breach (as it says) of the licence agreement, disrupted its plans for a Canadian leg of the CoComelon Tour. It is common ground that the New York claim is purely a common law breach of contract claim on which, therefore, the first defendant is entitled to, and has been granted in principle, a jury trial. No cause of action for equitable relief under New York law is asserted.
31. The relief sought in the New York claim, as set out in the prayer for relief in the Complaint, is as follows:
  - i) firstly, *“actual and compensatory damages for Moonbug’s wrongdoing, including a disgorgement of all amounts that Moonbug has wrongfully earned in conjunction [sic] with the Breaching Show [i.e. CoComelon Party Time], in an amount to be established at trial”*;
  - ii) secondly, *“an accounting of all amounts earned by Moonbug in connection with the Breaching Show”*;
  - iii) thirdly, pre-judgment and post-judgment interest on any monetary relief, and attorney’s fees;
  - iv) fourthly, *“Tolling all applicable deadlines of the Initial NA Exploitation Period in order to enable CCM to proceed with a Canadian tour”*;
  - v) fifthly, *“Tolling all applicable deadlines for CCM to exercise its contractual rights to extend the Initial NA Exploitation Period and the Initial ROW Exploitation Period”*;
  - vi) sixthly, any other relief that the court may deem just and proper.
32. Under the licence agreement, the Initial NA Exploitation Period is the period from the date of the agreement, 5 February 2021, until 4 years after the first ticketed CoComelon Tour show performance in North America, but subject to a maximum of 6 years. It seems to be common ground that the first ticketed CoComelon Tour show in North America was on 4 December 2021. If that is right, then the Initial NA Exploitation Period is set to run, other things being equal, until 4 December 2025.
33. The Initial ROW Exploitation Period is the period from the date of the agreement until 4 years after the first ticketed CoComelon Tour show performance anywhere outside North America, which will have been the date of the first show in Argentina, but again subject to a maximum of 6 years. The claimant says in the Amended Particulars of Claim here that the first CoComelon Tour show in Argentina was in July 2023. If that is right, then other things being equal the Initial ROW Exploitation Period is determined by the 6-year cap to run until 5 February 2027.
34. The licence agreement provision fixing those Initial Exploitation Periods is clause 2.1.



35. Then by clauses 2.2 and 2.3, subject to pre-conditions, the first defendant is given a right to extend each of those Periods by adding a Second NA (respectively, ROW) Exploitation Period of 12 months (clause 2.2), and after that a Third Period, again of 12 months (clause 2.3). Notice to add a Second Period must be given not later than 30 days before the expiry of the respective Initial Period; notice to add a Third Period must be given not later than 30 days before the expiry of the respective Second Period.
36. Meanwhile, clause 3.1 of the licence agreement, the subject matter of the claimant's claim here, does not mention or operate by reference to any of those Exploitation Period provisions or timings.
37. With the benefit of those explanations, it can be seen that to seek, as the first defendant does in New York, the "tolling" of "*applicable deadlines of the Initial NA Exploitation Period*" is to request relief pushing the end date of that Period beyond 4 December 2025. That is the only Initial NA Exploitation Period deadline. The evidence of New York law relied on by the defendants on this application does not identify any basis under New York law for the grant of such relief at a jury trial of a common law breach of contract claim. Mr Siev's evidence is that it is not a form of relief known to the law in New York, and Mr Sammataro has not identified any example of such relief ever being granted by a New York court. Mr Sammataro does assert in terms, however, that the tolling of deadlines under the licence agreement "*is a legal remedy available under contractual principles*". Though the cases he cites do not support that assertion, but only the different proposition that in certain circumstances New York law may allow a defence to a contractual claim by saying that the defendant was entitled to suspend performance on account of a breach by the claimant, without having the conflicting opinions tested by cross-examination I would not be prepared to find on this application that Mr Sammataro's assertion is definitely wrong.
38. What matters for my purpose is that none of that has anything to do with clause 3.1 of the licence agreement, or whether it operated on the facts to revert in the claimant licensed rights to put on CoComelon Tour shows in countries other than the US, Argentina or Canada.
39. As regards the "tolling" of "*applicable deadlines for the first defendant to exercise its contractual rights to extend*" the Exploitation Periods, those are the rights under clauses 2.2 and 2.3 to which I have referred. The respective exercise deadlines are set thereby, entirely independently of clause 3.1; and clause 3.1 operates without reference to them. If the claimant is correct as to how clause 3.1 has operated, the licensed rights to which the Initial Periods now apply concern only the US, Argentina, and possibly Canada; but that neither has anything to do with, nor is affected in any way by, the existence or terms of the extension option exercise deadlines set by clauses 2.2 and 2.3.
40. The same contest in the evidence exists here as with the other "tolling" relief sought in New York, as to whether any such relief is known to New York law anyway. Again, I decline to make a finding on it absent oral expert evidence and cross-examination, but that does not affect the outcome, because even if Mr Sammataro has that point right, it has nothing to do with clause 3.1 or its operation on the facts.

41. Mr Sammataro says he agrees with a comment by Mr Evans in his first statement in support of this application that “*there is a genuine dispute in the US Proceedings concerning the tolling of all relevant deadlines in the [licence agreement] concerning the exploitation of rights in all countries (outside of the United States and Argentina), which it would appear [the English] proceedings are designed to work around*”. That is not an expert view as to foreign law on which there might be a need for caution over whether to reject it on an interlocutory argument. Nor is it testimony of witnessed primary fact that the court cannot test on such an argument. It is an interpretation of the effect of the first defendant’s New York claim, as pleaded, that is just not borne out by a simple consideration of the relevant primary document, if Mr Sammataro means by it to claim that the meaning, effect or operation on the facts of clause 3.1 is raised by the New York claim.
42. I therefore find myself in agreement with the claimant that the claim it has brought here is not before the New York court as part of the claim brought by the first defendant there. It therefore follows, as I have already said, that by clause 8.3 of the licence agreement the claimant has a contractual right to have this court determine the claim it has brought here, as a claim governed by English law, and that there is therefore no basis for a challenge to the jurisdiction or a stay of this claim.
43. That brings me to the revised draft Defence. It particularises the breach of contract by the claimant proposed to be alleged as being the launching and marketing of CoComelon Party Time in the US and Canada. It then sets out a plea as to New York law, and how allegedly it operated on the facts, that is plainly irrelevant to the claimant’s claim litigated here, since, as I have just concluded, English law will govern. Consistently with my analysis that the claimant’s claim is not part of the New York claim, the possible New York law plea sets out a case concerning clause 3.1 that is not pleaded in New York. It then pleads, irrelevantly to the merits, that the first defendant brought the New York claim and sought the “*tolling*” relief in the prayer for relief there that I have considered. Finally, it asserts that the consequence of the breach of contract allegedly constituted by the CoComelon Party Time activity, is that the claimant is not entitled to the declaration sought as a matter of English law “*since Moonbug cannot take advantage of its own wrong*”. But so far as I can see, no factual basis to render that conclusion arguable as a matter of English law is pleaded. If clause 3.1 means what the claimant says it means, it effected a reversion of rights in any given country if there had not been meaningful ticketed presentation of the CoComelon Tour in that country by 5 November 2023. There is no proposed plea that the claimant’s alleged breach played any part in any absence thereof by that date in any country anywhere in the world apart from Canada; and the claimant does not seek declaratory relief in relation to Canada.
44. Therefore, in my view the revised draft Defence does not affect the matter.

#### **Submission?**

45. I shall deal more briefly in the circumstances with the question of submission at common law.
46. A defendant cannot dispute the jurisdiction of the court having freely submitted to it. Taking voluntarily a step consistent only with an acceptance that the court is to deal with the merits of the claim is a submission. That requires the step to be incapable of

explanation except on the assumption that merits jurisdiction is accepted. A step capable of being explained on the basis that it was necessary or useful without merits jurisdiction being accepted is not a submission.

47. In *Global Multimedia International Ltd v ARA Media Services* [2006] EWHC 3107 (Ch), at [30], Sir Andrew Morritt C noted that given the short period of time within which a decision must be made whether to contest jurisdiction, a party would be well advised in case of doubt to file an acknowledgment of service stating an intention to contest jurisdiction and obtain an extension of time to apply under CPR Part 11, in order to preserve a right to do so. That does not mean *Global Multimedia* is authority for the proposition that filing an acknowledgment of service that states instead an intention to defend and not an intention to contest jurisdiction is a submission. With respect, *Dicey & Morris*, “*The Conflict of Laws*”, 16<sup>th</sup> Ed., is wrong to state otherwise, as it does in f.n.185 to para.11-066. To the contrary, in that case counsel for the claimant accepted that filing such an acknowledgment of service did not, on its own, amount to a submission (*ibid* at [28(ii)]), and the decision proceeded on that basis, not on the basis that counsel’s concession was wrong.
48. Much more recently, in *AELF MSN 242 LLC v Surinaamse Luchtvaart Maatschappij NV (Surinam Airways)* [2021] EWHC 3482 (Comm), the deputy High Court judge treated an acknowledgment of service stating an intention to defend and not an intention to contest jurisdiction as relevant to the purport, assessed objectively, of later conduct, and not capable itself of being a submission to the jurisdiction, because of CPR rule 11(3). I leave to a case in which it will affect the outcome whether that is correct, or whether there is room to say that if an acknowledgment of service states an intention to defend the claim, and not an intention to contest jurisdiction, there is a submission because of that content, not because of the fact that an acknowledgment of service is filed, such that rule 11(3) is no answer, in which case *Dicey & Morris*’s f.n.185 might be correct after all in the proposition it states even though it is wrong to suggest that *Global Multimedia* is authority for it. Like counsel in that case, Mr Mill KC for the claimant asked me to consider his argument that the defendants submitted on the basis that their acknowledgment of service was not, without more, a submission, and I now do so.
49. The Acknowledgments of Service here, stating intentions to defend the claim and not any intention to contest jurisdiction, were filed on Friday 17 November 2023. On Monday 20 November, the defendants by their solicitors asked the claimant by its solicitors to agree a 28-day extension of time “*to file and serve their defences*”, but on the basis that their “*position on service and jurisdiction is reserved*”. The defendants had until 15 December 2023 to issue a Part 11 application if they wished to challenge jurisdiction notwithstanding what they had said in their Acknowledgments of Service. The claimant’s solicitors offered 14 days only, on condition that the defendants submitted to the jurisdiction. That condition was rejected, and a 14-day extension without it was ultimately agreed and notified to the court.
50. On 15 December 2023, the deadline for any Part 11 application expired without the defendants making any application. The time for challenging jurisdiction having thus passed, on 19 December, the day before Defences were due, the defendants’ solicitors wrote to the claimant’s solicitors stating that the defendants would not be in a position to file and serve Defences by 20 December and asking the claimant to agree to time being extended to 24 January 2024. The letter contained no reference to any possible

challenge to jurisdiction and no reservation of rights. It enclosed a draft application, to which the claimant was invited to consent, and which was issued the next day, consent having not been given overnight.

51. The extension application did not state any reservation as to jurisdiction and sought the extension on the simple ground that the defendants were not in a position to file and serve their Defences on time. The unequivocal tenor of the explanation given to the court by Part C of the Application Notice was that the defendants had decided to defend on the merits and would be filing and serving Defences. The claimant objected to the extension sought, arguing that no proper basis had been provided for it, and that it would impact the date for the CMC. Correspondence on when the CMC should be scheduled followed, without mention or hint that there might yet be a challenge to jurisdiction and without reservation of rights.
52. It should be noted that both the extension of time application and the CMC correspondence referred specifically and in some detail to the New York claim and the suggested possible overlap of issues, but yet the decision unequivocally conveyed by it was that the defendants would defend here on the merits.
53. On 12 January 2024, Jacobs J considered on the papers, and granted, the application to extend time for Defences. The CMC correspondence continued, again without reference to any possible jurisdiction challenge and without reservation of rights.
54. On 17 January, the claimant's solicitors notified the defendants' solicitors of the dates in March for which the defendants' solicitors had confirmed availability for the CMC that the claimant's solicitors intended to take to the Listing Office to obtain a fixture. For that purpose, they asked whether the claimant's counsel's 2-hr. time estimate accorded with the defendants' counsel's estimate. The defendants' solicitors replied the following day, 18 January, initially just on CMC hearing dates and stating that they would revert on time estimate, and subsequently on time estimate, suggesting it was "*likely that a jurisdictional issue will need to be determined at the CMC*" so that a full day listing was appropriate, but also stating that "*the defendants' position on jurisdiction will have been finalised by the time their defences have been filed*" and seeking to delay any listing of the CMC, therefore, until then, i.e. until after the defendants had filed their Defences. The claimant's solicitors replied on 22 January, agreeing to leave the listing of the CMC until after Defences had been filed since they were by then due imminently.
55. I agree with Mr Mill KC that, whatever the defendants' solicitors had in mind by their reference to a "*position on jurisdiction*" being "*finalised*", no reasonable recipient of the defendants' correspondence on 18 January might have thought it meant that there might be a challenge to the jurisdiction, since that correspondence confirmed in terms that Defences were going to be filed. Earlier in the CMC correspondence, on 9 January, the defendants' solicitors had reminded the claimant's solicitors that the use of the Shorter Trials Scheme had not been agreed, and said that the defendants might yet apply to have the claim transferred out of it and that they, the defendants' solicitors, felt that the claimant was unilaterally seeking, without due consideration for the defendants' concerns, to press for "*the STS forum*", which is the language of jurisdiction albeit that word was not used. In this correspondence, its subject matter the fixing of a CMC, and a possible challenge to the use of the Shorter Trial Scheme having been flagged, the reference to a "*position on jurisdiction*" that would be

finalised with Defences that were going to be filed and might require a longer CMC hearing following those Defences could only sensibly have referred to that point.

56. Against the background of Acknowledgments of Service stating an intention to defend and not an intention to contest jurisdiction, and the deadline for any challenge to jurisdiction having passed, the defendants thus sought and obtained from the court an extension of time for Defences, a step consistent only with an intention to defend on the merits, and required only if a decision had been made not to challenge jurisdiction, by an Application Notice justifying the application precisely on the basis that indeed the defendants had decided to defend on the merits but needed more time to plead to the merits, and then engaged in correspondence over the listing of a CMC that likewise was consistent only with an intention to defend on the merits, so that a CMC would be needed, getting the claimant's solicitors to defer going to the Listing Office for a hearing date on the basis that Defences were going to be filed. Although one reference was made to a "*position on jurisdiction*" still being considered on the defendants' side, it came late in the sequence and it was explicit that whatever was meant by it was not something that would hold up the filing of Defences. By that application and subsequent correspondence, in my judgment the defendants plainly submitted to the jurisdiction.

### **Conclusion**

57. This application therefore fails, because it is falsely premised on the notion that the claimant's claim concerning clause 3.1 of the licence agreement is part of the New York claim, and in any event because the defendants submitted to the jurisdiction. On either basis, the claimant is entitled by clause 8.3 of the licence agreement, as the party bringing this claim, to have it determined under English law, exclusively by this court. In those circumstances, there is no arguable basis for a stay of these proceedings in favour of or pending the New York claim.

### **Relief from Sanctions?**

58. It is not necessary therefore to deal with the further issues that would arise over whether a retrospective extension of time should be granted, with relief from sanctions, to enable some arguable challenge to jurisdiction to proceed. There is no arguable challenge to pursue.
59. In very brief summary only, therefore:
- i) a 40-day default against the deliberately short timescale for issuing any challenge to the jurisdiction is a significant and substantial default. That it may have had limited impact in the event, because the claimant's appeal to the judge in charge for an expedited listing of this hearing succeeded, does not detract from that conclusion, although it could be relevant to stage 3 of the *Denton* analysis;
  - ii) as to stage 2 of that analysis, the default is in substance unexplained in evidence. The supposed explanation put forward by Mr Evans is, with respect, nothing of the sort. He refers to commonly encountered practical problems that he says arose in this case over his firm getting going fully on it, but none of them explains how it came to be that decisions were made by the defendants

(a) to acknowledge service stating that they would defend on the merits, not that they would contest jurisdiction, and then (b) having toyed with the possible thought of challenging jurisdiction nonetheless, to confirm to the court that the defendants would be defending on the merits, seeking and obtaining additional time to do so, all in full knowledge of the New York claim and what it involved, and yet (c) the New York claim and what it involved supposedly meant, this being the premise for the jurisdiction challenge belatedly issued, that the claimant's claim here should never have been brought. Mr Evans' evidence effectively proceeds as if what the defendants needed to explain was why an application it was evident was or might be made took until 24 January 2024 finally to put together, when what cried out for explanation was the *volte face* in the defendants' attitude towards these proceedings;

- iii) at stage 3 of a *Denton* analysis, then, the defendants' actions and correspondence evidence that a decision was taken (as it happens, on my analysis of the case, a correct decision) that the claimant's claim as brought had to be defended here on the merits, the New York claim not providing grounds to avoid doing so, but then, late in the day relative to the extended deadline that on that basis they had obtained to plead Defences, a decision was taken instead to issue this application in an attempt to avoid having to defend on the merits after all. I bear well in mind that thanks to Foxton J's direction on the papers to give the application an expedited hearing date, it may be that it will now have been dealt with very little, if at all, later than it would have been if it had been issued in mid-December 2023. But I also bear in mind that the claim as brought is within a narrow compass that appears well suited to the Shorter Trials Scheme, and if the defendants were held to the submission arising by operation of CPR rule 11(5), it could satisfactorily be tried promptly under that Scheme whereby efficiently to resolve for the parties that element of their wider dispute, even if (contrary to my conclusion, but this would be the premise on which the *Denton* analysis would have arisen) it is also raised as an element of the New York claim such that in the absence of earlier determination here it might fall to be resolved later there as part of a trial dealing also with other matters between the parties. On that balance, I would not have said that justice required relief from sanctions to be granted, and I would have refused the application in any event.