Neutral Citation Number: [2025] EWHC 444 (Ch)

Case No: BL-2024-001170

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 27 February 2025

Before:
MR JUSTICE MARCUS SMITH

- -

Between:

HIPGNOSIS SFH 1 LIMITED	Claimant (Respondent)
-and-	
(1) BARRY MANILOW **(2) MANILOW PRODUCTIONS, INC** **(3) HASTINGS, CLAYTON, TUCKER, INC DBA STILETTO ENTERTAINMENT**	Defendants (Applicant)

Heard on 21 February 2025

EDMUND CULLEN, KC (instructed by **Clintons**) for the **Claimant**
ANDREW SUTCLIFFE, KC (instructed by **Wiggin LLP**) for the **First and Third Defendants**

Approved Judgment

This judgment was handed down remotely at 10:30 am on 27 February 2025 by circulation to the parties or their representative by e-mail and by release to the National Archives

MR JUSTICE MARCUS SMITH:

1. By a **Claim Form** issued under Claim No BL-2024-001170, the claimant – Hipgnosis SFH 1 Limited, a company incorporated in England and Wales, **C** – made claims against the following defendants:

   i) Mr Barry Manilow (**D1**).

   ii) Manilow Productions Inc (**D2**).

   iii) Hastings, Clayton, Tucker, Inc. DBA Stiletto Entertainment (**D3**).

   Terms and abbreviations used in this Judgment are in **bold** on their first use. I shall refer to these proceedings as the **English Proceedings**.

2. D2 has been dissolved some years ago, and C accept and assert that the English Proceedings will not continue as against D2. D1 and D3 are (respectively) resident in and incorporated in the State of Nevada in the United States. I shall make no further reference to D2 in this Judgment. Generally speaking, it will not be necessary to differentiate between D1 and D3. I shall refer to them collectively as **D**.

3. The claims in the English Proceedings advanced by C are pleaded in **Particulars of Claim** dated 12 August 2024, the same date as the Claim Form. The Particulars of Claim refer to a Music Catalogue Agreement dated 20 March 2020 (the **Agreement**) between C and D. The Agreement made provision for the payment of certain receivables from D1's recordings (D1 is a well-known singer-songwriter) to C in return for payment of a purchase price comprising an initial purchase price and an additional purchase price.

4. The English Proceedings were served on D out of the jurisdiction where the permission of the court for service out was not required. C certified that D were party to an agreement conferring jurisdiction on the English courts.

5. The terms of the Agreement can be stated broadly, as can the nature of the dispute between C and D. That is because the substance of the dispute is not before me: rather, this Judgment determines D's application dated 13 November 2024 for an order that this court has no jurisdiction to hear certain claims pleaded in the Particulars of Claim (the **Application**). It is both possible, and desirable, to make this determination without descending into the detail of the substantive dispute between C and D. It is sufficient to note that:

   i) C contends that D have failed to pay receivables that D are obliged to pay to C pursuant to the Agreement, and that D holds such receivables as have been received by them on trust for C in any event.

ii) D contend that the additional purchase price stated in the Agreement is due and payable to D, that C has not paid this additional consideration, and that this justifies the retention of receivables by D that would otherwise be payable by D to C under the Agreement.

6. The provision lying at the heart of this Application is clause 14 of the Agreement. Clause 14 provides:

> **[1]** This Agreement and any related dispute or claim (contractual or non-contractual) shall be governed by, and construed in accordance with, English law. **[2]** Each party irrevocably submits for all purposes of this Agreement (including any such dispute or claim) to the exclusive jurisdiction of the English courts. **[3]** Any judgment obtained in the English courts may be enforced in any other jurisdiction. **[4]** Notwithstanding the foregoing, any claims made by [D] against [C] related to the Purchase Price may be brought by [D] in the courts of Los Angeles, California or New York City, New York and solely in connection with such claims, [C] hereby agrees to submit to the jurisdiction of the courts located in Los Angeles, California and New York City, New York.

The bold numbers in clause 14 have been inserted by me for ease of reference. As can be seen, the clause comprises four parts:

i) **Phrase [1]** is a general choice of law clause in favour of English law. It was common ground that all parts of the Agreement, <u>including</u> clause 14, were to be construed in accordance with English law.

ii) **Phrase [2]** is a general jurisdiction clause, widely drawn ("…for all purposes of this Agreement…") conferring jurisdiction on the English courts.

iii) **Phrase [3]** seeks to render the enforceability of any judgment obtained in England more robust in the case of enforcement of an English judgment in a foreign court.

iv) **Phrase [4]** is a limited exception to Phrase [2], enabling D to bring proceedings in the courts of Los Angeles or New York, but <u>only</u> where these relate to the Purchase Price.

7. The payments C was to make to D are provided for in clause 6 of the Agreement, which articulates the **Purchase Price** C was to pay to D. A claim in regard to D's alleged entitlement under clause 6 was commenced in the courts of Los Angeles on 28 August 2024, 16 days after the English Proceedings were issued (the **Los Angeles Proceedings**). There is a dispute

about when the English proceedings were served, but nothing turns on this. For completeness, however:

i) C says that the proceedings were served on D3 on 12 August 2024, but D3 says that the date of deemed service was 23 August 2024.

ii) C says D1 was deemed served on 9 October 2024, and that appears to be common ground.

8. D's claim in the Los Angeles Proceedings relates to the Purchase Price, but (according to C) goes well beyond articulating such a claim only. There is no application before me as regards the jurisdiction of the courts of Los Angeles. There is, however, pending before the Los Angeles courts, an application to do with jurisdiction due to be heard in March. That application is a matter for the Los Angeles courts, and not for me. However, I note: (i) the fact of the application in Los Angeles; and (ii) that it would be helpful if this Application could be determined as soon as possible.

9. I proceed on the basis that (for purposes of clause 14) the courts of Los Angeles have before them claims by D relating to the Purchase Price. Whether there are claims wider than this is not a matter that concerns me: this is a matter for the Los Angeles courts, as matters presently to stand.

10. According to C, because the English proceedings not only relate to the question of payment of receivables but also plead a case regarding the Purchase Price, the English courts (so it is said) have jurisdiction over these claims also by virtue of Phrase [2]. D have, therefore, by virtue of Phrase [2], irrevocably submitted to the jurisdiction of the English courts; and D's Application must accordingly fail. That means that there will be (so far as the issue of the Purchase Price is concerned) parallel proceedings in two jurisdictions, with the risk of inconsistent outcomes. C says that dealing with such inconsistency is a matter of case management for the courts of both jurisdictions but – at least so far as this jurisdiction is concerned – there is no basis on which the Application can succeed.

11. For their part, D contend that, so far as the Purchase Price claims are concerned, the courts of Los Angeles have exclusive jurisdiction over those claims and that C has submitted to that jurisdiction by virtue of the terms of Phrase [4]. D accept that all of the other claims articulated in the English Proceedings are properly made and should be tried in England. This explains the terms in which the Application is made, which seeks orders that:

i) Pursuant to Part 11 of the Civil Procedure Rules (**CPR**), this court has no jurisdiction to hear those claims pleaded at paragraphs 7 to 12 and 13.2 to 13.3 of the Particulars of Claim (which are Purchase Price

claims) alternatively that this court should not exercise any jurisdiction it might have over the Purchase Price claims.

ii) C amends its Particulars of Claim to remove the Purchase Price claims.

Other orders are also sought: but it is not necessary to set these out.

12. As I have described, the Application makes particular reference to paragraphs 7 to 12 and 13.2 to 13.3 of the Particulars of Claim. It is easy to see why. These paragraphs plead a positive case on behalf of C that no additional Purchase Price is payable. The detail (which is considerable) is pleaded in paragraphs 7 to 12, and does not require further elucidation in this Judgment. Paragraph 13 pleads that C seeks declarations that:

> 13.2 In order for any additional Purchase Price to have become payable under clause 6(d) of the Agreement, the cash income for Year 1 was required to be at least 10% in excess of the cash income for the year to the Closing Date.
>
> 13.3 The Defendants are not entitled to payment of any additional Purchase Price under the Agreement.

The prayer to the Particulars of Claim seeks relief in similar terms.

13. In the course of their submissions, D suggested that there was something illegitimate in C seeking a "negative declaration" in regard to the Purchase Price. To the extent that it matters (and I do not think that it does), I reject the suggestion that C has behaved in any way tactically in regard to incorporating Purchase Price claims in the English Proceedings:

i) Prior to both the English Proceedings and the Los Angeles Proceedings there was correspondence between C and D regarding the dispute between them, and the appropriate jurisdiction(s) in which that dispute might be litigated. In particular, I was referred to a letter dated 2 May 2024 in which D stated, having set out Phrase [4] of clause 14 that:

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

ii) The letter is correct to say that the only forum in which C can commence proceedings in regard to the Agreement is England. That is the effect of Phrase [2]. However, to the extent that this was the thinking, the letter is incorrect in considering that C would be limited to claiming "peanuts" in England. I infer that this reference to "peanuts" is intended to mean "not very much" and it may very well be that if D's Purchase Price claim is well founded there will be very few receivables payable to C under the Agreement.

iii) However, the assumption in the letter that Purchase Price claims could only, or only properly, be litigated in the United States pursuant to Phrase 4 is wrong as the Particulars of Claim demonstrate:

a) The Particulars of Claim begin by asserting a claim to the receivables, the "peanuts" identified in the letter.

b) Paragraph 8 of the Particulars of Claim then pleads various no-set-off provisions contained in the Agreement. I note that paragraph 8 is one of the paragraphs in the Particulars of Claim that D object to. It is difficult to see how – even if D are right on everything else –this plea can be regarded as a Purchase Price claim: what the plea is asserting (and I say nothing about its substantive merits) is that receivables due under the Agreement must be paid in full, without set off.

c) Thereafter, covering all bases, C plead that "[i]n any event, no additional Purchase Price is due". This is an alternative plea, contending that even if the no-set-off argument fails, set-off avails D nothing, because there is nothing to set-off.

d) Although I can see that these pleas are in relation to the Purchase Price, and are negative in form (in that they seek a declaration that no Purchase Price is due) that plea is a natural one to make in these circumstances. Of course, that is not to say that D's Application is not well-founded. It is just that I derive no assistance from the fact that Purchase Price claims appear in the Particulars of Claim. D's reliance on the fact that C's reaction to the correspondence between the parties was to issue in England pursuant to Phrase [2] takes matters no further.

14. The approach of most civil jurisdictions is only to permit a court to take jurisdiction in an international case where specific connective factors exist. McLachlan and Nygh in their book *Transnational Tort Litigation: Jurisdictional Principles* (OUP 1996) say (at 41):

> In civil law systems jurisdiction is founded on statute. The statutory jurisdiction grounds are based on the existence of particular connections between the litigation and the forum. The mere physical presence of the defendant in the forum is not regarded as a sufficiently connecting factor.

By contrast, jurisdiction under English law turns on service. Considerable weight is attached to party autonomy and agreements as to jurisdiction. Indeed, it has been suggested (eg, Peel, *Exclusive Jurisdiction Agreements: Purity and Pragmatism in the Conflict of Laws*, [1998] LMCLQ 182) that where a jurisdiction clause is valid and enforceable it should not be overridden at the discretion of the courts.

15. Suffice it to say that although there is a discretion in the courts to decline to enforce an exclusive jurisdiction clause (see, for example, *Donohue v. Armco*, [2002] 1 All ER 749, [2002] CLC 440), that discretion is rarely exercised.

16. The starting point is to construe the jurisdiction clause in question and to give it due effect. It was common ground – and, indeed, the contrary could scarcely be argued – that by virtue of Phrase [1], construction was a matter of English law. D placed considerable weight on the decision of Brandon J in *The Eleftheria*, [1970] P 94 and an essay by Day on that case published in Day and Merrett, *Landmark Cases in Private International Law* (Hart 2023, Ch 10), and I entirely accept the very considerable importance that attaches to party agreement. The question is what does clause 14 actually provide in terms of that agreement?

17. Phrase [2] provides that "[e]ach party irrevocably submits for all purposes of this Agreement…to the exclusive jurisdiction of the English courts". C contend that this provision was determinative against D of their Application. Indeed, C went so far as to contend that because this jurisdiction was <u>exclusive</u>, this court is precluded from declining jurisdiction (even as a matter of discretion) by virtue of article 5 of the Hague Convention on Choice of Court Agreements 2005 (the **Hague Convention**). As to this:

    i) The words used in Phrase [2] are wide words and clearly can embrace claims relating to the Purchase Price. Indeed, Phrase [2] is the <u>only</u> means by which C can commence proceedings in relation to disputes (of whatever sort) concerning the Agreement. Where this occurs, D can perfectly easily accede to a claim so brought: indeed, Phrase [2]

provides for irrevocable submission to the jurisdiction by both C and D.

ii) The fact that Phrase [2] bites on both C and D highlights an obvious, but important, point. Viewing Phrase [2] purely on its own terms, it confers precisely the same jurisdictional rights and obligations on both C and D. It is, viewed in this way, a symmetric jurisdiction clause, and an exclusive one. Phrase [2] viewed on its own does fall within article 5 of the Hague Convention and – on this (blinkered) basis – the Application would fail.

iii) But it is obviously necessary to eschew a blinkered approach and to construe the Agreement as a whole, and in particular clause 14 as an internally consistent, single, contractual agreement between C and D as to jurisdiction, applicable law and enforcement of judgments. I remind myself that the "phrases" I am referring to in this Judgment are no more than an *ex post* label, used for convenience only. Clause 14 must be read as a whole.

iv) The opening words of Phrase [4] obviously derogate from what has gone before. The opening words of the phrase, "[n]otwithstanding the foregoing" can mean nothing else. More to the point, because Phrase [4] accords a limited jurisdiction to United States' courts, it is in particular a derogation from Phrase [2].

v) The nature of that derogation from or qualification of the rights contained in Phrase [2] is as follows:

a) So far as claims brought by C against D relying on Phrase [2] are concerned, the clause is conferring of an exclusive jurisdiction in the sense that C cannot contend for any other contractually conferred jurisdiction.

b) However, that is not the case where C is claiming against D. In such a case, D may (but need not) sue C in the courts of Los Angeles or New York, but solely in connection with Purchase Price claims. In short, so far as Purchase Price claims are concerned, D has a choice as to whether to litigate in England pursuant to Phrase [2] or in Los Angeles/New York pursuant to Phrase [4]. Obviously, so far as C is concerned, clause 14 is not an exclusive jurisdiction clause at all.

c) The question is whether D's choice as to where to litigate Purchase Price claims is eliminated where C have themselves commenced proceedings pursuant to Phrase [2]. Put another

way, the question is whether the effect of the combination of Phrases [2] and [4] is to create – as regards disputes regarding the Purchase Price – a "first-past-the-post" jurisdictional race, whereby the party that commences proceedings first obtains the other party's submission to that particular jurisdiction.

d) In my judgement this is an incorrect construction of clause 14. Not only do courts – for good reason – frown on parallel proceedings and the risk of inconsistent outcomes in different jurisdictions, this construction disregards and gives no meaning to the opening words of Phrase [4], "[n]otwithstanding the foregoing". If all that was intended was a limited jurisdictional choice in D, eliminated the moment C articulated a Purchase Price claim against D pursuant to Phrase [2], these words would not be necessary. That outcome – limited choice and jurisdictional race – would be achieved without these words.

e) It might be said that D would retain a choice of litigating Purchase Price claims in two jurisdictions (England and one of Los Angeles or New York) rather than just one, but this is an absurd construction. The result is a positive encouragement to parallel proceedings in relation to Purchase Price claims; and this construction disregards the significance of the submission to jurisdiction contained in both Phrase [2] and Phrase [4].

f) In my judgement, the purpose of these words is to enable Purchase Price claims to be litigated in one of England or the United States (specifically, Los Angeles/New York) at D's choice. That choice is unaffected by the commencement of Purchase Price claims by C in England pursuant to Phrase [2]. The effect of the words "[n]otwithstanding the foregoing" is to preserve that choice and to retract D's otherwise irrevocable submission to the English jurisdiction pursuant to Phrase [2].

18. It follows that although the English Proceedings were properly commenced by C and that service out was regular, that was only because D had not, at this stage, made their choice as to jurisdiction, which choice was conferred on D (but not on C) by Phrase [4]. Exercising that choice – by commencing the Los Angeles Proceedings within a reasonable time of the commencement of English Proceedings by C and by making the Application – crystallised the floating jurisdiction between England on the one hand and Los Angeles/New York on the other in favour of Los Angeles. I conclude that D is entitled to a stay as of right, but if I am wrong on this, I consider that this court should not exercise any jurisdiction which it may have.

19. I consider that some form of stay of the English Proceedings – with liberty to apply – is the appropriate order to make. It would obviously be inappropriate to allow the Particulars of Claim, as framed, to proceed without more. D cannot however, without at least risking a submission to the jurisdiction, apply to have the relevant paragraphs in the Particulars of Claim struck out. Strike out is not something provided for in CPR Part 11, and it is certainly not something I am prepared to do of my own motion.

20. On circulation of a draft of this Judgment, C made clear that they wished to proceed with all pleaded non-Purchase Price claims. Given the terms of Phrase [2], that desire must be respected and facilitated. In this regard, I should be clear that I do not regard the question of set-off (pleaded in paragraph 8 of the Particulars of Claim) to be a "Purchase Price claim" and I can see no reason why, notwithstanding D's invocation of a Los Angeles jurisdiction, paragraph 8 of the Particulars of Claim cannot continue in this jurisdiction.

21. Accordingly, there will be a stay – with liberty to apply – of all Purchase Price claims pleaded in the Particulars of Claim, which permits:

    i) The non-Purchase Price claims to proceed in this jurisdiction pursuant to Phrase [2] in clause 14;

    ii) The Los Angeles courts to consider the claims articulated by D before them; and

    iii) This court to review the stay in light of future developments pursuant to the liberty to apply.