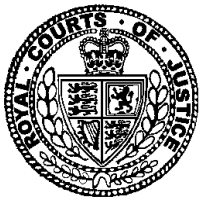

Neutral Citation Number: [2024] EWHC 324 (KB)

Case No: QB-2021-003847

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 February 2024

Before:

CLARE AMBROSE
(Sitting as a Deputy Judge of the High Court)

- -

Between:

IAIN SHOVLIN	**Claimant**
- and –	
(1) PAUL CARELESS	**Defendants**
(2) THE ESTATE OF NIGEL WARR (DECEASED)	
(3) MONEYEXPERT LIMITED	
(4) MONEYEXPERT HOLDING LIMITED	
(5) MONEY EXPERT INSURANCE SERVICES LIMITED	

- -
- -

Sebastian Kokelaar and Mark Baldock (instructed by **Richard Slade & Co Ltd**) for the **Claimant**
Saul Lemer (instructed by **DAC Beachcroft LLP**) for the **Defendants**

Hearing dates: 26, 29 & 30 January 2024

- -

Approved Judgment

This judgment was handed down remotely on 16 February 2024 at 10.30 by circulation to the parties or their representatives by email and released to the National Archives.

Clare Ambrose:

A Introduction

1. This is the trial of a claim to enforce a judgment made in the Superior Court of the State of California ("the Californian Court") and recorded in an order granting default judgment dated 9 June 2021 ("the Judgment"). The Judgment contained an order that the Second to Fifth Defendants[1] ("the Defendants") pay the Claimant the sum of US$10,066,353. The Claimant now seeks an order in this court that the Defendants pay that sum plus interest and costs.

2. The Claimant is UK citizen but has lived in the USA for many years and was made a director of the Third Defendant in around 2008. The Third to Fifth Defendants are English companies within the Money Expert group which is a price comparison website business. The late Mr Nigel Warr was the chief executive and a significant shareholder of the Third Defendant. The First Defendant was a business partner of the Third Defendant but the claim against him was struck out. There is an underlying dispute arising from events that mainly took place in 2008.

3. However, the dispute before me is as to whether the Californian Court is a court of competent jurisdiction because the Defendants voluntarily submitted to that court's jurisdiction. The Claimant's case is that both as a matter of Californian and English law the Defendants voluntarily submitted by appearing (through their attorney) at a hearing on 9 February 2019 ("the Prove Up Hearing") and arguing that his claim against them should be dismissed for want of prosecution.

B The English law background

4. The claim is an action on the Judgment brought at common law, and is not made under any treaty or statute providing for enforcement. It was common ground that the Judgment met the common law requirements of being a) for a definite sum of money and b) final and conclusive. The issue in dispute was as to whether the Claimant met the further requirement that the Californian Court had jurisdiction over the defendant as determined by the English conflict of law rules of international jurisdiction (*Dicey, Morris & Collins on the Conflict of Laws*, 16th Edition, Rules 46-47).

5. The Claimant alleged that the Californian Court had jurisdiction on grounds of the Defendants' voluntary submission, and his case depended on whether there was a submission by way of voluntary appearance. Consent or unequivocal waiver will be

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[1] The late Nigel Warr was named as a defendant in the Judgment but he died in 2021 and his estate is named as a defendant in these English proceedings. For convenience a distinction is not drawn between them hereafter, but he (and not his estate) was party to the proceedings before the Californian Court.

the underlying rationale for submission on this ground. This is explained by Philips J in *Golden Endurance Shipping SA v RMA Watanya SA, The Golden Endurance* [2016] EWHC 2110 (Comm) [41], adopting the explanation from *Briggs, Civil Jurisdiction and Judgments,* para 7.52 of the 6th Edition:

> "*as a matter of theory, a party who voluntarily appears or participates in proceedings is considered by the common law to have accepted an offer from the opposing party who commenced the proceedings to accept the jurisdiction and be bound by its judgment. The touchstone of submission on this basis is therefore consent, although the question of whether consent has been given is to be judged objectively.*"

6. The important aspects of the English law on voluntary submission were not controversial:

   a) The onus lies on the claimant seeking to enforce the judgment of a foreign court at common law to prove the competence of such court (*Adams v Cape Industries PLC* [1990] 1 Ch 433, 550).

   b) Both sides referred to Lord Collins' explanation of the applicable test in *Rubin v Eurofinance SA* [2013] 1 AC 236.

> "*159 The general rule in the ordinary case in England is that the party alleged to have submitted to the jurisdiction of the English court must have taken some step which is only necessary or only useful if an objection to jurisdiction has been actually waived, or if the objection has never been entertained at all: Williams & Glyn's Bank plc v Astro Dinamico Cia Naviera SA [1984] 1 WLR 438, 444 (HL) approving Rein v Stein (1892) 66 LT 469, 471 (Cave J). "*
>
> *160 The same general rule has been adopted to determine whether there has been a submission to the jurisdiction of a foreign court for the purposes of the rule that a foreign judgment will be enforced on the basis that the judgment debtor has submitted to the jurisdiction of the foreign court: Adams v Cape Industries plc [1990] Ch 433, 459 (Scott J) and Akai Pty Ltd v People's Insurance Co Ltd [1998] 1 Lloyd's Rep 90, 96—97 (Thomas J); see also Desert Sun Loan Corpn v Hill [1996] 2 All ER 847, 856 (CA); Akande v Balfour Beatty Construction Ltd [1998] IL Pr 110; Starlight International Inc v Bruce [2002] IL Pr 617, para 14 (cases of foreign judgments) and Industrial Maritime Carriers (Bahamas) Inc v Sinoca International Inc (The Eastern Trader) [1996] 2 Lloyd's Rep 585, 601 (a case involving the question whether the party seeking an anti-suit injunction in support of an*

English arbitration clause had waived the agreement by submitting to the jurisdiction of the foreign court).

161 The characterisation of whether there has been a submission for the purposes of the enforcement of foreign judgments in England depends on English law. The court will not simply consider whether the steps taken abroad would have amounted to a submission in English proceedings. The international context requires a broader approach. Nor does it follow from the fact that the foreign court would have regarded steps taken in the foreign proceedings as a submission that the English court will so regard them. Conversely, it does not necessarily follow that because the foreign court would not regard the steps as a submission that they will not be so regarded by the English court as a submission for the purposes of the enforcement of a judgment of the foreign court. The question whether there has been a submission is to be inferred from all the facts."

c) The same general rule applies whether the court is looking at the question of voluntary submission to an English court or a foreign court.

d) A modern and succinct way of stating the *Rubin* test is to ask whether there has been an unequivocal representation by word or conduct that objection is not taken to the relevant jurisdiction.

e) The Claimant acknowledged that the test set out in *Rubin* meant that relevant conduct must be unambiguous and unequivocal.

f) The court must look at all the circumstances and the totality of the conduct.

g) The assessment of the defendant's conduct must be undertaken objectively, sometimes said to be from the perspective of the disinterested bystander.

(On all these points see *Rubin* [159-161] *PJSC Bank Finance and Credit v Zehvago* [64, 66], *SMAY Investments v Sachdev* [2003] EWHC 474 (Ch) [41], *AELF MSN 242 LLC v Surinaamse Luchtvaart Maatschappij NV* [2021] EWHC 3482 (Comm) [66]).

h) Both parties also adopted the test of Goff LJ in *The Messianiki Tolmi* [1984] 1 Lloyd's Rep. 266, 270:

A party "*makes a voluntary submission to the jurisdiction if he takes a step which in all the circumstances amounts to a recognition of the court's jurisdiction in respect of the claim which is the subject matter of those proceedings."*

i) Both sides emphasised that the role of foreign law is important but not necessarily decisive.

Thomas J in *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90, 97 suggested that a foreign court's conclusion that a person has not submitted to its jurisdiction may well be decisive, whereas the converse does not necessarily follow.

> "*In The Atlantic Emperor (No. 2) regard was paid to the way the domestic law of the foreign court viewed the steps taken. In such cases the effect of the law of the foreign court may well be decisive; there would be some illogicality in an English court finding a person had submitted to the jurisdiction of the foreign court in circumstances in which that court would find he had not submitted. However the converse is not necessarily the case. Section 32(3) makes it clear that the English court is not bound by the decision of the foreign court that a person had submitted; it must follow that an English court is not bound by the characterisation of a step as a submission merely because the law of the foreign court would regard it as a submission.*"

However, as stated above in *Rubin* [161], the English court will not necessarily follow the foreign court's conclusion that there is no submission.

j) Section 33 of the Civil Jurisdiction and Judgments Act 1982 provides a statutory rule that a person shall not be regarded as having submitted by reason only of appearing to contest the jurisdiction of the court.

C The underlying factual background

7. The claim before me depended on whether the Defendants had submitted to the jurisdiction of the Californian Court rather than the merits of the dispute that gave rise to the Judgment. It is common ground that the Judgment was obtained in Californian proceedings that were not defended on the merits, and there has never been a determination of the merits. I accept the Claimant's argument that I need not investigate the underlying merits. The mere fact that the Judgment was entered in default makes it no less enforceable than a judgment on a defended claim, although the context of default proceedings will be part of the surrounding circumstances to be taken into account.

8. Both sides asked me to take into account that there was a complex and genuine substantive dispute that had given rise to the Californian Proceedings. The nature of that dispute was relevant background, even if no findings are made on disputed matters.

9. The Claimant was employed between around 2003 and 2009 by a company within a group called Technology Crossover Ventures ("TCV"). TCV invested around USD 50 million in the Money Expert group of companies ("Money Expert"). This led to his appointment as a director of the Third Defendant.

10. The Claimant maintains that the Defendants fraudulently manipulated the Third Defendant's accounts to induce the investment. He says that the First Defendant and Mr Nigel Warr then embarked on a defamatory campaign to discredit him which caused him to be sacked and lose business opportunities.

11. For their part, the Defendants deny the allegations of fraud and defamation and emphasise that although TCV sought compensation from Money Expert it did not press misrepresentation allegations and settled on terms that allowed Money Expert to keep the investment. They say that the Claimant was dismissed from TCV in around 2008 (and later removed as a director) for poor performance and that in breach of his duties as a director he tried to poach the Third Defendant's business partner, Mr Careless (the First Defendant) and the Claimant was not falsely discredited.

D The evidence

12. The court had the great benefit of a verbatim transcript of the Prove Up Hearing, and also of the hearing on 3 May 2021 at which the Judgment was entered. It also had a copy of the court docket and most of the documents filed in the Californian proceedings leading to the Judgment ("the Californian Proceedings").

13. The Claimant served a short witness statement from Jaime Bartlett who represented the Claimant in the Californian Proceedings from 2020 to 2022. The Defendants called Mr Anthony Ellrod who had acted as their attorney in the Californian Proceedings.

14. The Claimant called expert evidence on Californian law from Professor Stephen McG Bundy, Professor Emeritus at the University of California at Berkely School of Law and also a practising member of the California State Bar. His report was served on 28 September 2023. The Defendants called Judge Robert Bruce Minto (now retired) who sat from 2000 until 2013 as Judge of the Superior Court for the State of California for Los Angeles County. His report was served on 30 October 2023. These experts had a meeting on 6 December 2023 and they signed a 21 page joint statement on 18 and 19 December 2023.

15. Both experts were distinguished in their field although Judge Minto had stronger experience of practice in the Californian State Court system. They gave useful and balanced evidence and expressed their own independent opinions. They helpfully reached agreement on the key questions of law (even if they disagreed on how the law would be applied to the facts), also acknowledging areas where the law was unclear.

16. Two aspects of the joint statement merit comment. First, each expert presented their own detailed position on judicial estoppel which had only been raised as a distinct

matter in Judge Minto's report. It was efficient to include their respective views in a joint statement (and this reflected the case management order) but it may have been more appropriate for this evidence to be presented in reply reports. Having separate reply reports may have enabled a joint statement to be issued more promptly (as envisaged by paragraph 81 of the guidance on CPR Part 35). In addition, the experts could have been properly assisted by the solicitors on relevance on the content of a reply report without interfering with their joint statement.

17. The second aspect is more important and was taken into account in assessing the evidence. Prior to trial it emerged that Judge Minto had provided drafts of the joint statement to the Defendants' solicitors and they had provided comments. The Claimant objected that this was inappropriate as shown by authorities such as *BDW Trading v Integral Geotecnique Ltd* [2019] TCLR 1 and *Andrews v Kornospan Ltd* [2022] EWHC 479 (QB), and contrary to the King's Bench Guide at paragraph 10.48.

> "*Whilst the parties' legal advisers may assist in identifying issues which the joint statement should address, those legal advisers must not be involved in either negotiating or drafting the experts' joint statement. Legal advisers should only invite the experts to consider amending any draft joint statement in exceptional circumstances where there are serious concerns that the court may misunderstand or be misled by the terms of that joint statement. Any such concern should be raised with all experts involved in the joint statement.*"

18. The Claimant raised this in evidence and Judge Minto explained that there had been around seven iterations of the joint statement and he had sent at least two of them to the Claimant's solicitors, asking them to proof-read, format and make comments. He received comments on at least two occasions, mainly covering formatting and organisational changes but also on matters of relevance and asking rhetorical questions such as "what about this?" Comments on relevance included a suggestion that a page of content be removed. He said that he made no change to his opinion as a result of the comments but he had made a decision on some deletions based on relevance.

19. I accept Judge Minto's evidence that he had not understood that it was inappropriate to pass drafts back for comment, and do not criticise him. He had not seen the passage in the King's Bench Guide and was unfamiliar with the role of joint statements in this court (and how they are treated differently from the original report).

20. The Defendants' solicitors did not serve evidence but I was willing to accept their apology and explanation that they were unaware of the wording of the King's Bench Guide. They had not intervened in deliberate disregard of the rules. However, the King's Bench Guide is not an unexpected outlier – it reflects the authorities, the wording of CPR Part 35, the guidance on that rule and other King's Bench court guides (for example the TCC Guide referred to in the authorities).

21. The Defendants' lawyers should have known that their conduct was inappropriate and that it was contrary to CPR Part 35 which makes clear that lawyers may not attend the joint meeting or intervene in the meeting, and that the joint statement should be signed at the conclusion of the discussion or as soon as possible thereafter. This wording, and all the court guides and authorities make clear that the joint statement is to be drawn up by the experts alone, and it is not for the lawyers to contribute to its substantive content.

22. The obvious purpose of these rules is that the joint statement reflects solely the experts' views and does not become a matter of negotiation with lawyers, even if the lawyers might consider that they could improve the formatting, organisation or content. If an inexperienced expert needs guidance then it can be provided in advance of the meeting, or exceptionally after the meeting on an inter partes basis in accordance with the King's Bench Guide.

23. Making substantive comments on a single draft, let alone at least two iterations of the draft was obviously contrary to CPR Part 35, the case law and all guidance on the role of lawyers in a joint statement.

24. The Claimant rightly did not ask the court to exclude Judge Minto's evidence as this would have been a disproportionate sanction. However, it was entitled to object and may well have been placed at a disadvantage by reason of the breach of the guidance on the Claimant's side. The Defendants had declined to disclose any of the exchanges on grounds of privilege.

25. While Judge Minto was a balanced witness I assess his written evidence in the joint statement with caution (as requested by the Claimant) because I could not exclude the possibility that such evidence may have been influenced by the Defendants' inappropriate intervention in the joint statement.

E Outline context of Californian Law

26. The question to be decided involved a careful assessment of what took place in the Californian Proceedings. Before taking a deep dive into the details of what happened it is useful to outline some aspects and terminology of the Californian law that was engaged.

27. The term "motion" is still commonly used to describe what an English lawyer would now call an application.

28. Californian legislation provides a mandatory five-year rule requiring an action to be brought to trial within five years after the action is commenced ("the five year rule"). Section 583.310 of the Californian Code of Civil Procedure ("CCCP"), provides that:

> "*An action shall be brought to trial within five years after the action is commenced after the defendant*."

The sanction is dismissal for failure to prosecute, as set out in Section 583.360 of the CCCP which provides that:

> "*(a) An action shall be dismissed by the court on its own motion or on motion of the defendant, after notice to the parties, if the action is not brought to trial within the time prescribed in this article.*
>
> *(b) The requirements of this article are mandatory and are not subject to extension, excuse, or exception except as expressly provided by statute.*"

29. Californian law (like English law) provides a procedure whereby a party may obtain a judgment where the other side has defaulted in appearing to defend the claim. There is a first stage of default being entered administratively by a clerk, and then the claimant may request an entry of default judgment. The court will then list what is described as a prove up hearing at which it will consider whether to enter a default judgment and award damages. Where there is a claim in tort the claimant should set out its claim for damages in what is called a section 425.11 statement.

30. California, like other US jurisdictions, recognises a distinction between general and special appearances. The experts agreed that a general appearance operates as a submission to the personal jurisdiction of the court. A special appearance preserves a jurisdictional defence (although the scope of both these terms was in issue). The experts also accepted that the issue discussed at the Prove Up Hearing on failure to comply with the five-year rule was a non-jurisdictional issue.

F The Factual Background

31. The parties helpfully agreed a chronology and the matters set out below are largely common ground.

a) <u>2013: The Claimant started the Californian Proceedings</u>

32. The Claimant filed a complaint in the Californian Court on 24 May 2013. He had previously brought two sets of proceedings in the Californian Federal Court but these were dismissed in 2013.

33. The Claimant had originally sought injunctive relief and punitive damages in the Californian Proceedings but he ultimately asked for default judgment for compensatory damages on grounds of, *inter alia*, libel, slander and tortious interference with prospective economic advantage, breach of fiduciary duty, negligent misrepresentation, intentional infliction of emotional distress, fraud, fraudulent concealment, civil conspiracy and unfair competition. The claim for compensatory damages was initially not quantified except that damages were sought in an amount exceeding $25,000.

34. On 26 March 2014 the Californian State Proceedings were served.

b) <u>2014: First English Proceedings</u>

35. On 8 April 2014 the Defendants issued proceedings in the English High Court ("the First English Proceedings") seeking declaratory relief, and damages or equitable compensation. The Claimant sought a stay on grounds of inappropriate forum. The application was heard by Deputy Master Eyre on 6 October 2014 and he made an order describing the action as a mirror image of the Californian Proceedings. He made an order staying the action pending the result of the Californian Proceedings (but not declining jurisdiction) on grounds that "*Moneyexpert has announced that it will take no step in the California action beyond those steps needed to bring and maintain its challenge to that jurisdiction. This will ensure that any judgment obtained by Mr. Shovlin in California will not be enforceable in this jurisdiction: in other words, if Mr. Shovlin has any idea of enforcing the result of a Californian judgment in this jurisdiction, he will need to relitigate his allegations here as if the Californian judgment did not exist.*"

36. No further steps were taken in the First English Proceedings.

c) <u>The Defendants meanwhile also issue Motion to quash for lack of jurisdiction</u>

37. On 9 April 2014 the Defendants filed a motion to quash service of summons in the Californian proceedings citing lack of personal jurisdiction. On 1 July 2014 their motion to quash was heard and denied by the Hon Carol Overton. On 16 July 2014 the Defendants petitioned to appeal that decision, and the appeal was dismissed by the California Court of Appeal on 26 February 2015.

D) <u>2017-2019: Request for entry of default</u>

38. The Defendants did not file a defence in the Californian proceedings. On 20 September 2017 the Claimant served a form requesting entry of default against the Defendants.

39. On 23 May 2018 default was entered against all the Defendants except for Mr Nigel Warr and Mr Paul Careless (the default was backdated as filed on 20 September 2017).

40. On 13 December 2018 the Claimant requested judgment against the Defendants but not Mr Warr. It was supported by an 18 page declaration in support of damages by way of affidavit signed by the Claimant on 12 December 2018.

41. On 2 January 2019 the Claimant served notice of a prove up hearing on 4 February 2019, and this notice was served on the Defendants' attorneys.

42. On 22 January 2019 the Claimant served a 15 page document ("the pre-hearing brief") in support of its motion for entry of default judgment against all the Defendants, setting out the factual background, referring to Mr Warr having been served and also referring to the five year rule and an authority, *Hughes v Kimble* 5 Cal App 4th 59 ("*Hughes v Kimble"*), and this was served on the Defendants' lawyers.

e) <u>The Prove Up Hearing on 4 February 2019</u>

43. On 4 February 2019 there was a hearing (i.e. the Prove Up Hearing) before the Honourable Theodore C. Zayner ("the judge") who was based in the Californian State Court (County of Santa Clara) in a building in San Jose. The Claimant attended with two lawyers Mr Sandrock and Mr Croke. There was some debate as to whether the hearing was remote or in person. I accept Mr Ellrod's evidence that he attended by telephone from his office in Los Angeles but the other attendees were likely to have attended in person.

44. According to the transcript the hearing took around 18 minutes and the exchanges between the judge and Mr Ellrod lasted up to 2 minutes. The transcript records that the hearing started as follows:

> *MR. SANDROCK: Good afternoon, your Honor. Ryan Sandrock on behalf of plaintiff, and along with me is Patrick Croke and also Mr. Shovlin.*
>
> *MR. ELLROD: Good morning, your Honor. Anthony Ellrod specially appearing on behalf of defendants Nigel Warr, MoneyExpert Limited, MoneyExpert Holdings Limited and MoneyExpert Insurance Services Limited.*
>
> *THE COURT: All right. And, Mr. Ellrod, what's the nature of your special appearance here?*
>
> *MR. ELLROD: I was hoping to suggest to the Court that they consider whether this case should be dismissed under Code of Civil Procedure Section 583.360, Court's own motion. And the case that's directly on point is called Hughes versus Kimble, 5 Cal. App. 4th 59.*
>
> *MR. SANDROCK: Your Honor, if I may, there was a motion to quash filed in this case by Mr. Ellrod's clients.*
>
> *THE COURT: Yes, I was aware of that.*
>
> *MR. SANDROCK: And that was denied. And so I'm not sure of the nature of his appearance here. We're here on a prove-up, and I'm not sure how he can be specially appearing given the denial of that motion.*
>
> *THE COURT: All right. Well, maybe you can –*
>
> *MR. ELLROD: I don't have anything else to say. I'm not here to oppose any prove-up.*
>
> *THE COURT: Okay. And, Counsel, your brief references – or argues about impossibility and impracticability and contrary to the five-year -- I guess tolled a five-year statute. Was there ever any court finding that the five-year statute was tolled?*

MR. SANDROCK: No, your Honor, there was not. So in response to the citation to Hughes versus Kimble, Hughes versus Kimble says the time period between a default and a default judgment is not counted towards the five-year rule.

45. There was then a short discussion about the five-year rule and the judge then asked Mr Ellrod a question:

THE COURT: Okay. And Mr. Ellrod, do you have anything to say in your special appearance in response to that?

MR. ELLROD: Only that there's a period of over three years between the time that the motion to quash was denied and the request for entry to default was filed and then over a year after that before any judgment -- motion to enter judgment was entered, which I don't think is diligence, as that term is considered in the cases that [inaudible] position.

THE COURT: But you are arguing for mandatory dismissal; right?

MR. ELLROD: Yes.

THE COURT: Okay. So when do you submit that the maximum time period would have run or did run in this case for—after which the Court is obligated to dismiss the matter for failure of prosecution?

MR. ELLROD: Yes, I think it would have run on May 24th, 2018.

THE COURT: Okay. And that is—

MR. ELLROD: Five years after the filing date.

THE COURT: --just five years straight from the filing date.

MR. ELLROD: Right.

MR SANDROCK: So, your Honor, we would be happy to brief this. That's simply incorrect under that view.

46. Mr Sandrock added some short argument on the five-year rule and offered to serve a brief. The judge said he would probably take up the Claimant's offer to put in a brief and he also raised two matters, first that he had not seen all the files so he was going to bring the matter back anyway, and he also asked whether there was a statement of damages (with proof of service) because tort claims were being made and a statement of damages was required. Mr Sandrock told the judge there was no

such statement but asked whether the Claimant could vacate the default and file a statement and then proceed to prove-up from there, saying "*I suspect Mr Ellrod might claim a five-year rule problem with that, but there would not be. And we can brief on that.*"

47. The judge responded, "*if you're comfortable with that and comfortable with your position that you're going to brief, then we can proceed accordingly. I can issue that order. Counsel specially appearing certainly is -- I assume is going to reserve his rights to argue that mandatory dismissal should apply.*"

48. There was then some discussion on the procedure for the brief and damages statement, and the Claimant's counsel took instructions. The Claimant's counsel also discussed the timetable with the judge proposing a deadline of the 15 February 2019 for the brief. He then raised two matters, first that Mr Ellrod should not submit any argument and secondly on service:

> "*MR. SAND ROCK: One, I don't think Mr. Ellrod should be able to submit any argument given his special appearance here. He's already made his argument here, but I don't think it would be appropriate for him to submit a briefing on it. As we set forth in the papers, one of the big issues in this case, why it's taken so long, is what his clients have done to resist jurisdiction of this Court. And I don't think he can have it both ways, be here and not here.*
>
> *THE COURT: Well, no, I think that's certainly – you find yourself in a delicate procedural place, to say the least. I mean, your clients are in default. Technically, there's no – I know you stated a special appearance, but technically there's no right to a hearing and argue substantive law or procedure in this instance.*
>
> *MR. SANDROCK: And one more point on that, your Honor. The 425.11 statement, if we were – if the Court were to give us leave to serve that, I bet that he's going to argue that we have to serve it through the Hague Convention, notwithstanding the fact that he's here representing his clients, which I think is inappropriate. If he's here, which he seems to be, we should be able to serve it on him. Again, he can't have it both ways*.
>
> *THE COURT: How was the initial process, service of process –*
>
> *MR. SANDROCK: Through the Hague Convention.*
>
> *THE COURT: So the jurisdiction was already obtained at that instance and argued against by counsel's office. Well, let's add to your briefing and tell me if you think you need more*

time to do this. I think that I have to consider that as well. And I'd appreciate some briefing on whether, under these particular circumstances, which are somewhat unique – that further service by the Hague Convention of both the request to enter default and 425.11 statement would be required, or why not, which is what your argument is.

MR. SANDROCK: Okay. Your Honor, we can certainly do that.

THE COURT: Okay. So the 15th is still good for all then?

MR. SANDROCK: Yes.

THE COURT: All right. Then that will be the order for the briefing filed with the Court by February 15th, 2019. Those limited issues will be tendered to the Court, will be submitted to the Court for a decision at that time. And the Court will set another hearing and give notice to counsel if and as necessary. Another hearing on those issues, that is."

49. The judge then closed the hearing, explaining that it would not be necessary to set another hearing but the Prove Up Hearing could be restored.

50. On 15 February 2019 the Claimants served a document entitled, "Supplemental Memorandum in response to Court's questions at February 4, 2019 hearing" ("the post-hearing brief"). The Claimant also served a proposed order in draft, and a declaration of Mr Sandrock. These were all served on the Defendants' lawyers. The 14 page post-hearing brief covered the five year rule and the Claimant's request to serve a statement on damages. It also addressed service and stated:

"*If a party has not appeared in the action, the statement of be served in the same manner as a summons" Section 425.11(d)(1). The question then is whether defendants have appeared. If a defendant confines its participation in the action to objecting to lack of jurisdiction over the person, there is no general appearance. Section 418.l0(e)(l). This means that defendants' conduct prior to losing the motion to quash did not constitute a general appearance. Here, however, defendants' counsel has continued participation even after losing that motion and subsequent to his clients' default. Counsel appeared at least twice by telephone at case management hearings, on March 29 and November 17 of 2016. Participation in a case management can be sufficient to constitute a general appearance in itself. See 28 Mansour v. Superior Court, 38 Cal. App. 4th 1750, 1756-57 (1995); In re Vanessa Q., 187 Cal. App.4th 128, 135 (2010). Further, counsel made arguments to the Court on February 4, 2019. Finally, section 418.10, subdivision (e)(2) provides that if a*

motion to quash is denied and a writ filed, the defendant "is not deemed to have generally appeared until the proceedings on the writ petition have finally concluded." Here, the writ proceedings have concluded and therefore there is authority that defendants have generally appeared.

Plaintiff therefore will serve counsel for defendants with the section 425.11 statement. However, in order to prevent defendants from contesting judgment in the future and recognizing the complexity of the law on this issue, Plaintiff will also serve defendants through the Hague Convention procedures. If service through the Hague Convention threatens delay or the clock is approaching the revised five-year deadline, Plaintiff may seek the Court's ruling on the general appearance and service issue. In addition, Plaintiff may raise the general appearance and service issue should defendants continue participation in the matter. Defendants have defaulted and resisted jurisdiction. They therefore are not properly before the Court. Defendants represented to the UK court that they would take no step in California beyond the challenge to jurisdiction. See Sandrock Decl. Ex. E at 2:20. Plaintiff assumes they will abide by this promise.

…

The Claimant also made general submissions on whether he should be permitted to pursue his judgment stating as follows:

"*Defendants' only strategy through the case has been to avoid and ignore the California courts.*

…

Defendants appear to have decided that they never will appear to contest this matter in a California court, no doubt worried that doing so would make them more vulnerable to enforcement of the judgment in the UK. Plaintiff is not aware of any case in which a court exercised discretion under [part of the five-year rule] to benefit a party that is resisting the jurisdiction of California courts. Five year motions are typically brought by the defendants that are actively litigating matters in California courts, not defendants who claim the right (contrary to the Court's ruling) of resisting all litigation in California. Defendants here have made clear that they will never participate in a trial. Their stated plan is to accept a default and challenge it in the UK. Given these facts, and based on Court's understanding of the procedural history of this case, Mr Shovlin should be allowed a final attempt to

prove-up his damages and then attempt to enforce the judgement."

51. The declaration of Mr Sandrock of the same date referred to the First English Proceedings and attached the order of Deputy Master Eyre referred to above.

f) May 2019: Default vacated

52. On 15 May 2019 Judge Zayner made the proposed order stating that the default was vacated and ordering the Claimant to set forth his damages in a section 425.11 statement or amended complaint, serve these documents and obtain a default. He also made rulings as to the number of days counting for the calculation of the five-year rule.

53. On 10 October 2019 the Claimant filed a revised complaint dated 4 October 2019. This was served on the Defendants and later a request for entry of default was made.

g) February 2020: Default entered on revised complaint

54. The clerk's entry of default was entered on 7 May 2020 and dated 28 February 2020. On 18 September 2020 the Claimant filed a declaration in support of its motion for entry of default judgment and also put forward a draft order. On 12 February 2021 the court listed a remote trial setting conference in order to schedule a prove-up hearing, which was later attended by the Claimant's lawyers and Mr Ellrod on 5 April 2021. The court set up a prove up hearing, 1 hour time estimate, listed for 3 May 2021.

55. On 29 April 2021 the Claimant submitted its prove up summary ("the Prove Up Summary") which was served on the Defendants.

h) Further prove up hearing on 3 May 2021

56. A remote hearing took place on 3 May 2021 before the Hon. Beth McGowen, Mr Ellrod attended and introduced himself as attending by special appearance. The Claimant and his lawyers also appeared. The Claimant was sworn in, the judge stated that she accepted the declarations and evidence submitted, and entered judgment. On 9 June 2021 the court issued the Judgment signed by the Hon. Beth McGowen.

57. In October 2021 the Claimant issued this claim to enforce in the English court.

G The Issues

58. The essential issue is as to whether the conduct relied upon by the Claimant constitutes voluntary submission to the jurisdiction of the Californian Court as a matter of English law. To answer that question it is necessary to consider that conduct in its context. Taking account of Californian law, the most relevant question is whether the Defendants' counsel's conduct at the Prove Up Hearing would amount

to a general appearance (and therefore a submission to jurisdiction) under the law of California. There was a further question as to whether under Californian law the Defendants could invoke the doctrine of judicial estoppel and whether this would be relevant to the question to be decided under English law.

H The Claimant's case in outline

59. The Claimant emphasised that the Defendants made a positive choice: they could have taken no further part in the Californian proceedings after their challenge to jurisdiction failed, and their counsel could simply have said that he was attending only as an observer. Instead, they made a targeted attempt to argue that the claim should be dismissed for want of prosecution, and this was a step in their interests, that they would have taken the benefit of. Mr Ellrod asked the Californian Court to dismiss the claim on the merits and the Defendants thereby actively participated in a manner which recognised that the Californian Court had jurisdiction to hear and determine the claim.

60. The Claimant relied on Professor Bundy's evidence that Mr Ellrod actively and deliberately invoked the court's authority to decide a non-jurisdictional matter that had nothing to do with jurisdiction, which had already been finally resolved. This met the test for a general appearance and could not be treated as a special appearance since the authorities make clear that a special appearance is an appearance solely for the purpose of challenging jurisdiction. Special and general appearances are the flip side of the same coin, and there is no third category of appearance. The Claimant contended that any appearance that is not a special appearance made for the sole purpose of objecting to the court's jurisdiction will be treated as a general appearance. Accordingly, Mr Ellrod's appearance to raise questions on what the experts agreed was a non-jurisdictional matter can only have been a general appearance.

61. The fact that the Defendants were in default did not preclude them from being treated as actively participating since default had not been entered against Mr Warr. In any event, the judge had exercised his discretion to allow the Defendants to participate despite their default. The judge had rejected their attempt to get the case dismissed and had vacated the default.

62. There was no need for the judge to rule on whether there had been a general appearance and the Claimant in its post-hearing brief had adopted the position that there was a general appearance at the prove up hearing. The Defendants knew from the Claimant's post-hearing brief that he was saying that they had made a general appearance at the Prove Up Hearing. They could have defended the amended complaint but instead allowed default judgment to be entered.

63. It was significant that the Defendants never asked for an opportunity to serve a brief and Mr Ellrod accepted that he never had any intention to do so because this would have amounted to a general appearance. The Claimant also said that the Defendants could have issued a formal motion to dismiss but had instead tried to go under the radar and raise the matter informally, but their conduct amounted to a general

appearance whether their arguments were made orally or put in a written brief or a formal motion to dismiss.

64. The Claimant's primary position (as set out in more detail below) on judicial estoppel was that it was irrelevant, but in any event the doctrine would not apply to preclude a finding that the Defendants had submitted to the Californian Court's jurisdiction.

65. While the Defendants' arguments at the Prove Up Hearing may have only taken a couple of minutes they were a very significant intervention that could have brought the Claimant's action to an end on the merits. The arguments met both the English and Californian test for submission since they could only be necessary or useful if the Californian Court had jurisdiction and they presupposed that the court had jurisdiction.

I The Defendants' case in outline

66. The Defendants relied on Judge Minto's evidence in contending that Mr Ellrod's conduct at the Prove Up Hearing did not amount to active participation that recognised the jurisdiction of the court to proceed. They pointed to a number of features that showed that the brief exchanges that Mr Ellrod engaged in did not amount to a general appearance.

a) They were not entitled to participate in the Prove Up Hearing because they were in default and the judge knew that.

b) Even if they had been entitled to participate, Mr Ellrod did no more than bring the Californian Court's attention to its power to dismiss of its own motion under the five-year rule, and he did not oppose the prove-up or seek to add anything further.

c) Mr Ellrod said he was appearing specially and did not make any type of motion, and his exchange lasted no more than two minutes.

d) While Mr Ellrod was entitled to be present he was obliged as a matter of ethics to respond to the judge's further enquiries.

e) The Californian Court would find that the Claimant was estopped from arguing that the Defendants made a general appearance (as addressed in more detail below).

J Discussion on the application of Californian Law

J.1 <u>Did the conduct of the Defendants' counsel at the Prove Up Hearing amount to a general appearance under the law of California?</u>

67. It was common ground that the Defendant's conduct prior to the Prove Up Hearing and afterwards did not amount to a general appearance. During the hearing Mr Ellrod put forward short oral argument suggesting that the claim should be dismissed under the five-year rule but he said he was not disputing the prove up and did not

ask to serve a brief on the arguments raised. The question was whether this conduct amounted to a general appearance.

68. Most of the factual events and principles of Californian law were uncontroversial but a number of issues arose. There was considerable debate as to the significance to be given to the Defendants being in default and also as to whether the Defendants had raised a motion at the Prove Up Hearing. These were related issues and linked to the arguments on judicial estoppel. My overall conclusions are dealt with following discussion of these areas.

The test for a general appearance

69. The starting points on the Californian law on general and special appearance are set out in the outline above. I agree with Professor Bundy that the determination of whether there has been a general appearance is not merely a matter of discretion; it is a question of mixed fact and law. The experts agreed that:

a) The label counsel uses for his appearance will not be decisive.

b) Mere attendance at a hearing, or counsel introducing himself at a hearing as attending by way of special appearance, would not in itself amount to a general appearance.

c) The test for a general appearance is formulated in different ways including as, "participating in an action in a manner which recognises the authority of the court to proceed", "seeking, taking, or agreeing to some step or proceeding in the cause beneficial to himself or detrimental to the plaintiff, other than one contesting the jurisdiction only" (*Mansour v Superior Court* (1995) 28 Cal. App. 4th 1750, 1756, *Creed v. Shultz* (1983) 148 Cal. App. 3d 733, 74).

d) The legal standard for a general appearance requires active participation in the proceedings by a party or its counsel.

e) A general appearance is not necessarily a formal or technical step in the proceedings.

70. The Californian authorities analyse the question as going to whether participation operates as consent to the court's exercise of jurisdiction (e.g. *Marriage of Obrecht* 245 Cal.App.4th 1 (2016)). The courts also maintain that a party cannot take advantage of being a party and escape the responsibilities (*Creed v Schultz* 148 Cal.App.3d 733 (1983)).

71. Both experts acknowledged that there was no authority on Californian law as to whether counsel's request that the court act on its own motion on a non-jurisdictional issue would be enough to amount to a general appearance. Taking account of the experts' agreed tests and the general tenor of the Californian authorities from which that test is derived (including that a general appearance need not be a formal step) I am satisfied that asking a court to act of its own motion on such an issue would, in principle, be conduct that could amount to a general appearance.

72. However, the authorities also emphasise that the determination of whether a party has made a general appearance will depend on an objective assessment of the particular facts and the context in which such an argument is made.

The test for a special appearance and relevance of stating a special appearance

73. There was an issue as to the whether the term special appearance was to be construed narrowly as an appearance for the sole purpose of contesting jurisdiction. Professor Bundy acknowledged that this was the traditional definition.

74. The experts also noted that California has codified its special appearance procedure for jurisdictional challenges and there are specific statutes providing that raising a defence of delay in prosecution will not be treated as a general appearance in certain situations. It was common ground that the statutory ways of raising such a defence by way of special appearance were not applicable here.

75. I accept Judge Minto's evidence that counsel use the term "special appearance" in a broader way than referring to an appearance made solely for the purpose of contesting jurisdiction. The term may cover broader situations including where a jurisdictional defence is being preserved and also where counsel has not been formally retained or is monitoring the matter. This approach was reflected by the fact that Mr Ellrod had attended at the further prove up hearing on 3 May 2021 and introduced himself as specially appearing for the Defendants.

76. At the Prove Up Hearing the Defendants' counsel, Mr Ellrod, maintained that he was "specially appearing" on behalf of the Defendants. This indication was not determinative on the question raised (i.e. whether there was a general appearance) because the Californian court will not characterise conduct based on its label (e.g. *Creed v Schultz*) . However, I accept Judge Minto's evidence that it was a relevant factor against finding a general appearance because it was consistent with Mr Ellrod's other conduct (including saying he was not opposing the prove up and not seeking to serve a brief on any of the matters) suggesting that the Defendants were preserving a jurisdictional defence, and not making a motion or seeking to participate actively.

The position of Mr Nigel Warr

77. The Claimant relied on the fact that default had not been formally entered against Nigel Warr at the date of the Prove Up Hearing so he was under no disability and his default could not be relied upon to suggest that he had not participated actively at the Prove Up Hearing. The Defendants objected that the point was not pleaded (indeed the Claimant's positive case was that following the dismissal of the jurisdictional challenge in California he was entitled to apply for judgment in default against all the Defendants). However, I allowed the point to be made because it could be fairly addressed.

78. Default was not entered originally against Mr Warr because the clerk entering default against the other Defendants made an administrative error and mistakenly cited lack of proof of service on Mr Warr as a reason for not entering default. This error was

referred to in the Claimant's pre-hearing brief in which the Claimant maintained that Mr Warr had been served and default judgment should be entered against him. Mr Warr's position was not mentioned again at the hearing, or in the post-hearing brief or the court's order. Even though there was evidence that default had mistakenly not been entered against him, Mr Warr was treated as in exactly the same way as the other Defendants, and took the same position.

79. I reject the Claimant's suggestion that Mr Warr would have been able to participate as an active party at the Prove Up Hearing because default had not been entered against him. This was inconsistent with the Claimant's positive case in its pre-hearing brief and also his attorney's conduct at the Prove Up Hearing which treated Mr Warr, like all the Defendants, as having made a special appearance and not entitled to participate by way of making a brief. There was no evidence to suggest that the clerk's error would have been sufficient to allow Mr Warr to take active part and be treated differently.

Did the Defendants raise the five-year rule as a motion?

80. The parties disagreed as to whether the issue of non-compliance with the five-year rule was raised as a motion by the Defendants. This issue mattered because it was common ground that if a motion had been raised then that would have amounted to a general appearance.

81. Judge Minto considered that no motion had been issued because it would have had to have been in writing, filed and given with notice, and the Defendants' default precluded them from making a motion. Professor Bundy considered that the judge had treated the Defendants' conduct as a "dismissal motion" and a motion can be made informally.

82. The Claimant maintained that the Defendants had moved the Californian Court to dismiss the claim and the judge had agreed to entertain the motion (referring to the dismissal motion which must be regarded as the Defendants' motion). The Defendants had raised the five-year rule of their own initiative. The matter could not be treated as being raised of the court's own motion, since the court was acting at the Defendants' prompting.

What is the effect of default being entered against the Defendants?

83. The Prove Up Hearing was requested on grounds that the Defendants were in default under Californian law and default had been entered at the Claimant's request. I accept Judge Minto's evidence that a defendant against whom default has been entered is "out of court" and barred from taking active part or "advancing any contention on the merits". That party cannot take any further steps affecting the Claimant's action until the default is set aside in a proper proceedings. (See *Devlin v. Kearny Mesa* (1984) 202 Cal.Rptr. 204, *Rios v Singh* 65 Cal.App.5th 871 (2021)). The Court of Appeal in *Singh* explained that after default is entered the defendant is no longer an active party in the litigation.

84. Professor Bundy accepted that an entry of default terminates a defendant's right to take any further affirmative steps in the litigation until either its default is set aside or a default judgment is entered. While the defaulting defendant can attend at a prove up hearing, it does not have an enforceable right to participate in that hearing. The party in default would be barred from participating, whether opposing the prove up or bringing a motion to dismiss for delay, and the Californian Court would be bound to stop a party doing so.

85. Judge Minto emphasised that there are very important consequences of a party having made a general appearance, and such an appearance at a Prove Up Hearing would have serious implications since that party would then be entitled to participate, and they could, in principle, contest the case on the merits, serve evidence or call witnesses, and ultimately oppose judgment on the sums claimed. He said that if that had been the intended outcome then a ruling as such should have been sought by the Claimant.

86. A general appearance would also affect the service required following a prove up and create uncertainty in that respect (as acknowledged by the Claimant at the Prove Up Hearing).

87. Professor Bundy acknowledged that the Defendants' default would put them in "a delicate procedural place" but he did not address the inconsistency of them being treated as having made a general appearance and yet still being in default (or if not treated as in default what they would then be entitled to do).

88. He accepted that under Californian law a judge should not allow a party against whom default has been entered to participate as an active party. The judge cannot be assumed to have done so at the Prove Up Hearing, especially where his concluding comments suggested that he had accepted that the Defendants were in default and that it would be inappropriate for them to submit a brief.

89. The judge had listened to Mr Ellrod's short argument but there was no basis to suggest that this would mean that the Defendants were no longer treated as in default, especially since the judge had concluded that they were in default and had correctly proceeded on that basis. While the Claimant suggested that the judge could have refused to hear Mr Ellrod, neither expert (nor the Claimant) criticised his approach. The Claimant had also supported the judge's conclusion in its post-hearing brief.

90. Professor Bundy fairly acknowledged that he could not say whether a Californian Court would have discretion to allow a party to participate and be an active party, notwithstanding that default has been entered against it. Judge Minto, equally fairly, acknowledged that a judge probably would have discretion to hear arguments from a party in default.

91. The experts accepted that there was no authority as to whether an appearance on a non-jurisdictional issue by counsel for a party against whom default has been entered can be a general appearance. Ordinarily Californian treats that person as "out of court" and there would be unfairness, uncertainty and inconsistency in treating such

a party as taking an active part and yet also remaining in default, especially where no ruling or notice is given to either side.

92. Based on the judge's conclusions and his order, my view is that the Defendants remained as Defendants against whom default had been entered until the default was vacated on 15 May 2019, and both parties proceeded on that basis. Mr Ellrod had not challenged the judge's view that his clients were in default and had no right to a hearing. Under Californian law the Defendants were not entitled to make a motion, serve a brief or evidence or take part as an active party at the Prove Up Hearing.

93. The Claimant's lawyers had themselves denied that the Defendant's interventions meant that the Defendants should be allowed to participate as an active party. They told the judge it would be inappropriate to allow the Defendants to submit a brief because they had specially appeared and cannot *"have it both ways, be here and not here*". The judge accepted this and made directions only allowing the Claimant to serve a brief, also relying on the related consideration that the Defendants were in default.

94. The Claimant's lawyers confirmed in their post-hearing brief that "*Defendants have defaulted and resisted jurisdiction. They therefore are not properly before the Court".* This was relevant to service but also as to the way the court was being asked to deal with the case. They relied on the Defendants having represented to the English court that they would not take a step in the Californian proceedings but instead resist enforcement in the UK. They stated that the Claimant was assuming that the Defendants would abide by this representation, and he should be entitled to attempt to prove up his damages by way of a default judgment. The Claimant was deliberately choosing to proceed on the basis that default had been entered against the Defendants and also asked the court to proceed on that basis.

95. On service the Claimant's lawyers also raised the question of whether there had been a general appearance at the hearing indicating that the Defendants had participated. However, as Mr Kokelaar fairly acknowledged, there was an element of the Claimants' lawyers trying to have their cake and eat it. They only reserved the right to make an application for a ruling on that question and refrained from asking for a ruling. In their Prove Up summary they subsequently maintained that the Defendants had ignored the Californian proceedings.

96. It would have been open for both sides to seek a ruling as to whether the Defendants had made a general appearance but the burden of proof in establishing a voluntary submission lay with the Claimant. No inference could be drawn from the Defendants having not made a formal motion or applied for a ruling; their inactivity was consistent with the position they had put forward at the Prove Up Hearing and them having remained in default.

97. Judge Minto had rightly given the nature of the Defendants' participation and their position in default strong weight in concluding that even if Mr Ellrod's conduct was capable of being treated as a general appearance under Californian law (a matter upon which the experts agreed there was no authority), it would not be so treated.

J.2 Would the Claimants be estopped under Californian law from arguing that the Defendants made a general appearance at the Prove Up Hearing?

98. Judicial estoppel had been raised by Judge Minto in his expert report and had been addressed at length by both experts in the joint statement. The Claimant objected that the argument was not open to the Defendants but that in any event it was a bad point on the merits and also irrelevant. The Defendants maintained that the matter did not need to be pleaded but following their opening I asked them to put forward an amended case on judicial estoppel without deciding whether it was required. The Claimant correctly agreed to allow the amended case on judicial estoppel. That case did not depend on detriment or prejudice and the Defendants' submissions on the Claimant having been advantaged by his conduct of the Californian Proceedings were largely irrelevant.

The Defendants' position

99. In alleging that the Claimant would be estopped under Californian law from arguing that the Defendants made a general appearance the Defendants alleged that the Claimant had successfully taken several matters which were totally inconsistent with the Claimant's current position that there was a general appearance.

    a) At the Prove Up Hearing the Claimant's lawyer took the position that the Defendants had not made a general appearance, and this was successful as the judge responded to that point and the Defendants were prevented from filing a written brief.

    b) In the Claimant's memorandum in support of his motion for entry of default judgment dated 18 September 2020 the Claimant took the position that the Defendants had not made a general appearance, referring expressly only to their lawyers having appeared specially.

    c) In the proposed draft order for default judgment the Claimant asked the court to order that "*Defaulting Defendants were properly served but have failed to timely appear before this Court*". The Defendants say that this does not refer solely to the amended complaint.

    d) In the Prove Up Summary dated 29 April 2021 the Claimant stated that "*the Defaulting Defendants have totally ignored these proceedings*" and later stated that "*Defaulting Defendants are well aware of this matter – rather than contesting the allegations they disappeared after their bid to contest jurisdiction and to assert forum non convenience failed*."

The Claimant's position

100. The Claimant argued that whether the Californian Court would be estopped was entirely irrelevant to the question as to whether there was a voluntary submission at English law. The Defendants did not allege that the Claimant was estopped from asserting in these English proceedings that the Defendants' conduct amounted to a submission to the jurisdiction (whether under Californian or English law). The

judicial estoppel argument also proceeds on the premise that there was a submission and it is no answer that a Californian Court would now find that the Claimant is estopped.

101. In addition, the argument failed on the merits since the judge had not accepted the Claimant's position on item (a) but had instead made his decision on the basis that the Defendants were in default. The Defendants were on notice from the post-hearing brief that their counsel's conduct at the hearing could constitute a general appearance.

102. On items (b) and (c) the Claimant's position was ambiguous and not totally inconsistent. The statements could be construed as merely referring to the Defendants' special appearance on its jurisdictional challenge, or their failure to appear in response to the amended complaint.

103. On item (d), the question of whether or not there was a general appearance at the Prove Up Hearing (and the Claimant's statements as to the Claimant's earlier participation) were totally irrelevant to whether the Claimant was entitled to judgment in default on its amended complaint.

Conclusion on judicial estoppel

104. The experts agreed that under California law judicial estoppel applies when: *"(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.*" (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183). Prejudice is not a requirement for judicial estoppel although fairness of the proceedings is relevant since the Californian Court of Appeal in *Jackson* explained, "*The gravamen of judicial estoppel is not privity, reliance, or prejudice. Rather it is the intentional assertion of an inconsistent position that perverts the judicial machinery*".

105. On the first pleaded item (a) relied upon by the Defendants as giving rise to judicial estoppel, I considered that the Californian doctrine would apply. There was a clear inconsistency between the position taken by the Claimant at the Prove Up Hearing, namely that given Mr Ellrod's special appearance it would be inappropriate for him to submit a brief, and what the Claimant is now contending took place, namely a general appearance. The judge considered that there was a further ground for declining to allow a brief (namely that the Claimant was in default) but this was closely related and wholly consistent with the Claimant's position which was that they cannot put in submissions because they cannot "*have it both ways, be here or not here*". The Defendants had been successful in asking the court to decline to allow any brief on grounds that there had only been a special appearance.

106. On items (b) and (c) I accept the Claimant's argument. On item (d) there was total inconsistency between the position being taken by the Claimant and the position now taken. That inconsistency was of relevance to the court's decision to enter judgment

in default and there was no evidence to suggest that prior participation by the Defendants would have been irrelevant to the court's decision to award damages in the sum requested. Indeed, the Claimant's inclusion of these statements in its Prove Up Summary suggested that such matters were relevant.

107. Accordingly, if under Californian law the Defendants' conduct could amount to a general appearance then I would have concluded judicial estoppel applied to preclude the Claimant from arguing that case. The Defendants could point to totally inconsistent positions taken by the Claimant such that under Californian law he would be estopped from arguing that the Defendants made a general appearance.

108. Some of the arguments on judicial estoppel overlapped with the more general debate about the nature of the Defendants' appearance. The doctrine is also relevant because the English law test of whether a party has submitted requires the English court to look at all the circumstances and the whole context, including the position taken by the foreign court as to whether there has been a submission. The English court will not look solely at the conduct relied upon and exclude all matters arising subsequently (or previously) that assist in its characterisation, it must look at the conduct in its context and also at the totality of the conduct.

109. The Californian doctrine of judicial estoppel was about what arguments could be made and did not appear to be premised on the Claimant having necessarily been right about there being a general appearance. In any event, the fact that a Californian Court, applying its doctrine of judicial estoppel, would not accept that the Defendants had made a general appearance would be a very relevant consideration to the question under English law.

J.3 Overall conclusions on the Defendants' conduct under Californian law

110. A motion probably can be made informally under California law in certain situations and where procedurally fair. However, the Defendants did not move the Californian Court at the Prove Up Hearing and the judge did not entertain a motion from them.

a) The Claimant's lawyers had raised the five-year rule (and *Hughes v Kimble*) in their pre-hearing brief since the court has a mandatory duty to dismiss an action falling within that rule. This was a non-jurisdictional matter but it had not been initiated by the Defendants.

b) The judge listened to Mr Ellrod's suggestion, gave the Claimant an opportunity to respond and asked for Mr Ellrod's response.

c) Mr Ellrod's conduct went beyond what was required as a matter of ethics in responding to a judge's enquiries. However, that did not mean that Mr Ellrod had recognised the court's jurisdiction to decide the claim.

d) Objectively assessing Mr Ellrod's conduct, he had not made an informal motion. He had suggested the court act of its own motion.

e) Mr Bundy was incorrect to treat the judge as having characterised or described the Defendants' conduct as a dismissal motion. The judge had not treated Mr Ellrod's argument as being put forward as a motion (or entertained it as such). The judge's reference in the transcript to "*mandatory dismissal"* and also the *"dismissal motion argument"* were not references to a motion by the Defendant. They were references to the court's mandatory duty to dismiss, and the case (*Kimble v Hughes*) being discussed had been introduced by the Claimant and expressly referred to "a motion for mandatory dismissal" in the context of the court dismissing an action of its own motion.

f) The Claimant's attorneys had also not understood that a motion had been raised. The Claimant's lawyers made no reference to a motion being made at the Prove Up Hearing or in his post-hearing brief, which was entitled as a response to the judge's questions. The judge's ruling was addressing those questions rather than a motion raised by the Defendants.

111. Overall the Defendants' conduct did not amount to active participation or participation that recognised the authority of the court to determine the claim.

a) The Defendant had not raised a motion at the Prove Up Hearing and the judge had not entertained it as such or ruled on it.

b) All the Defendants were treated as parties against whom default was entered, and treated by the judge as such, even though he listened to Mr Ellrod's argument.

c) The Defendants' remained in default and were not allowed to participate as an active party, and were not treated as such. Their conduct did not meet the test from *Creed v Schultz* of taking the advantage of being a party or actively participating.

d) The experts agreed that there was no authority on whether an appearance on a non-jurisdictional issue by counsel for a party whose default has been entered can be a general appearance. The law was unclear and the judge had described the situation as "*somewhat unique"*. There was insufficient evidence on this area of Californian law to make a finding that Mr Ellrod's appearance was a general appearance under Californian law.

e) Even if such an appearance could amount to a voluntary submission under Californian law, Mr Ellrod's conduct was not sufficient to amount to a general appearance. He communicated that he was making a special appearance (and the Claimant's lawyers relied on this during the hearing). He then only took part in brief exchanges on the five year rule, expressly acknowledging from the outset that his clients' status (both being in default and making a special appearance) precluded him from opposing the prove up, and he also accepted that it precluded him from serving a brief.

f) The Defendants were able to show that under Californian law the Claimant would be estopped from arguing that the Defendants made a general

appearance at the Prove Up Hearing. Judicial estoppel meant that the Claimant could not show that a Californian Court would have accepted that there was a general appearance amounting to a submission to the jurisdiction.

J.4 <u>Did the Defendants submit to the jurisdiction of the Californian Court by reason of voluntary submission at the Prove Up Hearing?</u>

a) <u>Discussion on English law</u>

112. The applicable English law was largely uncontroversial (as explained in the background above). However, there was a dispute as to the approach to be taken where the foreign court has already made a final ruling on the defendant's jurisdictional objection.

113. The Claimant denied that the Defendants could be treated as appearing without prejudice to the right to argue there was no jurisdiction. His counsel said it made no sense and could not be supported under English law (or under Californian law for similar reasons). The Claimant's counsel relied on paragraph 14-074 of Dicey stating that if the challenge to the jurisdiction of the foreign court is unsuccessful and the defendant goes on to contest the merits, the defendant will have submitted to the jurisdiction of the foreign court for English law purposes. His counsel emphasised that following the unsuccessful appeal in 2015, the Defendants' case on jurisdiction had hit the buffers and they could no longer sensibly maintain that they were objecting to the foreign court's jurisdiction. At that stage a party can no longer rely on an attempt to reserve its position on jurisdiction as somehow rendering steps taken as equivocal or ambiguous because it no longer makes sense since the foreign court has finally decided that it has jurisdiction.

114. The Claimant also referred to a footnote to paragraph 14-077 of *Dicey* (set out below) suggesting that there is "perhaps" an additional requirement that a challenge to the jurisdiction is rational and "it will not be open to a defendant to give himself a lifeline by complaining about the jurisdiction in circumstances where there is no basis for making a challenge". Philips J in *Golden Endurance Shipping SA v RMA Watanya SA, The Golden Endurance* [2016] EWHC 2110 (Comm) [46] was more cautious as to whether such a requirement applied, suggesting merely that if a challenge was obviously absurd then the court might conclude that in reality the defendant had submitted.

115. The Claimant maintained that the situation was comparable to *Marc Rich v Società Italiana Impianti, The Atlantic Emperor* [1992] 1 Lloyd's Rep. 624, where the defendants had put in a new defence on the merits after failing on jurisdiction in the highest court, and were treated as having thereby submitted to the foreign court. His counsel pointed to Christopher Clarke LJ's comment at paragraph 59 of *Ecobank Transnational v Tanoh* [2015] EWCA Civ 1309, that the defendant in *The Atlantic Emperor* could not sensibly have reserved jurisdiction since its objection had already been overruled.

116. The Claimant's case was that the Defendants' arguments at the prove up could not be regarded as necessary, relevant or useful for disputing jurisdiction. Here the

Defendants had contested the merits by raising the defence of failure to prosecute since merits is not construed narrowly as the merits of the underlying substantive dispute (*Henry v Geoprosco International Ltd* [1976] QB 726, e.g. 749). The Defendants' appearance for the purpose of inviting the court to dismiss the claim for want of prosecution was not within the ambit of section 33 of the Civil Jurisdiction and Judgments Act, and the experts agreed that the issue raised was non-jurisdictional.

117. The Claimant maintained that once jurisdiction is decided it became obviously absurd to reserve an objection to the court's jurisdiction when there was already a final decision on that question. Jurisdiction was *res judicata,* and as a matter of common sense the Defendants could not sensibly continue to appear on a without prejudice basis when jurisdiction had conclusively been decided against them.

118. The Defendants argued that even where there has been a final ruling on jurisdiction a party can still maintain that its primary position is that the court has no jurisdiction, referring to *Evison Holdings v International Company Finvision* [2020] EWHC 239 (Comm) and *Dicey v Morris's* explanation:

> "*14-077 The general thrust of the authorities is that for so long as the defendant asserted, and is obviously still asserting,*[2] *as its primary defence that the court has no jurisdiction over it in relation to the merits of the claim, then even if it also takes steps which are purposeful in relation to the merits of the claim, doing so should not be taken to mean that it has submitted to the jurisdiction for the purposes of the common law of submission, and has abandoned the challenge for the purpose of s.33. The real question for the English court should not be whether the defendant has taken a step in proceedings which prepare for the trial of the merits, but whether it has chosen to abandon its challenge to the jurisdiction*."

119. The Defendants also maintained that English law has not recognised the Claimant's approach which would create a hard stop beyond which any conduct would amount to a submission. In particular section 33 of the Civil Jurisdiction and Judgment Act 1982 leaves open whether steps other than disputing jurisdiction will amount to a voluntary submission (as pointed out by Philips J in *The Golden Endurance* [31] and also at a broader level by Clarke LJ in *Ecobank* [67]).

120. I preferred the Defendants' position. The existence of the Californian Court's ruling on jurisdiction was a relevant part of the context. However, the Claimant failed to show that it was a decisive consideration as a matter of law or fact. Under English law the timing of any conduct may be relevant in that conduct taken while a jurisdictional objection is pending is most likely to be protected (as explained in *AELF MSN* [67]). However, the mere fact that the foreign court has ruled on jurisdiction does not mean that the defendant has hit the buffers or is otherwise

[2] Dicey here contains the footnote indicating that there is perhaps a requirement that the challenge is rational.

disabled from maintaining its primary case that the court has no jurisdiction, and in denying an unequivocal waiver.

121. *The Atlantic Emperor* (and the footnote in *Dicey*) are not authority for a different approach where jurisdiction has been decided by the foreign court because the defendant's conduct in that case was unequivocal on the facts. The same legal test applies, namely as to whether in all the circumstances there has been an unequivocal representation by word or conduct that objection is not taken to the relevant jurisdiction.

122. Even if the Californian Court had considered that its ruling on personal jurisdiction gave rise to a *res judiciata* (and neither expert suggested as much), there was no basis to suggest that the English court would treat that ruling as binding on the question of voluntary submission. The Defendants' position in stating they were attending the hearing by way of special appearance (which objectively communicated an intention to preserve a jurisdictional defence) was not obviously absurd. Indeed, they had taken that position on the previous case management hearings and the Claimant relied in its post-hearing brief on the fact that the Defendants had told the English court that it would take no steps beyond maintaining their challenge to the Californian court's jurisdiction. Their overall behaviour could not be construed as conceding the Californian Court's jurisdiction once there was a ruling.

123. The question remained, however, as to whether Mr Ellrod's subsequent conduct at the Prove Up Hearing amounted to an unequivocal representation that objection was not taken to the Californian Court's jurisdiction.

b) Conclusions under English law

124. The Claimant could not establish that there was a general appearance or a voluntary submission under Californian law (as set out above in my conclusions). The uncertainty as to Californian law in circumstances where default had been entered against a party did not assist the Claimant because even if that uncertainty was resolved in his favour, there had on the facts been no submission to the jurisdiction of the Californian Court.

125. The position under Californian law was a decisive consideration because, on the facts as described above, it would be illogical if the Defendants were held to have submitted if the Californian court would have concluded that there was no voluntary submission. This was because the Californian approach is consistent with the English approach on assessing voluntary appearance. Indeed the Californian Law test was almost identical to that put forward by Goff LJ in *The Messiniaki Tolmi.* The Claimant provided no reason why the Californian law position should not be given weight.

126. As a matter of English law the Claimant could not establish that the Defendants had voluntarily appeared before the Californian Court by reason of their conduct at the Prove Up Hearing. For the same reasons given above for concluding that there was no submission under Californian law, Mr Ellrod's conduct did not amount to an unequivocal representation that objection was not taken by the Defendants to the

jurisdiction of the Californian Court. The matters addressed above in the assessment of the position under Californian law would also be relevant to the approach under English law. They showed that the Defendants had maintained their position that they did not recognise the Californian Court's jurisdiction to hear and determine the claim and had not unequivocally represented that objection was not being taken to that jurisdiction.

127. In these circumstances the claim is dismissed.