Neutral Citation Number: [2021] EWHC 2035 (Ch)

Case No: BL-2020-001133

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

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

Date: 20 July 2021

Before :

DEPUTY MASTER FRANCIS

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Between :

DITTO LIMITED	**Claimant**
- and –	
(1) DRIVE-THRU RECORDS LLC **(a limited liability partnership registered under the laws of the State of California)** **(2) WAR ROAD MUSIC INC** **(a corporation registered under the laws of the State of California)**	**Defendants**

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Justin Kitson (instructed by Trainer Shepherd Phillips Melin Haynes LLP) for the **Claimant**
Lisa Lacob (instructed by Keystone Law) for the **Defendants**

Hearing date: 19 May 2021

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APPROVED JUDGMENT

I direct that this approved judgment, sent to the parties by email on 20 July 2021, shall deemed to be handed down on that date, and copies of this version as handed down may be treated as authentic.

Deputy Master Francis:-

1. On 3 December 2020 Master Teverson granted permission pursuant to CPR r. 6.36 to the Claimant, Ditto Limited ("Ditto"), to serve the claim in this matter on the Defendants, Drive-Thru Records LLC ("Drive-Thru") and War Road Music Inc ("War Road"), out of the jurisdiction. The Defendants subsequently applied to set aside that order under CPR r. 11 (1) by application dated 22 February 2021. That application came before me on 19 May 2021, with Drive-Thru and War Road represented by Lisa Lacob of Counsel, and Ditto by Justin Kitson of Counsel. The hearing was prefaced by detailed skeleton arguments prepared by them both, and was followed at its conclusion by further short written submissions on relevant authorities concerning the jurisdictional gateway in tort claims under PD6B paragraph 3.1 (9), and on the authorities discussed in paragraphs 50 and 51 below concerning the place where the contract was made for the purposes of the jurisdiction gateway in contract under PD6B paragraph 3.1 (6) (a). This is my judgment on the application.

Factual background

The parties

2. Ditto is a limited company incorporated in England. Its registered office, which also serves as its administrative headquarters, is in Liverpool, although it also has an office in London. It has two directors, both described as CEOs, Matthew Parsons and Lee Parsons, who were between them at the relevant times the owners of the entire issued share capital in the company.

3. Ditto carries on business under the trading name Ditto Music as a digital music distributor. It is one of a number of corporate entities which operate under the Ditto Music brand worldwide, including Ditto Inc., a Tennessee registered company. The exact relationship between these entities is not explained in the evidence, but it is clear that Ditto Music, although initially established in the United Kingdom, is now a global operation with offices in at least 20 countries, in Europe, the United States and elsewhere. Its core business is the distribution of musical recordings to online stores such as iTunes and Spotify and collection of royalties from sales of such recordings, for which artists pay either a yearly subscription or a percentage of the royalty. It also provides more traditional record-label services including financial support for artists to record music and promoting such music.

4. Drive-Thru is a limited liability partnership registered in California, owned and managed by siblings Richard Reines and Stefanie Reines, both of whom reside in California. It is the vehicle through which they operate a record label which was founded by them in 1995 and enjoyed considerable success in the early years of this century in finding and promoting a number of pop-punk and indie bands. In more recent years, it has primarily been a catalogue label, holding the rights in a portfolio of music and video recordings. Before its collaboration with Ditto, the subject of the present claim, Drive-Thru licensed the exploitation of such recordings to other distributors in North America and other territories, including PIAS in Europe.

5. War Road is a Californian corporation of which the Reines are also the owners and managers. It is stated in evidence that the company was incorporated on 31 July 2019,

which is a date later than the contract which is the subject of the present claim against it, but neither party has taken any point on this. It is the corporate vehicle through which they operate a new record label, established by them to find and promote an up-coming generation of artists and bands, the bulk of whom are based in the United States.

6. The Reines also provide artist management services, although it is not clear whether this is in their own name or through a corporate entity, and if so whether War Road or another similarly named company.

Events leading up to the July 2019 agreements

7. In July 2019 Ditto entered into two written agreements, with Drive-Thru and War Road respectively, under which Drive-Thru and War Road granted Ditto rights to exploit their portfolios of music and video recordings worldwide. In return Ditto agreed to provide funding, *inter alia* to facilitate the remastering, remixing and repackaging of existing Drive-Thru recordings, and the signing and development of new artists by War Road. This funding took the form of advances which were to be recouped from the royalties collected by Ditto from the licensing of the recordings to digital platforms and elsewhere, with any surplus royalties thereafter being shared between them. It will be necessary to return to consider some of the detailed provisions of these agreements in due course.

8. The negotiations which led to these written agreements had commenced in January 2019, initially between the Reines and Christopher Mooney. Mr Mooney was at the time employed by Ditto's sister company, Ditto Inc., as Head of US Operations, and was based in New York where he worked from home or from serviced office space in the Dumbo district, but it is common ground was acting on behalf of Ditto in these dealings. In his first witness statement filed in support of the application for permission for service out, Michael Shepherd, Ditto's solicitor, describes Mr Mooney as an employee of Ditto itself, a mistake perhaps arising from there being no clear delineation on the ground between the different corporate entities within the Ditto Music operation.

9. In due course Mr Mooney brought in Craig May, Ditto's Global Head of Artist and Label Services, based in its London office, who Mr Mooney describes as his then supervisor, and discussions continued between the Reines, Mr Mooney and Mr May by telephone and e-mail during February and March 2019. Mr May was responsible for liaising with Matthew Parsons on the proposed terms and then, in or before May 2019 in reducing into a legal text the broad heads of agreement which had been reached. The Reines in turn brought in their New York based attorney, Jason Matuskievicz, to finesse the terms of such text.

10. By 6 June 2019 draft terms of what are described as "short-form agreements" had been settled, and on 13 June 2019 Mr May sent out "clean, execution copies" of the two agreements for signature. These agreements concluded with the following words:-

> *It is the intention of the Licensee and Licensor that they negotiate and enter into a more comprehensive formal long form agreement incorporating the agreed terms of this Agreement together with additional terms and conditions as are standard in agreements of this kind in the music industry (**Long Form Agreement**). In the event a Long Form Agreement is not concluded, the parties agree to be bound by the terms and conditions of this Agreement*

Following this, the agreements contained signature blocks signalling an intention that they were to be completed by each party signing the same.

11. In the morning of 14 June 2019 Stephanie Reines inquired of Mr May whether he required hard copies of the signed agreement, or just digital. Mr May replied that "digital copies would suffice" and that "we can do some kind of fancy signing thing for the long form". Richard Reines signed the two agreements on behalf of Drive-Thru and War Road the same day using the DocuSign app and returned the same to Mr May and Mr Mooney by e-mail. Subsequently, the agreements were signed by Matthew Parsons on Ditto's behalf and these were then sent by Craig May to Richard Reines by e-mail on 17 June 2019.

12. In its particulars of claim, Ditto states the two agreements were entered into on 17 June 2019, at the conclusion of the process described above. In his first witness statement made in support of the service-out application, Ditto's solicitor, Michael Shepherd, of Trainer Shepherd Phillips Melin Haynes, similarly states that the agreements were made on 17 June 2019. However, in a second, supplemental statement, Mr Shepherd states that the agreements were in fact concluded on 14 June 2019 when the copies signed by Mr Reines were received by Mr May. I shall return to this in considering the jurisdictional gateway which applies to contractual claims under PD6B paragraph 3.1 (6).

13. Finally, I should note at this stage that Ditto alleges that Mr Reines made certain representations which were untrue upon which it relied in entering into the agreements. They concern:-

    a) statements concerning the income which Drive-Thru had derived from its catalogue and the interest of big-name artists in working with Drive-Thru on a new compilation album which were made in two e-mails sent by Mr Reines to Mr May and Mr Mooney on 23 February 2019 and 4 April 2019 (detailed in paragraphs 7.5 and 7.6 of the particulars of claim); and

    b) other promises or statements of intent on the part of both Drive-Thru and War Road made in the course of oral discussions over the telephone (detailed in paragraphs 7.1 to 7.4 and 7.7 and 7.8 of the particulars of claim).

The terms of the two agreements

14. The core express terms of the first agreement between Ditto and Drive Thru were as follows:-

    a) Drive-Thru granted Ditto the right to exploit worldwide by various means, either exclusively or non-exclusively, the sound recordings and videos owned by Drive-Thru for an initial three year term;

    b) Drive-Thru was required at its own cost to deliver to Ditto the master recordings for such sound recordings and videos, all accompanying artwork, all label copy documentation and all digital metadata for the recordings;

c) Ditto was to make available various funds to Drive-Thru, including a $50,000 general advance payable on execution, a $50,000 marketing fund, a $100,000 A&R fund, a $75,000 artists' signing fund and $50,000 artists' marketing fund, on which Drive-Thru was entitled to draw as required for such activities;

d) Drive-Thru was permitted to determine and direct promotion and marketing campaigns in consultation with Ditto, to be funded by such advances;

e) Ditto was entitled to be refunded for all such advances from royalties received from the exploitation of the recordings; once the advances were fully recouped from royalties, any net receipts would be shared by the parties on a percentage basis; the sums due would be paid by Ditto to Drive-Thru on a quarterly basis in US dollars.

15. The second agreement between Ditto and War Road was in similar terms, the principal difference being in the amounts and purposes of the advances to be made by Ditto thereunder.

16. Both agreements were silent on any further obligations arising on either side in respect of their performance of the agreement. Ditto contends that various terms should be implied into the agreements to give them business efficacy or to satisfy the officious bystander test including:-

a) an obligation on the part of Drive-Thru and War Road to make available to Ditto for distribution and on-line streaming their entire portfolios of sound recordings and videos, as well as the promotion and marketing of the artists (paragraph 11.1 of the particulars of claim);

b) an obligation on the part of Drive-Thru to carry out work in the first year of the agreement to remaster, remix and repackage its old sound recordings and to create compilations of the artistic works of its signed artists (paragraph 14.1 of the particulars of claim);

c) an obligation that Drive-Thru and War Road would only use the advances for reasonable and necessary expenditure for the marketing and promotion of the recordings for exploitation by Ditto, and would provide reasonable accounting information in relation to such expenditure on request (paragraphs 14.2 and 14.3 of the particulars of claim);

d) an obligation on both sides to act in good faith (paragraph 15 of the particulars of claim).

17. In the New York proceedings to which I shall refer further below, Drive-Thru and War Road for their parts have alleged that Ditto acted in breach of the agreement in failing to provide "the promised services" which, although not clearly set out, appear to include:-

a) a requirement to work diligently with Drive-Thru's previous distributor to secure the transfer of, and to take possession of, Drive-Thru's catalogue (paragraphs 29 and 30 of the New York complaint); and

b) a requirement to distribute (or perhaps to use reasonable endeavours to distribute) the recordings (paragraph 32 of the New York complaint).

Events following entry into the agreements

18. Following entry into the two agreements, it is common ground that Ditto made various advances to Drive-Thru and War Road in accordance with their terms in the period between 24 June and 31 December 2019, sums totalling $77,500 in the case of Drive-Thru, and $77,500 in the case of War Road. These advances were made by bank transfers from Ditto's bank account in Liverpool into Drive-Thru and War Road's bank accounts in the US.

19. Ditto complains that such advances were not used for the purposes for which they were authorised under the agreements but were instead used to meet other expenses incurred prior to the agreements or for purposes unconnected with the agreements, and that Drive-Thru and War Road failed when asked to provide reasonable accounting information as to the expenditure for which the advances were used (paragraphs 18 to 21, 23.4 – 23.5 and 23.8 – 23.9 of the particulars of claim). Drive-Thru and War Road have denied that they were under any obligation to account for their expenditure or use of the advances.

20. Drive-Thru and War Road arranged for some of their master recordings and accompanying material and data to be delivered to Ditto, either by themselves or the third party distributors who then held the material. This appears to have been effected by transfer or upload of electronic files, rather than by physical delivery. However it is common ground that Ditto did not receive into its possession all of Drive-Thru's master recordings and accompanying material and data. Here the parties are at odds as to where the blame lies: Ditto contends that it was Drive-Thru's responsibility to ensure the delivery of the same (paragraphs 23.1 and 23.7 of the particulars of claim), whereas Drive-Thru has contended in the New York proceedings that Ditto was responsible for working with its previous distributor to secure the transfer of all of the recordings (paragraph 30 and 31 of the New York complaint).

21. Ditto further complains that Drive-Thru and War Road continued to receive royalties from third parties for the exploitation of sound and video recordings within their portfolios in respect of which Ditto had acquired exclusive rights (see paragraph 23.3 and 23.8 of the particulars of claim); and that Drive-Thru failed to undertake the required works of remastering and repackaging of its old recordings (paragraph 23.6 of the particulars of claim). These allegations appear also to be denied, although Drive-Thru and War Road of course have not pleaded any defence to the claim whilst they are contesting the court's jurisdiction.

22. In January and February 2020 Drive-Thru and War Road submitted invoices to Ditto requesting payment of further advances in respect of their artist development and marketing activities, which requests went unsatisfied. Instead Ditto signalled its intent to bring the two agreements to an early close. In an e-mail dated 20 February 2020, to which Matthew Parsons was copied in, Mr Mooney informed the Reines that:-

> *After our previous call, I have conversations with these deals. Ditto's CEOs Lee and Matt Parsons are interested in dissolving these deals as quickly as possible in order for all parties to move forward. In no way does this reflect on the respect we have for*

> *your success and choices. These deals were made by a former employee and do not align with our current and future plans.*

Ms Lacob has placed some reliance on this e-mail in her written and oral submissions as an indicator that Ditto was seeking to bring the relationship to an end for purely commercial reasons, and not because of any default on Drive-Thru and War Road's part, and that the complaints which form the basis of the present claim have been confected after the event. I am unable to reach any such conclusion on the material before me, and should make clear that I do not accept her submission that the claim is clearly one without reasonable prospects of success, such that I could set aside the order permitting service out on that ground alone.

The descent into litigation and the competing claims issued in London and New York

23. Drive-Thru and War Road then instructed Mr Matuskiewicz to take up the issue of unpaid invoices on their behalf, and matters quickly became litigious. Mr Matuskiewicz sent a "notice of breach" letter to Ditto dated 31 March 2020. That was countered by a letter of claim dated 17 April 2020 sent on Ditto's behalf by Mr Shepherd in which he asserted (i) that the two agreements were not binding or enforceable because their terms were too uncertain and in part constituted nothing more than an agreement to agree, and (ii) that Drive-Thru and War Road were both in repudiatory breach of their respective agreements, and that Ditto was for that reason terminating the agreements.

24. The parties agreed to mediate. A mediation was fixed to take place on 20 July 2020 before a retired justice of the New York Supreme Court but had to be postponed to September 2020 because Matthew Parsons was taken unwell. In the meantime, Ditto issued the present claim in the High Court in London on 11 August 2020, without at that stage notifiying Drive-Thru and War Road of such action. Quite separately Drive-Thru and War Road prepared a draft complaint against both Ditto and against Mr Mooney personally for intended filing in the United States District Court for the Eastern District of New York, a copy of which was provided to Ditto on 8 September 2020, shortly before the rescheduled mediation date on 14 September 2020.

25. The mediation was unsuccessful on the day. Ditto then immediately provided Drive-Thru and War Roads with a copy of the issued London claim together with draft particulars of claim. Four days later Drive-Thru and War Road filed their complaint, in the event in the Supreme Court of the State of New York rather than the United States District Court. A copy of the filed complaint was sent to Mr Shepherd by way of courtesy although he declined to accept service of the same on Ditto's behalf.

26. There is a dispute between the parties as to whether service of the New York proceedings was thereafter effected on Ditto, or even attempted to be effected on Ditto, on 12 November 2020. On that day, a process server attended on Mr Mooney at his New York apartment. It is common ground that she served him personally with the proceedings, but a matter of some controversy whether she also served a second copy of the proceedings on him in his capacity as employee or agent of Ditto, and whether he had any authority in fact or in law to take service of proceedings on Ditto's behalf, as is asserted on behalf of Drive-Thru and War Road. Ditto contends that he had no such authority, but in any event only one set of proceedings was served on Mr Mooney, without any suggestion that he was being served as representative of Ditto. In fact, Ditto asserts, it had no idea that

service had even been attempted on it until Mr Shepherd was notified on 15 January 2021 of a motion for default judgment which Mr Matuskiewicz had filed against Ditto.

The application for service out

27. In the meantime, Ditto had issued its without notice application for permission to serve the London claim out of the jurisdiction on 2 November 2020, supported by Mr Shepherd's first statement of the same date. That statement set out the jurisdictional gateways upon which Ditto was relying to ground the application, as follows:-

    a) *The subject matter of the claim relates to intellectual property principally within the jurisdiction [PD 6B 3.1.11]*
    b) *The contracts relied upon in the claim were entered into by the Defendants who are trading and residing within the jurisdiction [PD 6B 3.1 (6)]*
    c) *A claim is also made in tort where damage was sustained within the jurisdiction [PD 6B 3.1.9]*

    The reference in (b), I am told, to the Defendants was a typographical error; it should have read "Ditto England".

28. In paragraph 14 of that statement, in stated compliance with Ditto's duty of full and frank disclosure, Mr Shepherd informed the court that the New York proceedings had been issued on 18 September 2020, but had not been served, as was of course indisputably the case at the time the statement was made. In paragraph 15 Mr Shepherd further stated that the London claim had been provided to Ditto and Drive Thru before the New York complaint was filed, an assertion which was also correct although arguably incomplete without the information I have set out in paragraph 24 above. A copy of the filed New York complaint was exhibited to the statement.

29. The application was listed for a hearing before Master Teverson at 2.30 pm on 3 December 2020. On the day before the hearing Mr Shepherd prepared and filed his second statement. This sought to supplement Ditto's case as it related to the jurisdictional gateway in contract by evidence that the agreements were ones made in the jurisdiction, so falling within PD 6B 3.1(6) (a). It said nothing further about service of the New York proceedings.

30. There is a note of the hearing before Master Teverson at which Mr Kitson appeared on Ditto's behalf. The Master had read the hearing bundle which had been provided and Mr Shepherd's separately filed second statement, and the hearing itself was brief, lasting no more than 3 units of solicitor's time. He granted permission on the specific basis that the claim related to property within the jurisdiction, but directed that the order should recite that he had read Mr Shepherd's two witness statements, in which reliance was also placed upon the jurisdictional gateways in tort and contract.

The matters in issue in the London claim and in the New York proceedings

31. As already adverted to, in the London claim Ditto seek by way of relief:-

    a) declarations that the two agreements have been terminated by acceptance of Drive-Thru and War Road's repudiatory breaches (details of which alleged breaches are set

out in paragraphs 19 to 21 above) are, or alternatively have been rescinded on grounds of misrepresentation (as detailed in paragraph 13 above);

b) damages and / or an account and inquiry of sums due in respect of the alleged breaches of the agreement;

c) damages and / or an account and inquiry of sums due in respect of the alleged misrepresentations.

32. Ditto's claim will accordingly be focused upon (i) the discussions which took place between representatives of the parties, by telephone and e-mail, in the period leading up to entry into the agreements, both to the extent that they contained actionable misrepresentations and to the extent that they may be relevant to the interpretation of the agreements themselves, and (ii) the conduct of Drive-Thru and War Road in the period after the agreements were entered into in the performance of the obligations they were alleged to be under, and in their use of the advances.

33. In the New York proceedings, Drive-Thru and War Road seek damages against Ditto:-

a) for losses they allege that they suffered by reason of Ditto's breaches of the agreements in failing to provide the agreed advances and failing to provide the promised services, namely securing the transfer and taking possession of Drive-Thru's recordings and distributing the same;

b) for further losses they say they have or will suffer by reason of Ditto's wrongful termination of the agreements.

Those losses are not particularised but are said to amount to at least $2 million on the part of Drive-Thru, and £2 million on the part of War Road.

34. In addition in the New York proceedings Drive-Thru and War Road seek damages against Mr Mooney in a sum in excess of $4 million for fraudulent representation. They allege that they were induced to enter into the agreements on the strength of his representation that Ditto's CEOs were aware of the agreements and in agreement with their terms; and that those representations were untrue if Ditto is correct in the subsequent statements which it has made in correspondence that its CEOs were not aware of the agreements until after they were signed. However, it appears that this complaint against Mr Mooney is unlikely to have any legs; as Mr Shepherd made clear to Mr Matuskiewicz in his letter of 14 September 2020 enclosing the issued London claim, it was no longer Ditto's case that the agreements were unenforceable by reason of its CEOs being unaware of the same.

The issues arising on the present application

35. The present application is brought under CPR r. 11.1. The primary relief sought is an order setting aside Master Teverson's order of 3 December 2020 granting permission for service out, and granting declarations that the court has no jurisdiction to try Ditto's claim or should not exercise any jurisdiction which it does have.

36. It is common ground between the parties that in determining whether the order for permission out should be upheld or set aside, it is for Ditto to satisfy me that:-

    a) there is a serious issue to be tried on the merits of the claim in respect of each cause of action in relation to which permission is sought;

    b) there is a good arguable case that the case falls within one or more of the heads of jurisdiction for which leave to serve out of the jurisdiction may be given, as set out PD6B 3.1, the so-called jurisdictional gateways; and

    c) in all the circumstances England is clearly or distinctly the appropriate forum for the trial of the dispute.

    This threefold test reflects the principles set out by Lord Collins in paragraph 71 the Privy Council case of *Altimo Holdings and Investment Ltd v Kyrgyz Mobile Tel Ltd* [2011] UKPC 7; [2012] 1 WLR 1804, and subsequently cited with approval by the Court of Appeal in *VTB Capital Plc v Nutritek International Corp* [2012] EWCA Civ 808; [2012] 2 Lloyds Rep 313, at paragraphs 99 to 101.

37. However, even if these three tests are satisfied Drive-Thru and War Road contend that the order should be set aside in any event on grounds of material non-disclosure on the part of Ditto, specifically:-

    a) the failure by Ditto to inform Master Teverson that the New York proceedings had been served prior to the hearing of the service out application before him;

    b) the failure by Ditto to inform Master Teverson that Ditto had been provided with a draft of the New York proceedings by Drive Thru and War Road before they knew of the London claim, so fostering the false impression that the New York proceedings were purely responsive to the London claim.

38. Finally, if I decline to set aside the order, Drive-Thru and War Road nevertheless contend that I should stay the claim pending the conclusion of the New York proceedings in exercise of the court's discretionary power under section 49 (3) of the Senior Courts Act 1981.

Serious issue to be tried on the merits

39. Although Ms Lacob set out in her skeleton argument various reasons why she contended that the claims were spurious and did not satisfy the threshold requirement that they should have real prospects of success, she rightly did not press this in oral argument. As I have already indicated in paragraph 22 above, I do not consider that I can draw any conclusions at this early stage as to the genuineness or strength of Ditto's claim from the tenor of the early correspondence between the parties. I am satisfied that the claim on the face of the pleadings is one which discloses serious issues to tried on the merits, and is not one which would fall to be summarily dismissed on an application under CPR Part 24. Beyond that, it is unnecessary and undesirable for me to say anything more on its merits.

The gateways to jurisdiction

40. Ditto relies upon the following jurisdictional gateways set out in CPR PD6B paragraph 3.1:-

> Claims in relation to contracts
>
> (6) A claim is made in respect of a contract where the contract—
>
> (a) was made within the jurisdiction; [or]
>
> (c) is governed by English law.
>
> Claims in tort
>
> (9) A claim is made in tort where—
>
> (a) damage was sustained, or will be sustained, within the jurisdiction; or
>
> (b) damage which has been or will be sustained results from an act committed, or likely to be committed, within the jurisdiction.
>
> Claims about property within the jurisdiction
>
> (11) The subject matter of the claim relates wholly or principally to property within the jurisdiction, provided that nothing under this paragraph shall render justiciable the title to or the right to possession of immovable property outside England and Wales.

41. Ditto is not limited in this respect on the specific sub-paragraphs of the Practice Direction which were relied upon at the hearing before Master Teverson, although the position must be assessed on the facts as they existed at the time of the original hearing: see *NML Capital Ltd v Argentina* [2011] UKSC 31; [2011] 2 AC 495.

42. The test of a "good arguable case" which Ditto must satisfy in respect of these gateways is itself the subject of judicial glosses in a number of subsequent decisions. In *Goldman Sachs International Ltd v Novo Banco SA* [2018] UKSC 34; [2018] 1 WLR 3863 the Supreme Court endorsed Lord Sumption's explanation of the requirement set out in previous cases that the claimant should have "the better of the argument" which he had expressed *obiter* in *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80; [2018] 1 WLR 192 as follows:-

> "(i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it.

In *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV* [2019] EWCA Civ 10; [2019] 1 WLR 3514 the Court of Appeal set out at considerably greater length how to apply that test in practice, at paragraphs 72 to 86.

The contract gateway

43. Before me, Mr Kitson relied upon this gateway as his principal entry point. He contended that the two agreements were made in England (sub-paragraph 6 (a)), and / or were governed by English law (sub-paragraph 6 (c)).

44. His argument as to the place the agreements was made was based on a traditional offer and acceptance analysis (following *Entores v Miles Far East Corp* [1955] 2 QB 327): Ditto offered to contract on the terms of the two agreements when Mr May sent the "clean, execution copies" of the two agreements to the Reines for signature by e-mail on 13 June 2019, the offer taking effect at the time and place of receipt of the e-mail; Mr Reines then accepted the offer on behalf of Drive-Thru and War Road by signing the two agreements and returning them to Mr May by e-mail on 14 June 2019, the acceptance taking effect at the time and place of receipt of the e-mail by Mr May in London. On that basis, it was contended, the two agreements were clearly made in England.

45. In response, Ms Lacob contended that, on a proper analysis, the two agreements were only concluded upon receipt in California, on 17 June 2019, of the two agreements countersigned by Matthew Parsons. This argument appeared to me to have a strong prima facie attraction to it since it was plainly contemplated on the face of the two agreements that they were to be signed on both sides by someone with the requisite authority to bind the respective corporate entities; why, therefore, should the time and place when the agreements were made be based on the receipt of two agreements by Mr May signed only by Mr Reines on behalf of Drive-Thru and War Road, rather than the later receipt by Mr Reines of the two agreements countersigned by Matthew Parsons on behalf of Ditto?

46. When I put this to Mr Kitson, he was prepared to entertain the premise that the agreements were not formally concluded before they had been signed on Ditto's behalf, but contended that I should nevertheless regard the agreements as concluded immediately at the point when they were so signed by Mr Parsons in Liverpool without the need for the countersigned agreements to be remitted back to Drive-Thru and War Road, or even for them to be notified of such signature.

47. In my judgment, that proposition is doubtful; if the parties were agreed that the process of concluding the agreements would only be complete after the person with the requisite authority for each party had signified their acceptance of the written terms by signing the agreements, it seems to me that the better analysis is that the agreements were only concluded when the agreements as signed by Mr Parsons were remitted back to Mr Reines in California.

48. However I find it surprising and somewhat disconcerting that the question whether the claim gets through the contractual gateway, thereby conferring a prima facie jurisdiction on the English courts to hear and determine the claim, might depend upon the arbitrary order in which the agreements were signed and / or the legal nicety of whether binding

agreements were concluded as soon as the signature of the second party was added or only when that was communicated back to the first party. In the *Brownlie* case Lord Sumption expressed his own dissatisfaction with this at paragraph 16 as follows:-

> But I think it right to draw attention to the artificial nature of the issue as the law currently stands. The argument on the point turned on the question who uttered the words which marked the point at which the contract was concluded and where the counterparty was physically located when he or she heard them. This is the test which has for many years been applied where the contract was made by instantaneous exchanges, e g by telephone: see *Entores Ltd v Miles Far East Corpn* [1955] 2 QB 327. It differs from the test applied to contracts made by post, which are complete when and where the letter of acceptance is posted: *Adams v Lindsell* (1818) 1 B & Ald 681, *Dunlop v Higgins* (1848) 1 HL Cas 381. These rules were adopted for reasons of pragmatic convenience, and provide a perfectly serviceable test for determining whether a contract has been concluded at all. However, their deployment for the purpose of determining when or where a contract was made is not at all satisfactory. It depends on assumptions about the point at which an offer is accepted or deemed to be accepted, which are particularly arbitrary when the mode of communication used is instantaneous (or practically so). It also gives rise to serious practical difficulties. The analysis of an informal conversation in terms of invitation to treat, offer and acceptance will often be impossible without a recording or a total recall of the sequence of exchanges and the exact words used at each stage, in order to establish points which are unlikely to have been of any importance to either party at the time. This may be unavoidable under the current wording of gateway 6(a). But the whole question could profitably be re-examined by the Rules Committee.

49. Lord Sumption's comments were *obiter*, and it is unclear whether any arguments were addressed to the court on this question. However, it certainly appears that the parties did not cite two relevant first-instance decision on this question, that of Mann J in *Apple Corps Ltd v Apple Computer Inc* [2004] EWHC 768 (Ch); [2004] 2 CLC 720, and Roth J in *Conductive Inkjet Technology Ltd v Uni-Pixel Displays Inc* [2013] EWHC 2968 (Ch); [2014] 1 All ER (Comm) 654.

50. *Apple Corps* concerned a claim like the present to set aside an order for service out in a dispute between an English claimant and US defendant arising out a settlement agreement which had been concluded between them over the telephone after many months' negotiation between the parties' lawyers. The judge found on the facts that the claimant had a good arguable case that the agreement was concluded in England on a traditional offer and acceptance analysis. However, he stated in the alternative that he would have been prepared to find that the agreement was made in both jurisdictions at the same time. He set out the principled basis for such an approach in paragraph 37, as follows:-

> 37. Before considering whether authority compels a conclusion one way or another, it is worth considering the validity of the point as a matter of principle. I confess that I can detect no conceptual barriers to the notion of a contract being treated as having been made in two places, and some not inconsiderable attractions. In a case where the two parties to a contract are not in the same location at the time of contracting, the notion of where the contract is made is essentially a lawyer's construct. It seldom matters of course, but where it does matter (principally for the purposes of jurisdiction under English law) the law has to provide some answers where an application of the

> experience of everyday life does not enable one to provide them. Hence the rule in *Entores* and *Brinkibon* to the effect that in the case of instantaneous communications (in those cases telex) the contract is made where acceptance is received. That form of approach assumes that one can analyse the formation of a contract in offer and acceptance terms, and in *Brinkibon* Lord Wilberforce indicated that, difficult though the exercise may be, the courts have to do their best with the evidence in order to work out, sometimes in situations of some difficulty, how the offer and acceptance analysis pans out. However, in the post-*Brinkibon* world, where oral telephone communications are even more common, and where such communications can involve three or more participants in three or more different jurisdictions, and where parties might even conclude a written contract by each signing, and observing each other signing, over a video-link, the law may have to move on and to recognise that there is nothing inherently wrong or heretical in allowing the notion of a contract made in two (or more) jurisdictions at the same time. This is not merely a way of avoiding an unfortunate, and perhaps difficult, evidential enquiry. It may well reflect the reality of the situation. Take the case of three parties who each agree to complete a written agreement by signing simultaneously over a three-way video link — where is that contract made? The natural answer is that it is made in all three jurisdictions. Such a conclusion does not necessarily create practical difficulties. If one of those jurisdictions is England, then one of the foundations for the English courts to assume jurisdiction is present, but it does not necessarily follow that jurisdiction will be assumed, because a Claimant who seeks to sue here would still have to establish that it is the most appropriate jurisdiction in which to sue. Jurisdiction would then dealt with on the basis of a mature *forum conveniens* doctrine rather than what might otherwise be a very forced and artificial analysis of trying to establish in which single jurisdiction the contract was made.

After then considering the authorities, and finding nothing in them to gainsay such approach, he set out his conclusions at paragraph 42:-

> 42. So far as it is necessary for me to do so, therefore, I am prepared to consider this matter on the footing that it is possible, as a matter of principle, for a contract to be made in two places at once so that if one of those two places is England the requirement of CPR 6.20 (5) (a) is made out. It is therefore necessary to consider whether on the facts of this case there is a good arguable case for saying that that is the appropriate analysis. In my view Mr Vos has succeeded. It seems to me that this sort of case is very arguably one of the class contemplated by Lord Diplock in which an analysis in terms of offer an acceptance is not appropriate. The parties had, by a long process of negotiation, arrived at agreed forms of agreement which were not to be made binding until both parties indicated that they were. If both parties had met in order to sign and complete in the same place, it might well have been extremely difficult to find anything amounting to an offer and acceptance. Where completion takes place at a distance over the telephone, it might well be possible to construct an offer and acceptance analysis (indeed, each party has sought to do so in this case) but it might equally be thought that that analysis is extremely forced and introduces a highly random element. The offer and acceptance may well depend on who speaks first and who speaks second, which is likely to be largely a matter of chance in closing an agreement of this sort. It is very arguably a much more satisfactory analysis to say that the contract was made in both places at the same time. On the facts of this particular case, that would coincide with the clearly expressed intentions

> of the parties that neither wished to give the other an advantage in terms of governing law and jurisdiction, and although introducing the somewhat random element of offer and acceptance into the concept might be said in one sense to coincide with their respective wishes, and although their expressed wishes did not go so far as to encompass the place of contracting, it seems to me that there is a good arguable case for saying that a dual place of contracting coincides rather more closely with the intentions of the parties.

51. In *Conductive Inkjet Technology* Roth J cited the above passage with approval and applied the analysis to the contract before him, which had been entered into between an English claimant and US defendant, holding the same to have been made in both jurisdictions for the purposes of the contract jurisdictional gateway. In that case, it appeared that the parties had agreed written terms by e-mail which were then signed by the claimant in England, sent by post to the defendant for its signature, and then returned duly signed to the claimant. Roth J said this at paragraph 73:-

> 73. Mr Cuddigan submitted that the same reasoning applies by analogy to the present case. I agree. Here, too, the parties expressly agreed not to incorporate a choice of law or jurisdiction clause. Here, too, it would in my view be wholly artificial to determine the place of the making of the contract by applying the traditional "posting" rule, dependent upon which party happened to send the fully executed document. I therefore find that CIT has a good arguable case that the 2005 NDA was made in both England and Texas. Moreover, the principle underlying the jurisdictional gateway is to establish a sufficient connection to this jurisdiction, and it would be arbitrary to do so on the basis of the order in which a document was signed.

52. Ms Lacob contends that the approach adopted in these two cases should be regarded as exceptional, and should apply only where there was evidence from which the court could find, or properly infer, that the parties intended that there should be no jurisdiction or governing law clause in favour of either party, and that neither should gain any advantage from the place where the contract was made.

53. I accept that the facts of *Apple Corps* were exceptional, and there is nothing in the present case which mirrors them. However, the facts of *Conductive Inkjet Technology*, so far as they concern the entry into the relevant agreement, are much closer to those of the present case, and as I read his judgment, Arnold J's decision was not based upon evidence, either express or inferred, that the parties had deliberately adopted arrangements for entering into the agreement so that neither party could seek advantage from the place the contract was made. Like that case, it seems to me that it would be wholly artificial in this case to determine the place the contract was made upon the happenstance of the order of signing.

54. I remind myself that for the purposes of entry through a jurisdictional gateway, Ditto need only show a good arguable case. With some hesitation I conclude that Ditto does cross that threshold in respect of the contractual gateway on the basis that the two agreements were made in both England and California.

55. The alternative basis upon which Ditto seeks entry through the contract gateway is that the two agreements are governed by English law. On this, it is common ground that the law governing the two agreements will be determined under Article 4 of the Rome 1

Regulation (as EU retained law). The relevant provisions of the Regulation are as follows:-

> (1) To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows:
>
> (b) a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence;
>
> (2) Where the contract is not covered by paragraph 1 or where the elements of the contract would be covered by more than one of points (a) to (h) of paragraph 1, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.
>
> (3) Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.
>
> (4) Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected.

56. Ms Lacob contended that the law of the agreements should be determined in accordance with paragraph (2) as being that of the State of California. That was on the basis that the party which was required to effect the characteristic performance of each of the agreements was Drive-Thru and War Road respectively, and their country, or (in this case) territorial unit, of habitual residence, being the place where they had their central administration, was California. She identified the performance which was characteristic of each of the agreements as being Drive-Thru and War Road's obligations to licence the exploitation of their portfolio works, to remaster and remix their recordings or the release new recordings, as the case may be, and (in the case of War Road) to sign up new bands; in contrast, Ditto's only obligation was to pay money which was not the performance which was characteristic of the agreements.

57. Mr Kitson for Ditto took issue with this. He pointed to the fact that Drive-Thru and War Road themselves contended in the New York proceedings that Ditto was in breach of its obligations (whether express or implied) under the agreements to take possession of the recordings and to distribute the same so as to earn royalties for the parties' joint benefit. Thus, he argued, the performance characteristic of the agreement was not all on the side of Drive-Thru and War Road.

58. I agree with Mr Kitson that these agreements are ones under which there were substantial performance obligations (other than simply the payment of money) on both sides. In reality, the agreements were joint ventures for the development and exploitation of Drive-Thru's and War Road's existing and future portfolio works for their mutual benefit. They are the type of agreements which Mann J refers to in his judgment in *Apple Corps* at paragraph 54 where it is not possible to identify a characteristic performance provided by one only of the parties. Accordingly, I do not consider that paragraph (2) of Article 4

enables a determination of the applicable law. Instead, that determination must be made by resort to paragraph (4) of Article 4.

59. What then is the country or territorial unit with which the agreements are most closely connected? On the evidence before me, I am satisfied that it is the State of California. That was where Drive-Thru and War Road were based and where for the most part they would perform their obligations under the agreements. In contrast, Ditto's own obligations relating to the digital distribution of the portfolio works were not ones which, on the evidence, fell to be performed in England to any particular extent, even if Ditto's central administration was based in England. Instead, Ditto's rights to exploitation of the portfolio works, and any corresponding obligations relating to the distribution of such works, were worldwide, reflecting the global reach of the Ditto Music brand.

60. Accordingly, I do not consider that Ditto has shown a good arguable case that the agreements were governed by English law so as to satisfy the contract gateway under sub-paragraph (6) (c) of PD6C paragraph 3.1. Instead I find that the agreements were governed by the law of State of California.

The tort gateway

61. Ditto relies upon the alleged misrepresentations on the part of Drive-Thru and War Road to which I have referred in paragraph 13 above as founding a claim for damages in negligent misstatement, or under section 2 (1) of the Misrepresentation Act 1967. It is contended that Ditto satisfies the jurisdictional gateway for bringing such a claim in England both (a) on the basis that Ditto has sustained damage in England as a result of the misrepresentations, and (b) because such damage results from "an act committed" in England.

62. I deal first with the second contention. It is uncontroversial that any statements of Mr Reines were made by him in California, albeit it is alleged that some or all of them were made to and received by Mr May in England, and are said to have been relied upon by Ditto in England in entering into the two agreements. So the question for determination is whether there was a relevant act committed in London in respect of the misrepresentations which has resulted in damage

63. In *Newsat Holdings Ltd v Zani* [2006] EWHC 342 David Steel J had to consider whether a claim in fraudulent misrepresentation fell within the then head of jurisdiction relating to claims in tort under the former CPR r. 6.20 (8). In that case, as here, the misrepresentation had been made in another jurisdiction but received and relied upon in this jurisdiction. It was necessary to show under the then r. 6.20 (8) (b) that "damage sustained resulted from an act committed within the jurisdiction", a provision which does not in substance differ from the current sub-paragraph 9 (b) of PD6B paragraph 3.1. The judge undertook a detailed review of the authorities, concluding that the relevant act for the purposes of the head was the making of the representation by the defendant, rather than its receipt or the reliance thereon by the claimant, notwithstanding the fact that the latter two matters were necessary components of a complete cause of action for negligent or fraudulent misstatement in tort. In consequence, he held that jurisdiction was founded on the place at which the representation was made, rather than where it was received or acted upon.

64. I can see no basis for distinguishing or departing from *Newsat*. Accordingly, Ditto cannot satisfy this sub-paragraph of the tort gateway.

65. What then of sub-paragraph 9 (a); has Ditto sustained damage in England in respect of the misrepresentations?

66. It is necessary first to identify what damage Ditto alleges that it has sustained as a result of the misrepresentations. Ms Lacob criticized Ditto's particulars of claim for its opacity; no attempt has been made to identify damages which can properly be claimed in respect of any misrepresentation (which should be assessed on the basis of putting Ditto back in the position it would have been in had the representations not been made) as distinct from damages for breach of contract. I agree with Ms Lacob that, on the face of it, the only damage which Ditto could be said to have suffered by reason of the representations are the payment of the advances which it made to Drive-Thru and War Road under the agreements, together perhaps with any other expenses which it may have incurred in implementing the agreements, and giving credit against such payments for any sums recouped and retained by Ditto by way of royalties.

67. Those are all losses which Ditto has incurred as a result of its entry into the two agreements in reliance on the alleged misrepresentation. In her supplemental written submissions on this question, Ms Lacob has argued that the "damage sustained" by Ditto in respect of the misrepresentations should be regarded as its entry into the agreements themselves as distinct from the payments or expenditure subsequently made or incurred under the agreements, and that the place where such damage was sustained was California, being the place where the agreements were made.

68. In support of this argument, Ms Lacob relies, amongst other authorities, upon the Court of Appeal decision in *VTB Capital*. That case concerned a claim in deceit by VTB, an English subsidiary of a Russian Bank, arising from a facility agreement which it had entered into with a Russian company for a loan to fund its purchase of six dairies in Russia owned by the first defendant who, it was alleged, had made various misrepresentations to induce the loan facility. One of the issues before the court was whether VTB had an arguable case that it had suffered any damage in consequence of the alleged deceit in circumstances where the facility was fully funded by its Russian parent under the terms of a participation agreement, and, if so, whether such damage was sustained in England for the purposes of the tort gateway. The Court of Appeal held that VTB had a good arguable case that it had suffered damage, and that damage was sustained in England. The damage was described in paragraph 110 as follows:-

> VTB was the owner of property (viz. a sum of US$ 225 million) which it lent to RAP under the terms of the Facility Agreement. As soon as VTB parted with that money it suffered loss because (on the assumptions being made) the reason it had done so was the contractual obligation to RAP that was created as a result of the defendants' torts. The position is the same as in the well-known case of *Forster v Outred* [1982] 1 WLR 86, in which the Court of Appeal held that a claimant who agreed to mortgage her house as security for an advance to her son suffered damage as soon as she entered into the mortgage deed in reliance on the negligent advice of her solicitors: see page 98 per Stephenson LJ and page 99 per Dunn LJ; Sir David Cairns agreed with both judgments. We accept that the amount of the loss will have become crystallised at a later stage, i.e. once the insufficiency of the security given by RAP was known. But

> VTB's loss occurred, at the latest, when it paid over sums under the Facility Agreement.

It is not clear to me from the passage cited whether the Court of Appeal regarded the damage as being the entry into the facility agreement, or the payment of sums pursuant to the agreement, but it did not matter as both took place in England. The matter was not further considered or elucidated upon in the judgment of the Supreme Court given following the further appeal against the refusal of permission for service out [2013] UKSC 5; [2013] 2 AC 337.

69. As I have found that Ditto has at least a good arguable case that the agreements were entered into in England as well as California, Ms Lacob's argument does not assist her as it would result in the place where damage was sustained by Ditto being England. However, I do not in any event accept her argument that the relevant damage on the facts of this case was Ditto's entry into the agreements as opposed to the payments or expenditure which it subsequently made or incurred thereunder. In my judgment, it is the latter which founds Ditto's claim for damages, rather than simply the entry into the agreements.

70. As already noted in paragraph 18 above, the payments made by Ditto by way of advances pursuant to the two agreements were made by bank transfer out of its account of Liverpool to accounts held by Drive-Thru and War Road in California. Was the damage in making those payments sustained in England or California? As a matter of common sense, the answer seems to me plainly to be England. That is also the conclusion which Professor Briggs reaches in the latest, 7th edition, of his seminal textbook *Civil Jurisdiction and Judgments* at p. 504. He goes to say these words, at p. 505, which appear to me to be apt more generally in considering the jurisdictional gateways:-

> "In the result, the sensible approach is not to be too clever or analytical when it comes to the location of intangible, or financial losses, but to rely on the principle of *forum conveniens* to screen out those cases in which the damage connection with England is too weak or tenuous to justify service out"

71. I conclude therefore that Ditto does have a good arguable case that the tort gateway is satisfied on the basis that it has sustained damage in England as a result of the alleged misrepresentations. This is on the primary basis that the relevant damage which it sustained was the payment of advances out of its bank account in Liverpool. But if I am wrong on that, and the relevant damage was its entry into the two agreements themselves, that was also damage sustained in England on Ditto's part where, as I have held above, the agreements were entered into at the same time by Ditto in England and by Drive-Thru and War Road in California.

"Property within the jurisdiction" gateway

72. This was the principal gateway considered at the original hearing but was relegated to little more than a makeweight in the submissions before me. Mr Kitson did not pursue his arguments as to its application with any evident enthusiasm. In the light of my decisions concerning the application of the contract and tort gateways, it is unnecessary to make any determination in relation to this jurisdictional gateway. However, in case this matter goes further, I shall state briefly my conclusions on the material before me.

73. In her skeleton argument, Ms Lacob set out three grounds of challenge to the suggestion made at the original hearing that the claim relates wholly or principally to property within the jurisdiction simply because the claim is about "*the right of C to exploit master recordings from England*".

74. First, Ms Lacob argues, it was not a claim relating to property at all, since there was no issue as to the existence, ownership or infringement of the intellectual property rights in the master recordings the subject of the two agreements, as opposed simply to a contractual dispute *inter alia* about whether the recordings the subject of the agreements extended to the whole of Drive-Thru's portfolio or only a more limited sub-set of the portfolio.

75. Second, she argues, it was not a claim relating to property *within the jurisdiction*. There is no sense in which the master recordings were delivered to Ditto in England, nor was there any obligation to deliver the same to Ditto in England; they were in fact uploaded in the US to a virtual platform for distribution worldwide.

76. Third, Ms Lacob argues that it is not enough to found jurisdiction that under the agreements Ditto would have able and entitled to exploit the intellectual property rights in the master recordings in England because (i) even putting Ditto's case at its highest the IP rights would only have been partly exploited in England as part of their global distribution and (ii) the property in question would have had to be present in England at the time permission was sought; it is not enough to state that it would have been so present but for the defendant's breach.

77. She prayed in aid of her third argument the decision of HHJ Hacon in *Vestel Elektronik Sanayi Ve Tikaret v HEVL Advance* [2019] EWHC 2766 (Ch); [2020] FSR 13. In that case a claim concerning a pool of global patents controlled by a Delaware registered defendant was held not to relate wholly or principally to property within the jurisdiction in circumstances where at most 4.9% of the pool were UK designated European Patents; the problem could not be solved by amending the claim to limit it to those patents, since the relief sought related to the FRAND terms of a global licence for exploitation of patents in the pool.

78. She also relied on the decision of Arnold J in *Fujifilm Kyoma Kirin Biologics Co Ltd v AbbVie Biotechnology Ltd* [2016] EWHC 2204 (Pat); [2017] Bus LR 333. The claim in that case for a so-called Arrow declaration in respect of pending European patents applied for by the first defendant concerning a new pharmaceutical product it was intended to market in the UK was held not to fall within sub-paragraph 11 where at the time of the application the product was not in the UK; it was no answer to say that the product would be within the jurisdiction by the time the claim for declaratory relief came before the court for substantial determination.

79. I do not accept Ms Lacob's first submission that the claim does not relate to *property* at all. The wording of sub-paragraph 11 is very wide, and there is nothing to suggest that it is limited to claims concerning ownership of, or rights to such property. However I do accept that the claim does not relate *wholly or principally* to property *within the jurisdiction* since, on the evidence, it does not appear that the master recordings the

subject of the agreements, or a substantial proportion of such recordings, were located in England at the time of the application.

Is England the appropriate forum for the dispute?

80. Having been satisfied that Ditto has a good arguable case that the claim falls within the contract or tort gateways, I must now consider whether it has also demonstrated that England is clearly or distinctly the appropriate forum for the trial of the dispute between the parties. The dispute for these purposes is not limited to Ditto's own claim but should also take into account Drive-Thru and War Road's counterclaims as they are set out in the New York proceedings, provided at least that they are matters which those parties genuinely intend to pursue and have some substance to them. If I am not satisfied that England is clearly and distinctly the appropriate forum, I must set aside the original order granting permission: see the Supreme Court decision in *VTB* per Lord Mance at paragraph 18. That assessment is an evaluative one, involving the weighing in the scales of a number of potentially competing considerations: see, again, *VTB* per Lord Neuberger at paragraph 97.

81. The principles which I have to apply are of course set out, classically, by Lord Goff in his speech in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460, in particular at pp. 478E - 482A. I have read again that speech, and have it at the fore of my mind in undertaking my evaluation as to "the forum in which the dispute could be most suitably be tried for the interests of all the parties and for the ends of justice."

82. In my judgment, the natural forum for the trial of the dispute between the parties, the place with which it has the most real and substantial connection, is the State of California. That is for the following reasons:-

    a) Drive-Thru and War Road are based in, and carry on business in California;

    b) the disputes which are the subject of the claim are centred upon the conduct of Drive-Thru and War Road:-

        i) in the representations made on their behalf by Mr Reines in California in the period before the two agreements were concluded; and

        ii) in the performance of their obligations and discharge of their duties arising under or in respect of the two agreements, after they were concluded, in California;

    c) although Drive-Thru and War Road's claims against Ditto, the subject of the New York proceedings, are focused upon Ditto's conduct insofar as they are based upon Ditto's alleged breaches of the two agreements, and its wrongful termination of the two agreements, I do not regard that conduct as having any strong or comparably close connection to England; true it may be that some of obligations which it is alleged Ditto was required to but failed properly to perform under the two agreements may have been carried out in England, but they may equally have been carried out in the United States, and in the largely digital world in which Ditto operates there is nothing which clearly ties their performance to England; in any event, as I read it, the meat of the New York complaint is really the claim that Ditto wrongfully terminated the agreements, rather than the failures of performance whilst the agreements were

still extant, which refocuses the dispute back to Drive-Thru and War Road's conduct in California;

d) similarly, in considering and comparing the question of losses which are claimed, on the one hand by Ditto in the present claim, and on the other hand by Drive-Thru and War Road in the New York proceedings:-

i) it is apparent that Drive-Thru and War Road's alleged losses were suffered by them, and are closely connected with their place of business in California;

ii) it is rather less clear the extent of any connection there may be between Ditto's losses and claims for other financial relief with England; Ditto may have carried out its global accounting and related administrative activities from its Liverpool head office, and it may have made and received payments from and to its Liverpool bank account in relation to its global business, as Mr Mooney states in paragraph 30 of his witness statement, but its alleged losses arise from the loss of opportunity to exploit Drive Thru and War Road's portfolio works globally, rather than in England principally or to any substantial degree;

e) as I have found above, the governing law of the two agreements is likely to be that of the State of California.

83. Other factors in my view are neutral or carry only little weight in considering the forum with which the dispute has the most real and substantial connection:-

a) the principal witnesses in the parties' respective claims are likely to be Mr Mooney, for Ditto, who is based in New York and the Reines, for Drive-Thru and War Road, based in California; Mr May is no longer employed by Ditto and so it is unclear whether he would be called upon to give evidence, voluntarily or otherwise; however I bear in mind that Mr Mooney has stated that he would attend London to give evidence, and the location of witnesses more generally no longer has the importance it may previously have been ascribed now that it is routine as a result of the pandemic for witness to attend trial for examination remotely; as.a result I afford this consideration only limited weight;

b) the fact that Ditto was first off the blocks to issue its claim in London is of no significance, not least where it is clear that both parties were jockeying for position in preparing and filing claims in their preferred jurisdictions to be activated as soon as the mediation between them failed.

84. It is of course a quirk of the dispute between the parties in this case is that neither party has in fact brought proceedings in California, the natural forum for their dispute. Instead I am faced with the position on the ground where there are competing proceedings brought by the parties in London and in New York, neither of which is the natural or most obvious place for the dispute to be determined. I am doubtful (although I make no finding on the question) whether Drive-Thru and War Road can pray in aid their claim against Mr Mooney to confer upon the dispute any stronger connection with New York in circumstances where that claim has been rendered largely if not wholly otiose by Ditto's concession in Mr Shepherd's letter of 14 September 2020 that it was no longer relying

upon any contention that the agreements were entered into without the knowledge of its CEOs.

85. Where does that leave the court in resolving the present application? In my judgment, it lays bare the key distinction between the service-in and service-out cases. In the former, where a defendant is seeking to stay proceedings served on it in the jurisdiction because it contends that the claim should be tried elsewhere, the onus falls squarely upon the defendant to establish that another forum in which it has brought or is proposing to bring its own claim is more suitable. In the latter, it is for the claimant to satisfy the court that England is clearly and distinctly the appropriate forum; there is no similar evidential burden on the defendant to set up and establish the suitability of another forum in order to defeat the claimant's application. So I am not concerned with the appropriateness of the forum which Drive-Thru and War Road have in fact adopted in the US to file their complaint. That will be a matter for the Supreme Court of the State of New York.

86. I find that Ditto has failed to satisfy me that England is clearly and distinctly the appropriate forum for the trial of the dispute between the parties. I consider that the natural forum for the dispute is California, and am not told of any reason why the dispute could not appropriately be determined in the courts of that state. The fact that Drive-Thru and War Road have themselves chosen to file a complaint in the State of New York is not a matter which affects my determination or upon which I need to make any finding.

87. As a result of this conclusion, the order of Master Teverson will fall to be set aside, together with the service of the claim form upon Drive-Thru and War Road made pursuant to that order.

Full and frank disclosure

88. In the light of my conclusion above, I do not need to make any findings in relation to the complaints that Ditto failed to give full and frank disclosure in bringing and pursuing its application for permission for service-out. However, in case this matter goes further and because the points have been fully argued, I shall set out briefly the conclusions I would have reached on the complaints.

89. The principles are not in doubt:-

a) on a without notice application for permission for service out the applicant should identify "any material facts, and in particular any which may constitute a defence or some ground for not granting the order sought"; in particular, the existence of foreign proceedings are likely to be material in considering whether to grant such permission: see *Masri v Consolidated Contractors International Co SAL* [2011] EWHC 1780 (Comm) per Burton J at paragraphs 58 - 9;

b) it is for the court to determine what is material according to its own judgment and not the assessment of the applicant; it is not an answer that the applicant in good faith took a different view, although that may affect the court's exercise of its discretion in deciding what to do in the light of the non-disclosure: see *MRG (Japan) Ltd v Engelhard Metals Japan Ltd* [2003] EWHC (Comm) per Toulson J at paragraph 24;

c) where a claimant deliberately misleads or has deliberately withheld information which it knew would or might be material, the order should ordinarily be set aside and not renewed; that sanction may also apply to innocent breaches, particularly in cases of any substantial breach: *Banca Turco Romana SA (in liquidation) v Cortuk* [2018] EWHC 662 (Comm) per Popplewell J at paragraph 45; but the jurisdiction is penal, and should be exercised having regard to proportionality between the offence and the punishment, and not so as to become an instrument of injustice: see the numbered list of principles set out by Christopher Clarke J in *OJSC ANK Yugraneft v Sibir Energy plc* [2008] EWHC 2614 (Ch) at paragraph 102.

The first complaint

90. In the face of the disputed evidence as to the actions of the process server who attended upon Mr Mooney at his New York apartment on 12 November 2020, I cannot sensibly make any findings as to whether Ditto was served or purportedly served with the New York proceedings on that occasion. There is, however, no dispute that Mr Mooney was himself served on that day.

91. As already noted, at the date Mr Shepherd made his first witness statement, on 2 November 2020, there was no question of anyone having been served. If Ditto can be criticised it is for failing to bring matters up to date before or at the hearing on 2 December 2020 by informing the court that New York proceedings had been served at least on Mr Mooney since the date of Mr Shepherd's first statement. It seems to that this was information which the Master may have considered material. However, I do not consider that the breach was substantial, in circumstances where the existence of the New York proceedings had been disclosed. And I have no basis for concluding that any failure on Ditto's part in this regard was anything other than an innocent mistake. In all the circumstances I do not consider the breach to be sufficiently serious to warrant the sanction that the order setting aside of the order.

The second complaint

92. As to the second complaint, I consider that someone reading Mr Shepherd's first witness statement might well reasonably derive the impression from that statement that the New York proceedings were prepared and filed in reaction to the London claim when in reality they were prepared independently of and without any knowledge of the London claim. Again, I consider that some criticism can be made of Ditto in the narrative of the statement but cannot say that there was any deliberate attempt to create a false impression on the part of Ditto.

93. In the circumstances I similarly conclude that any breach on Ditto's part was not one so substantial or serious that it should lead to the order being set aside.

The application for a stay

94. This does not arise for consideration in circumstances where I have set aside the order for service-out.

Disposal

95. Drive-Thru and War Road succeed in their application. Accordingly I shall make an order in the terms sought in paragraphs 1 to 3 of their application notice. I shall hear the parties further on questions of costs and other consequential matters.