



Neutral Citation Number: [2024] EWHC 1558 (KB)

Case No: KB-2023-004735

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 21 June 2024

Before :

THE HON. MR JUSTICE BRYAN

Between :

ARTCRAFTS INTERNATIONAL SpA
- and -
MOU LIMITED

Claimant

Defendant

Adam Tolley KC and Christopher Monaghan
(instructed by **Rowel Genn Solicitors**) for the **Claimant**
Philip Coppel KC and Olivia Davies
(instructed by **Wiseman Solicitors**) for the **Defendant**

Hearing dates: 11 and 12 June 2024

Approved Judgment

This judgment was handed down remotely at 3pm on 21 June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE BRYAN :

A. INTRODUCTION AND BACKGROUND

1. The parties appear before the Court on the return date hearing in respect of the application of the Claimant, Artcrafts International SpA (“Artcrafts”), for continuation of interim injunctive relief until trial restraining the Defendant, MOU Limited (“MOU”), from committing breaches of a written Licence Agreement between Artcrafts and MOU dated 8 April 2011 (the “Licence Agreement”) and Artcrafts’ exclusive licence in respect of specified territories thereunder (the “Interim Injunction Application”), an interim injunction to a return date having been ordered by Stacey J on 4 January 2024.
2. Artcrafts has made two subsequent applications against MOU which the parties accept can also be accommodated on this return date, namely:-
 - (1) Artcrafts’ application for summary judgment in respect of a new allegation on the part of MOU that the Licence Agreement was terminable on reasonable notice, and to strike out various other parts of MOU’s Defence and Counterclaim which are said to be irrelevant and/or untethered to any claim for relief (the “Summary Judgment/Strike Out Application”).
 - (2) An application for a judgment on an admission (made in the first witness statement of Shelley Tichborne (“Ms Tichborne”) on behalf of MOU), together with an associated declaration, Ms Tichborne having admitted that, with effect from 1 January 2015, the USA became included in the list of Artcrafts’ exclusive territories (the “USA Application”).
3. There are a number of witness statements before me in relation to the applications. Specifically, on behalf of Artcrafts, the first, second and third witness statements of Simone Ponziani, the CEO of Artcrafts (“Ponziani 1”, “Ponziani 2” and “Ponziani 3”), the first witness statement of Eric Barreveld (“Barreveld 1”), the first witness statement of Emeé Olarte-Foussard (“Foussard 1”), the first witness statement of Stefano Collini, (“Collini 1”), the first witness Statement of Katuscia Baccani (“Baccani 1”) and the first and second statements of Rowel Genn (“Genn 1” and “Genn 2”). Whilst, on behalf of MOU, there has been served the first witness statement of Ms Tichborne (the founder and sole owner of MOU). I confirm that I have had careful regard to all such statements and the evidence contained therein.
4. The parties have also provided me with no less than 98 authorities occupying 4 lever arch files. Such over citation of authority is to be deprecated (see *Keystone Healthcare Ltd v Parr* [2019] EWCA Civ 1246 at [26] per Lewison LJ and Practice Direction [2012] 1 WLR 780). The applicable principles in relation to interim injunctions, implication of terms including as to termination on reasonable notice, and when a declaration should be made, are well established, and well-known, and were ultimately common ground before me. To the extent that there were any differences between the parties they related to the application of established authorities to the facts.
5. These proceedings (the “Present Proceedings”) concern the Licence Agreement made on 8 April 2011 between Artcrafts (an Italian company) and MOU (an English

company). The subject of the Licence Agreement is the commercial exploitation of intellectual property rights in “Mou” footwear (referred to as the “Products”). Mou is a luxury brand, founded by Ms Tichborne, and most well-known for its footwear (although the brand extends to other items that are not the subject matter of the Licence Agreement). The name “Mou” means ‘soft to the touch’ in French and denotes both the tactile softness of materials used in the products the feminine spirit.

6. Under the Licence Agreement, MOU granted Artcrafts an exclusive licence to manufacture, distribute, sell, advertise and promote the Products throughout what was defined as the “Territory” and a non-exclusive licence to undertake the same activities elsewhere in the world. The “Territory” for the purposes of the Licence Agreement comprises the countries listed in its Schedule 2 and also, by subsequent variation (in the circumstances set out below), the United States of America (the “USA”).
7. In return for the granting of such exclusive licence to Artcrafts, Artcrafts pays substantial royalties to MOU (the “Royalties”) in accordance with the provisions of the Licence Agreement. Artcrafts’ position is that it has made a tremendous commercial success of this venture. It has generated almost €19m in Royalties paid to MOU in the period to the end of 2023, with the payment for 2023 standing at over €2.4m (see Ponziani 1 at [33]), and it is said that the generation and payment of Royalties can reasonably be expected to continue in the same way throughout the remaining term of the Licence Agreement, and any renewal thereof.
8. However, in recent years, and to put matters as neutrally as possible, the relationship has become strained. In 2022, MOU served a number of notices of alleged material breach upon Artcrafts (with a view to seeking to terminate the Licence Agreement before the end of its term). MOU’s conduct led Artcrafts to issue proceedings, in June 2022 against MOU under Claim No. QB-2022-001925 to protect its position and ensure the continuation of the Licence Agreement (“the Previous Proceedings”). On 30 January 2023, the Previous Proceedings were concluded by court order in Artcrafts’ favour (consequent upon the judgment of Freedman J dated 7 December 2022 [2022] EWHC 3511 (KB)). In the Previous Proceedings MOU did not suggest that the Licence Agreement was terminable on reasonable notice, and such allegation was first made in the Defence and Counterclaim in the Present Proceedings which was served on 26 January 2024.
9. In the Present Proceedings it is Artcrafts’ case that, in breach of the Licence Agreement: (1) MOU has recently been marketing, promoting and selling the Products through a third party in the Territory (specifically the USA), namely through Atallah International, a Canadian company trading under the name “SSENSE” (pronounced “essense”) which has a global e-retail business operating via its global online platform under the domain name ssense.com (SSENSE also having a single physical store in Canada which is not an exclusive Territory), (2) MOU has used its own website (mou.com) to advertise and promote the Products in the Territory generally and (3) MOU has placed Google Ads into the Territory.
10. MOU denies that it has committed breaches of the Licence Agreement and has not accepted that it should desist from such conduct, which led Artcrafts to issue the present proceedings and to make the Interim Injunction Application. In this regard Artcrafts made a number of attempts in correspondence, in November and December 2023, to persuade MOU to cease and desist from what it says was MOU’s unlawful

activity, but without success. MOU's stance was, and remains, that it has done nothing wrong.

B. THE INTERIM INJUNCTIVE RELIEF OBTAINED AND SOUGHT

11. As already noted, on 4 January 2024, on an interim "on notice" injunction application (the "Interim Hearing") Stacey J granted Artcrafts injunctive relief in the form of paragraphs 1 and 2 of the 4 January Order until after judgment on the Return Date or further order (the "Interim Injunction"). The interim injunctive relief she ordered was narrower than that which was sought, or which is sought on the return date, and largely tracked the language of Clauses 2.1.1 and 7.1.1 of the Licence Agreement (as opposed to what Artcrafts submits were MOU's obligations under such Clauses as advanced in the Particulars of Claim and at the present hearing). The interim injunctive relief ordered by Stacey J was as follows:-

"(1) not directly or indirectly manufacture, distribute, sell, advertise or promote the Products anywhere in the Territory (which, without prejudice to either party's case, shall for this purpose be treated as including the USA);

(2) not knowingly fail to use all reasonable endeavours so far as permitted by law to safeguard the sole and exclusive licence granted to [Artcrafts] and in particular to promptly cease to supply any person, firm or company who [MOU] knows infringes [Artcrafts'] rights under the Licence Agreement and in particular, without limiting the foregoing, any such entity who seeks to sell or otherwise dispose of the Products in the Territory"

12. The interim injunctive relief that is sought before me on the return date is as follows:-

"(1) manufacture, distribute, sell, advertise or promote the Products anywhere in the Territory (including the USA);

(2) supply Products to any person, firm or company whom [MOU] knows to have distributed, advertised, promoted, sole or otherwise disposed of Products in the Territory (including the USA) or to have sought to or to intend to take any such step;

(3) supply a third party, who is acting in the course of business, with Products unless [MOU]:

(a) makes that person aware of [Artcrafts'] exclusive licence and authority to manufacture, distribute, sell, advertise and promote Products throughout the Territory (including the USA); and

(b) makes it a contractual term of any agreement with that person that they must not infringe [Artcrafts'] sole and exclusive licence and authority to manufacture, distribute, sell,

advertise and promote Products throughout the Territory (including the USA)”

C. CONTRACTUAL INTERPRETATION OF CLAUSES 2.1.1 AND 7.1.1

13. It is clear that there are a number of issues of contractual interpretation and disputed evidence between Artcrafts and MOU which it is common ground can only be resolved at trial which relate to Clauses 2.1.1 and 7.1.1 of the Licence Agreement (albeit that MOU has now admitted certain breaches of the Licence Agreement in the course of oral submissions made at the hearing, and upon which Artcrafts relies in seeking the injunctive relief it seeks until trial).
14. It is convenient to set those Clauses out at this point, and to identify, in outline, the parties’ respective cases in respect of the same, in circumstances in which I am satisfied that Artcrafts has very much the better of the argument as to the proper interpretation of such Clauses, and there is, on any view, a serious issue to be tried in relation to Artcrafts’ case in relation thereto (which suffices for the purposes of the Interim Injunction Application).
15. Clause 2.1.1 of the Licence Agreement provides:

“[MOU] hereby grants to [Artcrafts] for the term of this Agreement and on the terms and conditions set out in this Agreement: An exclusive licence and authority to manufacture, distribute, sell, advertise and promote throughout the Territory the Products and to use the Trade Marks on and in relation to the Products manufactured, sold, advertised and promoted by [Artcrafts] in the Territory.”
16. The meaning of Clause 2.1.1 of the Licence Agreement is clear and not in dispute (save a short and discrete issue as to what is within the word “promote” and/or constitutes to “advertise” in the context of MOU’s case that content on its website is for “information” purposes only despite displaying MOU footwear). Pursuant to Clause 2.1.1, Artcrafts is granted an exclusive licence and authority to manufacture, distribute, sell, advertise and promote throughout the Territory the Products and to use the Trade Marks on and in relation to the Products manufactured, sold, advertised and promoted by [Artcrafts] in the Territory.
17. Artcrafts’ case is that this positive contractual provision contained, by necessary implication, a prohibition on MOU, directly or indirectly, manufacturing, distributing, selling, advertising or promoting the Products in the Territory (unless otherwise agreed by Artcrafts). This is pleaded by Artcrafts at paragraph 9 of the Particulars of Claim. To the extent that MOU does not accept that (it is notable that such plea is not expressly denied at paragraph 26 of the Defence and Counterclaim) I am satisfied that there is in any event very much more than a serious issue to be tried, and indeed that Artcrafts has very much the better of the argument on this point of construction. The reality is that the real issue between the parties on Clause 2.1.1 is not as to its proper construction, but whether MOU has breached the same on the facts (and/or may do so hereafter absent the injunctive relief sought).
18. Clause 7.1.1 of the Licence Agreement provides:-

“[MOU] shall use **all reasonable endeavours** so far as permitted by law **to safeguard the sole and exclusive licence granted to [Arccrafts]** and **in particular** to promptly cease to supply any person, firm or company who [MOU] knows infringes [Arccrafts’] rights hereunder and in particular, without limiting the foregoing, any such entity who seeks to sell or otherwise dispose of the Products in the Territory.”

(emphasis added)

19. The parties’ respective positions as to the proper construction of Clause 7.1.1 are at the heart of the issues for trial, and also in relation to the interim injunctive relief sought, and can be seen from their respective statements of case.
20. Arccrafts pleads as follows at paragraph 10 of its Particulars of Claim:-

“In relation to clause 7.1.1, and as a matter of the true construction of the Licence Agreement, Arccrafts pleads further as follows:

(1) MOU is required to use all reasonable endeavours so far as permitted by law to safeguard the sole and exclusive licence granted to Arccrafts;

(2) The generality of MOU’s obligation to use all reasonable endeavours so far as permitted by law to safeguard the sole and exclusive licence granted to Arccrafts is not circumscribed by the specific obligations which follow in clause 7.1.1.

(3) MOU must not supply Products to any person, firm or company who seeks to distribute, advertise, promote, sell or otherwise dispose of the Products in the Territory;

(4) Alternatively to (3), MOU must not supply Products to any person, firm or company who it knows or suspects will distribute, advertise, promote, sell or otherwise dispose of Products in the Territory;

(5) Before supplying a third party, who is acting in the course of business, with Products, MOU must or must use all reasonable endeavours (all of which would be permitted by law) to:

(a) make that person aware of Arccrafts’ exclusive licence and authority to manufacture, distribute, sell, advertise and promote Products throughout the Territory; and

(b) make it a contractual term of any agreement with that person that they must not infringe Arccrafts’ sole and

exclusive licence and authority to manufacture, distribute, sell, advertise and promote Products throughout the Territory.

(6) After supplying a third party, who is acting in the course of business, with Products, MOU must or must use all reasonable endeavours (which would be permitted by law) to enforce the said contractual terms in the event of a breach or threatened breach by the third party or anyone acting on its behalf.”

(emphasis added)

21. It will be seen that the language of sub-paragraphs (4) and (5) above as to Artcrafts’ construction of Clause 7.1.1 track sub-paragraphs (2) and (3) of the Order that is sought (whilst sub-paragraph (1) tracks the language of Clause 7.1.1).
22. It is said that sub-paragraphs (2) and (3) of the draft Order are necessary given MOU’s obligation to use “all reasonable endeavours” and MOU’s pleaded case as to Clause 7.1.1 in which it **denies** that it was obliged to do such matters (as addressed below), not least in circumstances where MOU has now admitted, in the course of the hearing, that it **has** breached the Licence Agreement in the past, albeit it says that such breach was not done knowingly or intentionally. Artcrafts submits that there is very much more than a serious issue to be tried as to the correctness of its construction of Clause 7.1.1, and that absent the granting of the injunctive relief sought there is every reason to believe that MOU will breach Clause 7.1.1 (and thereby cause harm to Artcrafts in the various respects alleged including, but not limited to financial loss, as well as causing reputational damage to Artcrafts and confusion to purchasers, to the detriment of Artcrafts) given the stance MOU has adopted as to the proper construction of Clause 7.1.1.
23. In this regard MOU’s pleaded case as to the proper construction of Clause 7.1.1 is set out at paragraph 27 of the Defence and Counterclaim (in response to paragraph 10 of the Particulars of Claim) and is as follows:-

“27. As to §10:

(1) D denies that §10 correctly summarises the effect of clause 7.1.1.

(2) Clause 7.1.1 requires D to use all reasonable endeavours so far as permitted by law to safeguard the sole and exclusive licence granted to C and “in particular to promptly cease to supply any person, firm or company who the Licensor knows infringes the Licensee’s rights hereunder and in particular, without limiting the foregoing, any such entity who seeks to sell or otherwise dispose of the Products in the Territory”.

(3) The requirement set out in (2) is only triggered if there is knowledge on the part of D of:

(a) an extant infringement of C's rights by a person, firm or company to whom D has already supplied the Products; and/or

(b) an extant intention of a person, firm or company to sell or otherwise dispose in the Territory of Products already sold to the person, firm or company by D.

(4) When triggered, the obligation in clause 7.1.1 is limited to requiring D to cease supplying the Products in the future to the person, firm or company in question.

(5) Clause 7.1.1 does not require D to inform a person, firm or company of the existence of the Exclusive Licence in advance of contracting with them to supply the Products outside the Territory.

(6) Clause 7.1.1 does not require D to impose a contractual term on a person, firm or company to whom D intends to sell the Products outside the Territory prohibiting that person, firm or company from infringing C's Exclusive Licence.

(7) A requirement that D:

(a) inform a person, firm or company of the Exclusive Licence in advance of contracting with them to supply the Products; or

(b) impose a contractual term on a person, firm or company to which D intends to sell the Products prohibiting that person, firm or company from infringing C's Exclusive Licence is not a reasonable endeavour within the meaning of clause 7.1.1 because it would impair D's right to sell, dispose of or promote the Products outside the Territory.

(8) D's right to sell, dispose of or promote the Products outside the Territory would be impaired by a requirement as set out in (7) because:

(a) D does not have the ability, within the law, to prohibit in advance, a person, firm or company from making such onward sales of the Products as that person, firm or company so chooses having been sold the Products by D outside the Territory.

(b) D cannot compel a person, firm or company to contract on specified terms when such terms are so opposed to the commercial interests of that person, firm or company that they would prevent an agreement for sale of the Products outside the Territory from being reached.”

(emphasis added)

24. It will be seen, therefore, that MOU denies that the “all reasonable endeavours” obligation extends to the matters emphasised above.
25. In support of its construction, and by way of rebuttal of MOU’s construction of Clause 7.1.1, Artcrafts relies upon the case law in relation to the use of “all reasonable endeavours”.
26. Whilst the content of the obligation is always fact-specific, the Courts have generally treated express obligations to use “best efforts”, “best endeavours”, and “all reasonable endeavours” as coterminous (see *Sir David Rowat Barclay v Tuck (aka Lord De Chanson)* [2018] EWHC 1125 (QB) at [102] (Spencer J)). As such, these have been described as imposing an obligation, “[to do] all that can reasonably be expected”: *Overseas Buyers Ltd v Granadex SA* [1980] 2 Lloyd's Rep 608 at 613 (per Mustill J), and “to take all the reasonable courses he can”: *Rhodia International Holdings Ltd and another v Huntsman International LLC* [2007] EWHC 292 (Comm), [2007] 2 Lloyd's Rep. 325, at [33] (per Julian Flaux QC (as he then was)).
27. Further, it is generally accepted that the use of the word “reasonable” imports an objective standard where the court applies objective criteria to determine whether an endeavour is reasonable (see, in this regard, paragraphs 16.49 to 16.52 of *Lewison, The Interpretation of Contracts*, 8th ed 2023). It does not suffice for a party subjectively to consider that they have satisfied the obligation to use all reasonable endeavours.
28. The fact that a party has agreed to use their best, or all reasonable, endeavours usually pre-supposes that they may well be put to some financial cost or detriment in achieving the stated objective. Whether, and if so to what extent, a person who has undertaken to use his best endeavours can have regard to his own financial interests will depend very much on the nature and terms of the contract in question (see *Jet2.Com Limited v Blackpool Airport Limited* [2012] EWCA Civ 417, [2012] 2 All E.R. (Comm) 1053, at [32] (Moore-Bick LJ) and [70] (Longmore LJ)).
29. Artcrafts’ case is that the obligation in clause 7.1.1 to “use all reasonable endeavours so far as permitted by law” is not limited by what follows about “promptly ceasing to supply” an entity whom MOU knows to infringe Artcrafts’ rights. Artcrafts submits that that is merely a specific instantiation of the general obligation to “use all reasonable endeavours so far as permitted by law to safeguard the sole and exclusive licence”. It is not sufficient, as MOU claims, merely - after the event - to cease to supply an entity, such as SSENSE, who is known to have infringed Artcrafts’ rights. Rather, the obligation includes the taking of positive steps not to infringe or cause an infringement.
30. Artcrafts submits that the steps it says MOU should take (as reflected in its pleaded case and the injunctive relief sought) are comfortably within the range of actions which MOU can reasonably be expected to take in fulfilment of its obligation under Clause 7.1.1 to use all reasonable endeavours (so far as permitted by law) to safeguard the sole and exclusive licence granted to Artcrafts.
31. Whilst I consider that Artcrafts has a strong case in relation to its interpretation of Clause 7.1.1 of the Licence Agreement for the reasons given by it, it suffices for the

purposes of the Interim Injunction Application that there is, at the very least, a serious issue to be tried.

D.OVERVIEW OF EVENTS OF RELEVANCE TO THE INJUNCTIVE RELIEF SOUGHT

D.1 SSENSE

32. MOU has supplied 7,000 of the Products to a global online retailer named Atallah International Inc (trading as “SSENSE”). That retailer is physically located in Canada (a non-exclusive territory) and has a physical site/store in Montreal, Canada. However, SSENSE was selling, advertising and/or promoting the Products into Artcrafts’ exclusive Territory through its online site, including, but not limited to, the USA (and other countries within Artcrafts’ exclusive Territory), as demonstrated by test purchases carried out by Artcrafts itself.
33. Artcrafts submits, but MOU denies, that in view of the volume concerned, it is obvious that this was MOU’s and SSENSE’s intention, not least in the context of MOU’s pleaded case (as identified above) that, when it supplies Products to third parties, it is not required to take any steps to restrict the third party from selling, advertising and/or promoting the Products in Artcrafts’ exclusive Territory. As MOU now accepts, it took no steps to inform SSENSE of Artcrafts’ exclusive licence, whether before or after the supply of the Products. Artcrafts submits that these acts and omissions, together and separately, constitute a breach of the Licence Agreement, and in particular MOU’s express obligation to “use all reasonable endeavours so far as permitted by law to safeguard the sole and exclusive licence granted to [Artcrafts]” in Clause 7.1.1, as quoted above.
34. MOU initially denied that it was in breach of the Licence Agreement and that remains its pleaded position in the Defence and Counterclaim (which will need to be amended in the light of admissions made on behalf of MOU at the hearing). In this regard, on the second day of the hearing, Mr Coppel KC admitted on behalf of MOU that MOU was in breach of the Licence Agreement in relation to the SSENSE sales (whilst denying such breach was intentional). As to the alleged lack of intentionality MOU points to the fact that 7,000 pairs of the Products is not a large amount set against the population of Canada (a point that Artcrafts, in turn, denies). Such matters, including what MOU knew and intended, will be issues for determination at trial.
35. It is important to appreciate how the parties’ positions have developed. It has always been Artcrafts’ case that the USA is within its exclusive Territory and accordingly that MOU cannot promote, advertise or sell into the USA (Clause 2.1.1) and must use all reasonable endeavours under Clause 7.1.1 to safeguard the sole and exclusive licence granted to Artcrafts in relation to sales into the Territory (including in the respects alleged by Artcrafts on its construction of Clause 7.1.1).
36. The USA came within the exclusive Territory following a letter agreement between MOU and Artcrafts dated 9 January 2012 from Ms Tichborne to Mr Ponziani (which the parties have referred to as the “USA Agreement”), and which provided:-

“With Reference to the License Agreement dated April 8, 2011,
MOU hereby states and confirms that as of January 1st 2012

the United States of America shall be included among the Territories itemized in Schedule 2 thereof for a trial period of 3 Years. The trial period shall be regulated, save for the aspects and covenants that are not compatible with a trial period, by and under the mentioned License Agreement. **If at the end of the third year (31 December 2014) sales of Products have exceeded 5000 prs [i.e. pairs] for such third year, the United States of America will be officially included into the list of Territories and regulated by and under the aforementioned License Agreement”**

(emphasis added)

37. Therefore, the USA was to be included within the Territory under the Licence Agreement if Artcrafts satisfied the condition (the “USA Condition”) of sales of Products exceeding 5,000 pairs for the period 1 January 2014 to 31 December 2014 (the “2014 Period”). Artcrafts’ evidence, as set out in Ponziani 1 at [42] is that in 2014 Artcrafts sold 5,391 pairs of the Products in the USA to CRS International Inc (“CRS”), Artcrafts’ distributor in the USA. Therefore, Artcrafts satisfied the USA Condition.
38. Thereafter a disagreement followed as to whether Artcrafts had demonstrated this (if it was obliged to do so). Artcrafts says that it repeatedly provided extensive documentary evidence detailing the relevant sales in the USA and first did so as long ago as May 2015 (as set out in Ponziani-1 at [42]) and provided evidence at subsequent intervals since 2015, including Customs Declarations from U.S. Customs and Border Protection which showed the number of Products imported to the USA in the 2014 Period. Artcrafts also paid Royalties to MOU in respect of the sales in the USA during the 2014 Period.
39. However MOU refused to accept that Artcrafts satisfied the USA Condition (the “USA Issue”), and this remained its position after the interim injunction and in its Defence and Counterclaim (also alleging that the USA Agreement contained additional conditions which were raised for the first time in the Defence and Counterclaim).
40. Thereafter on 29 February 2024, Artcrafts filed Barreveld 1. Mr Barreveld is the Managing Director of CRS. This again confirmed that Artcrafts satisfied the USA Condition (see Barreveld 1 at [9]-[16] exhibiting further evidence in that regard).
41. Then on 28 March 2024 Ms Tichborne in paragraph 2 of her 276-paragraph witness statement (supported by a statement of truth) admitted that the USA was within the exclusive Territory, albeit her stance, and that of MOU, remains that she was only able to make that admission in the light of the material exhibited to Mr Barreveld’s witness statement. It is accepted on behalf of MOU that this amounts to a CPR Part 14.2(1) admission on which Artcrafts can seek judgment (CPR Part 14.4(1)). The admission is also relevant to the declaration that Artcrafts seeks on the USA Application.
42. In relation to the admission, Ms Tichborne stated as follows:-

“Mou now has sufficient evidence that establishes that at the end of the year ending 31 December 2014 sales of Products (as defined in the Licence) in the USA exceeded 5,000 pairs, as a result of which with effect from 1 January 2015 the USA became included in the list of Territories in Schedule 2 to the Licence and became regulated by and under the Licence.”

43. In the course of the hearing I pointed out that MOU maintained its denial that the USA was within the exclusive Territory in its Defence and Counterclaim (and made other specific positive averments in that regard in relation to sales to the USA that had not previously been made) all of which could not stand in the light of Ms Tichborne’s admission. I invited MOU to serve a draft amended Defence and Counterclaim overnight with a view to remedying this (if the amendment was approved by the Court). MOU did so in a draft Amended Defence and Counterclaim (the “Draft Amended Defence and Counterclaim”), now admitting (at [22(f)]) that “The United States of America remained in Schedule 2 to the Licence after 31 December 2014”. However, as Mr Coppel KC accepted on MOU’s behalf on the second day of the hearing, the draft amendment remained defective in that it did not remove all associated pleas in relation to the USA that could no longer stand. No doubt a further revised draft will be forthcoming after this judgment which can be approved if it is in appropriate terms.
44. Whilst, as the parties accept, it is not necessary for me to address in this judgment when MOU should first have accepted that the USA remained part of the Territory, it is clear that MOU has always **known** that this was Artcrafts’ position, and MOU has now admitted that the USA has remained part of the exclusive Territory ever since 2014, and it is in such context that sales into the USA (other than by Artcrafts) were (and are) in breach of Artcrafts’ exclusive licence in relation to the USA, and would be in the future. Equally MOU now accepts that it was in breach of the Licence Agreement in relation to such sales through SSENSE as was confirmed to me on the second day of the hearing. The risk of future sales in breach of the Licence Agreement and MOU’s obligations thereunder is to be viewed in the context of MOU’s stance as to its interpretation of Clause 7.1.1 (which includes a denial of any obligation to inform any wholesale purchaser of Products from MOU of Artcrafts’ exclusive licence in the Territory, and denial of any obligation of providing for a prohibition of resale into such Territory in any contract with such wholesale purchaser).

D.2 THE MOU WEBSITE

45. MOU has a domain and website “mou.com” (the “MOU Website”). It sells MOU products on that website (including footwear i.e. the Products) as well as other MOU products (not the subject of the Licence Agreement). As at May 2023 when the MOU Website was live and purchases could be made on that website, though MOU says that the MOU Website was still in a “beta testing phase”, the MOU Website not only displayed MOU footwear (and so Artcrafts says advertised and promoted MOU footwear into the Territory in breach of the Licence Agreement, as it was active and accessible to any customer in the Territory), but actual sales could be made by customers in the Territory, as Artcrafts proved by test purchases, which on any view was a breach of the Licence Agreement, and Artcrafts says was a flagrant breach of the Licence Agreement (MOU thereby directly competing with Artcrafts in exclusive

Territory and depriving Artcrafts of sales (or potential sales) and having the potential to cause confusion to customers).

46. MOU's pleaded position (in the Defence and Counterclaim) was, and remains, that it was not in breach of the Licence Agreement in relation to the operation of the MOU Website pleading that it "has never sold, advertised or promoted the Products in the Territory on mou.com" (at [49(6)]). As Artcrafts points out, that contention is impossible to justify in circumstances where Artcrafts was able to complete test purchases from the MOU Website, and on day two of the hearing Mr Coppel KC again conceded that MOU was in breach of the Licence Agreement in relation to the (then) configuration of the MOU Website and such sales. Once again, the Defence and Counterclaim has yet to be amended to correct the position, and an amendment will be necessary.
47. As already noted, Artcrafts' case is that pursuant to Clause 2.1.1 MOU is not permitted, directly or indirectly, to manufacture, distribute, sell, advertise or promote the Products anywhere in the Territory (unless otherwise agreed by Artcrafts). In effect, clause 2.1.1 operates as an express or implied covenant that MOU will not, directly or indirectly, manufacture, distribute, sell, advertise or promote the Products anywhere in the Territory. It follows (it is said) that advertising and promoting the Products via the MOU Website to customers located within the Territory is a breach of the Licence Agreement. On any view Artcrafts' construction of Clause 2.1.1 stands a strong prospect of success at trial (if indeed it is disputed by MOU).
48. It is MOU's position that the set-up of the MOU Website was an innocent error (though it now accepts it was in breach of the Licence Agreement in consequence), and that it corrected the position when it was drawn to its attention by Artcrafts. If a user now uses a UK IP address and clicks on the "Footwear" Tab it no longer sees the MOU range of footwear, and receives the message, "Unfortunately, the Mou footwear collection is not available for purchase in your region from this site. To view the stunning collection of mou footwear available in your region, please shop our licensee's retail site mou-online.com" (the latter site being that of Artcrafts' website (the "Artcrafts Website"))).
49. Artcrafts' position is that MOU remains in (flagrant) breach of the Licence Agreement in relation to the MOU Website. First, it is said that without an automatic redirect to the Artcrafts Website (or, though less satisfactory, a "click through") the damage caused by MOU continuing to promote and advertise footwear in a manner accessible from the Territory (which Artcrafts says is in breach of Clause 2.1.1 of the Licence Agreement) is not ameliorated by the notice, and on any view, customers should be automatically redirected to Artcrafts' Website. Secondly, MOU is blatantly advertising and promoting the footwear (even if it cannot be purchased) in the Territory including in the UK (which is itself within the Territory, and MOU can only sell in the UK through its UK physical store). Clause 2.1.1 grants Artcrafts an exclusive licence to "sell, advertise and promote" the Products in the Territory, and so (per Artcrafts' case) the MOU Website, as configured, involves a breach of Clause 2.1.1. Thirdly, the MOU Website allows you to "click" at the bottom of the Home Page to change from "United Kingdom GBP" to any country/currency in the world, and if you choose a country other than in the Territory all the footwear products are then displayed (it may be, but I was not addressed on the point, that the same effect could be achieved by the use of a VPN).

50. For its part, MOU says that the MOU Website, so far as “Footwear” is concerned is for “information (only)” so far as concerns the Territory and does not amount to advertising or promotion in the Territory. Suffice it to say that I consider this to be a challenging submission for MOU to advance. Whilst it will ultimately be a matter for trial, I am satisfied that there is very much more than a serious issue to be tried that Artcrafts is right in submitting that the MOU Website, as configured (and as previously configured) gives rise to a breach of MOU’s obligations under Clause 2.1.1 of the Licence Agreement (and its “all reasonable endeavours” obligations under Clause 7.1.1 of the Licence Agreement), and does so in a way that not only leads to possible loss and damage to Artcrafts (albeit hard to quantify), but also confusion on the part of customers, and also potential reputational damage (none of which would be easily recompensed in an award of monetary damages).
51. On any view the MOU Website contains both photographs of models wearing MOU footwear, as well as pictures of MOU footwear (even on the home page) within the Territory (even if the Footwear Tab, when viewed in the Territory does not), though that can be circumvented by even a minimally “tech-savvy” customer by use of the country/currency tab, at the very least to view the footwear.
52. During the course of the hearing I raised with the parties the fact that it was in the interests of both MOU (through Royalties) and Artcrafts (through sales) to maximise sales of the Products in the Territory and the MOU Website could be amended to achieve just that (with automatic redirect), and such a solution (which would require the agreement of Artcrafts given the prima facie breaches of the Licence Agreement) would be to the potential benefit of both parties. However that is not something that can be achieved by the Court. To date MOU has objected to an automatic re-direct on the basis that this would negatively impact its search engine ratings. I do not know whether that is so or not (Artcrafts’ evidence is that it is not), nor do I know whether there is any way to ameliorate that. However at present the position remains that Artcrafts submits that MOU is in continuing breach of the Licence Agreement in relation to the MOU Website.
53. The position before the Court, in the context of the claim for injunctive relief, is therefore that MOU has now admitted that MOU has breached the Licence Agreement in relation to MOU Website in the past, and per Artcrafts’ case MOU is continuing to do so, and will continue to do so unless the injunctive relief sought is granted.

D.3 GOOGLE ADS

54. Until Artcrafts pointed this out to MOU, MOU was also using the Trade Marks to advertise and promote the Products in the Territory without Artcrafts’ consent, by means of Google Display advertisements shown to customers or potential customers located in the Territory and which, if clicked, redirected the user to the MOU Website. This has now been corrected by MOU (and it is said that this occurred in error, rather than being the result of deliberate conduct). However MOU continued to deny it was thereby in breach of the Licence Agreement. On day two of the hearing Mr Coppel KC, on behalf of MOU, accepted that there had been a breach of the Licence Agreement in that regard too.
55. A further allegation made by Mr Ponziani in Ponziani 1 at [79] is that MOU has also engaged in conduct of contacting publishers advertising the “Mou” brand within the

Territory to include and promote the MOU Website, even in circumstances where the Retail Site is already listed. This allegation was not addressed in Ms Tichborne's witness statement and has not featured prominently in the submissions before me. In such circumstances I simply note that such conduct (if proved) would almost certainly be a breach of the Licence Agreement, and would also be prevented in the context of the injunctive relief sought.

D.4 CORRESPONDENCE BEFORE THE ACTION WAS COMMENCED

56. I have been taken to the correspondence between the parties before the present action was commenced. In short, such correspondence did not lead to a position that would have obviated the need for injunctive relief. For its part MOU submits that the tone and content of the correspondence on behalf of Artcrafts was aggressive and inappropriate, whilst for its part Artcrafts submits that it was prepared to resolve matters by an appropriate deed of undertaking from MOU, but that at no stage was MOU willing to enter into any deed of undertaking, or give any solicitor undertakings that would have been satisfactory, or indeed acknowledge that MOU had committed any breaches of the Licence Agreement, and it says that in such circumstances it had no choice but to commence proceedings and seek the injunctive relief that it sought before Stacey J.
57. In this regard Artcrafts sent a letter before claim to MOU on 7 November 2023. The letter required MOU, amongst other matters, to cease to supply SSENSE with any Products and to take all reasonable endeavours to safeguard the sole and exclusive licence granted to Artcrafts (by reference to Clause 7.1.1). In relation to the MOU Website, it also required MOU to cease advertising and/or promoting the Products to any customer or potential customer in the Territory. Artcrafts invited MOU to enter into a Deed of Undertaking (in the form provided) in order to avoid proceedings.
58. I was taken to that letter and the Deed of Undertaking during the course of oral submissions. There is no doubt that the letter is in forthright terms (and, among other matters, accused MOU of intentional conduct that MOU still denies), and it is also correct that the Deed of Undertaking contained Recitals that required MOU to acknowledge breach of the Licence Agreement (albeit that MOU has since admitted some breaches on the second day of the present hearing), however the actual undertakings sought were in the following terms:-

“1.1. From the date of execution of this Deed of Undertaking by MOU until the date of termination of this Deed of Undertaking, MOU undertakes that it will:

1.1.1. Cease and desist from advertising and/or promoting the Products to any customer or potential customer in the Territory (unless it has been given prior and specific written consent by Artcrafts to do so);

1.1.2. Cease and desist from distributing, selling, advertising or promoting any Products in the Territory directly or indirectly through SSense.

1.2. Further, MOU undertakes that:

1.2.1. on the date of execution of this Deed of Undertaking, it will notify SSense in writing that it is unlawful for SSense to distribute, sell, advertise or promote any of the Products to any customer in the Territory; and

1.2.2. shall thereafter take all reasonable steps to safeguard, vis-à-vis SSense, the sole and exclusive licence granted to Artcrafts.”

59. By subsequent correspondence, MOU took the stance that it was entitled to act as it did and did not accept that it was in breach of the Licence Agreement or Artcrafts’ exclusive licence. In any event MOU did not agree to enter into the Deed of Undertaking, or give any undertaking, and it was in such circumstances that Artcrafts sought, and obtained, injunctive relief from Stacey J in the form already quoted above.
60. I cannot but help feel that matters could have been resolved without the intervention of the Court had MOU been willing to give an undertaking, in advance of the commencement of proceedings along the lines of paragraph 1.1, even if tweaked to be expressed in neutral terms by removal of “cease and desist” and with caveats that any undertaking was without prejudice to the parties’ respective positions, an approach I consider Artcrafts would also have been expected to give consideration to. Such undertakings are often given either in advance of proceedings, or at the time injunctive relief is sought (or upon return dates) to obviate the need for injunctive relief or continuing injunctive relief. However that has never occurred in this case, and so it is necessary to determine the Interim Injunction Application that is before me on its merits.
61. So far as paragraph 1.2 of the draft Deed of Undertaking is concerned, and as the correspondence shows, it was Artcrafts that in fact contacted SSENSE, and SSENSE has cooperated with Artcrafts to ensure that none of the Products sold to SSENSE will be sold into the Territory going forward.

E. THE INTERIM INJUNCTION APPLICATION

E.1 APPLICABLE PRINCIPLES – AMERICAN CYANAMID

62. Pursuant to section 37 of the Senior Courts Act 1981, the court may grant an injunction whenever it considers it “just and convenient” to do so. The parties are agreed that the principles stated in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 and developed subsequently by the courts apply to the question of whether the interim injunction should be continued until trial.
63. There was no issue between the parties as to the applicable principles. Such differences as there were between the parties related not to the applicable principles but to the application of the principles to the facts. In summary:
- (1) The court first asks itself whether there is a serious issue to be tried.

- (2) If there is, the court then considers whether the claimant would be adequately compensated in damages for any loss caused to it by the defendant's conduct which it seeks to restrain. If yes, no injunction should normally be granted.
 - (3) If damages would not be an adequate remedy for the claimant, the court considers whether the defendant would be adequately compensated by an award of damages under the claimant's undertaking in damages if it were to succeed at trial. If yes, the fact that the defendant may succeed at trial is no bar to the grant of an injunction.
 - (4) Where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, the court must determine where the balance of convenience arises. The matters to be taken into consideration at this stage and the weight given to each of them will vary from case to case.
 - (5) The court should take whichever course seems likely to cause the least irreparable prejudice to one party or the other or to preserve the status quo.
64. Other principles that emerge from the case law include that:-
- (1) It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial: *American Cyanamid* at 407.
 - (2) When considering whether there is a serious issue to be tried, the claimant's allegations of primary fact must be accepted as true unless they are plainly false or fanciful. The court considers whether the available material shows that the claimant has a real prospect of succeeding in its claim for a permanent injunction: *Sportsdirect.com Retail Ltd v Newcastle United Football Club Ltd* [2024] EWCA Civ 532, [29].
 - (3) The more uncertain the quantification of damages, the more likely it is that damages are not an adequate remedy: *Leo Pharma A/S v Sandoz Ltd* [2008] EWCA Civ 850, [23]-[25].
 - (4) As to the "balance of convenience", the essential principle is that the court should take whichever course seems likely to cause the least irreparable prejudice to one party or the other: *National Commercial Bank Jamaica Ltd v Olint Corp Ltd* [2009] UKPC 16, [2009] 1 W.L.R. 1405, [17].
 - (5) There is a strong presumption that the court will enforce negative covenants by injunction due to the policy that parties should be held to their bargains, though there may be exceptional cases or special circumstances where the court will refuse to exercise its discretion: *Insurance Co v Lloyd's Syndicate* [1995] 1 Lloyd's Rep 272.

E.2 SERIOUS ISSUE TO BE TRIED

65. As MOU rightly acknowledges (MOU Skeleton paragraph 27), the first question, is there a serious issue to be tried, is not usually difficult to satisfy because, on the

principles identified above, the Court will answer the question assuming the primary facts (i.e. what the parties did and what the parties did not do) alleged by the claimant will be established at trial.

66. I am satisfied that the position is a *fortiori* in the present case on the facts, and the parties' positions, as already known, and that there is very much more than a serious issue to be tried, and indeed in the context of such matters an interim injunction to trial is clearly necessary.
67. MOU has already failed to abide by the Licence Agreement in numerous respects in relation to the sales to SSENSE, in relation to the MOU Website, and the Google Ads each of which gives rise to breaches of the Licence Agreement that have already been committed – i.e. MOU has failed in the past to abide by its contractual obligations under the Licence Agreement in the various respects already identified above.
68. MOU has at all times (wrongfully) denied that its past actions amounted to a breach of the Licence Agreement when it is clear that it has acted in breach of the Licence Agreement. Thus before the proceedings were commenced, after they were commenced, after the injunction was granted by Stacey J, in the Defence and Counterclaim (supported by a Statement of Truth) and in the MOU Skeleton Argument (e.g. at [58]) MOU has continually denied that it has, to date, committed any breach of the Licence Agreement, when it undoubtably has. That denial can give the Court no confidence that it will abide by the terms of the Licence Agreement in the future, given that it has not done so in the past.
69. MOU now accepts (belatedly), on day two of the hearing, that contrary to its stance to date, MOU has breached the Licence Agreement in the context of the sales to SSENSE, the MOU Website and in respect of Google ads. Exactly how egregious such breaches are will be a matter to be explored at trial. However I am satisfied, for the reasons set out at paragraphs [42] to [63] of Artcrafts' Skeleton Argument, that there is a serious issue to be tried not only in respect of the scope of MOU's obligations under the Licence Agreement, but also on the pleaded issues of breach of contract committed by MOU (and for the reasons there stated).
70. But the position goes beyond serious issue to be tried, as it is now an admitted fact that MOU is in breach of contract in relation to SSENSE, the MOU Website and Google Ads even if issues remain on knowledge and intention. Accordingly MOU is already liable (not arguably liable) to Artcrafts in respect of such loss and damage as flows from such breaches (not only direct monetary loss however difficult to quantify, but also reputational loss and confusion to consumers as addressed below). Such admitted breaches are also set against the backdrop that MOU has been denying that it had done anything wrong (in terms of breaching the Licence Agreement) in doing that which it did, over an extended period of time, a stance it maintained until such position became untenable.
71. However MOU asserts that whether or not such conduct justified the imposition of injunctive relief in the terms ordered by Stacey J, as at the date of this return hearing there is no ongoing conduct of MOU to injunct (see MOU Skeleton at [58]). Quite apart from ignoring the relevance of considering past conduct (and MOU's previous untenable and unmaintainable stance in denying any breach in relation to the same)

when considering whether an injunction should be continued to trial, this submission simply does not bear examination, and is with respect, hopeless.

72. First, there is very much more than a serious issue to be tried that by reason of the MOU Website in its current form, there are ongoing breaches of the Licence Agreement on the part of MOU, which unless MOU is restrained by injunctive relief, will continue. As already noted, MOU continues to deny that by reason of the MOU Website it is promoting or advertising the Product (footwear) in the Territory, when there is very much more than a serious issue to be tried that it is (as already identified), and that in doing so it is in breach of Clauses 2.1.1 and/or 7.1.1 of the Licence Agreement. MOU's stance, that it is not advertising or promoting the Product (footwear) on the MOU Website (and which is viewable in the Territory) but is only providing "information" is, on any view, a challenging one for MOU, and I am satisfied that Artcrafts has very much the better of the argument on the point.
73. Secondly, and even more fundamentally, there is very much more than a serious issue to be tried that Artcrafts is correct in its construction of Clause 7.1.1, and that MOU has not taken, and does not intend to take hereafter and until trial, all reasonable endeavours to safeguard the sole and exclusive licence granted to Artcrafts. Crucially in this regard MOU has made it perfectly plain that it does not consider itself to be contractually obliged under Clause 7.1.1, (1) to make any third party acting in the course of business aware of Artcrafts' exclusive licence and authority to manufacture, distribute, sell, advertise or promote Products throughout the Territory or (2) make it a contractual term of any agreement with that person that they must not infringe Artcrafts' sole and exclusive licence and authority to manufacture, distribute, sell, advertise and promote Products throughout the Territory (including the USA), as expressly set out in its Defence and Counterclaim (supported by its Statement of Truth). There can be no doubt, therefore, that that is, and will remain, MOU's position.
74. In this regard, and given that MOU is in the business of seeking to make a profit from the sale of its footwear (in territories other than the exclusive Territory), and given its stance in relation to Clause 7.1.1, there is every reason to infer that unless the injunctive relief sought is granted, it will not do either (1) or (2) when selling to a third party acting in the course of business in the future, and in consequence will be (or will arguably be) in breach of the Licence Agreement and Clause 7.1.1 thereof, and arguably will also be in breach of Clause 2.1.1 of the Licence Agreement.
75. Indeed I consider it telling that when, during the course of day two of the hearing Mr Coppel KC, on instructions from Ms Tichborne, stated that MOU would be prepared to make any third party acting in the course of business aware of Artcrafts' exclusive licence and authority to manufacture, distribute, sell, advertise or promote Products throughout the Territory (this being the first time this had ever been indicated, no doubt in recognition of how matters had developed at the hearing), Mr Coppel KC then immediately, and unequivocally, stated, when asked, that MOU would **not** be prepared to give an undertaking to such effect. I consider that this only goes to reinforce the necessity for injunctive relief in circumstances in which MOU is not prepared to agree to a course consistent with a contractual interpretation on which there is very much more than a serious issue to be tried, and in circumstances where the giving of such undertaking could not possibly cause any possible harm to MOU or its commercial interests (viewed consistently with its obligations under the Licence

Agreement in relation to which MOU unequivocally accepts that there should not be sales into Artcrafts' exclusive Territory other than by Artcrafts).

76. In such circumstances, there is very much more than a serious issue to be tried, and I am satisfied that injunctive relief of the type sought is necessary to prevent future breaches of the Licence Agreement up until trial or further order, as without such injunctive relief I consider there is every chance that MOU will fail to abide by the terms of the Licence Agreement and commit further breaches thereof (and all in circumstances where the loss and damage suffered by Artcrafts would be difficult to quantify as addressed below). I am satisfied that there is a strong probability that, unless restrained by the injunction, MOU will act in breach of Artcrafts' rights, and I consider that it is vital for the injunction to continue in force to protect Artcrafts' interests (to adopt the language used in a case relied upon by MOU – *Celanese Corp v Akzo Chemie UK Ltd* [1976] FSR 273, 275).

E.3 ADEQUACY OF DAMAGES

77. Mr Ponziani addresses in detail in his statements why he says that damages would not be an adequate remedy for Artcrafts (see, in particular Ponziani 1 at [64]-[67], Ponziani 2 at [94] and Ponziani 3 at [63]). Like Stacey J before me (who had particular regard to reputational damage to a company such as Artcrafts – at [16]), and by reference to the evidence of Mr Ponziani before me, I am satisfied that damages would not be an adequate remedy for Artcrafts for any number of reasons.
78. First, there would be the inherent difficulty in actually quantifying Artcrafts' loss and damage both in relation to actual (or potential) lost sales. Even in relation to actual sales, relevant sales data would not be in the hands of MOU (save where MOU was the seller), and so far as potential sales that were lost the position would be even more difficult to quantify. Secondly, MOU's unlawful conduct (that is conduct amounting to a breach of the Licence Agreement) will already have caused damage, and would be likely to cause damage in the future, in relation to Artcrafts' current and future customers throughout the Territory (MOU's suggestion that Artcrafts has suffered "zero" loss simply does not bear examination). In this regard Artcrafts has no control over the range of Products offered by third parties, their quality or pricing structure. I accept that this causes, and has the potential to cause, significant customer confusion which damages the "MOU brand" (and, by extension, the sales of the Products), and is also likely to cause reputational damage. Thirdly, the consequences of the MOU Website existing (in its current form) in co-existence with the Artcrafts Website has the potential to cause further customer confusion and reputational harm. Yet further, and without an automatic redirect, customers may simply be "lost" to the MOU brand, and Artcrafts, as they may not bother to type in an IP address manually, and may fail to make a purchase (or purchase a rival product). Fourthly, Artcrafts' business involves multi-brand commercial relationships with third parties, in respect of MOU and other brands. I accept that those relationships would be potentially undermined by MOU supplying Products to be sold in the Territory, and this would go beyond the "MOU brand". The unlawful competition from third parties supplied by MOU to sell Products in the Territory could be highly damaging to Artcrafts' relationship with those third parties (with potentially serious consequences for Artcrafts' entire business). Finally, I accept that there is also a risk that Artcrafts could itself be subject to claims for losses that valid sellers to which Artcrafts has in turn promised

exclusivity within the Territory suffered as a result of competitive activity by MOU (albeit there is no evidence of that to date).

79. There is a further point. Artcrafts submits that MOU is unlikely to be able to meet any substantial award that would be made in Artcrafts' favour following a trial in which it succeeded in establishing that MOU has acted in breach of the Licence Agreement and in breach of Artcrafts' exclusive licence (as identified in the Previous Proceedings - see the 2022 Judgment at [70]). Whilst Ms Tichborne has stated (Tichborne 1 at [275]), that it is "nonsensical to suggest I am unable to pay my debts", MOU is, itself, a limited company and it does not automatically follow that Ms Tichborne has the assets and/or would sacrifice her assets, to pay such damages of the limited liability company. The evidence before me is that MOU initially failed to comply with a number of costs orders in the Previous Proceedings, which required Artcrafts to issue two statutory demands in relation to two different debts. I note that in the Previous Proceedings, MOU sought to rely on "a desktop valuation of PwC showing that the company might be worth many millions of pounds" to show that it could pay a substantial damages award, which was considered insufficient (see at [70] of the 2022 Judgment). No similar valuation has been attempted in these proceedings. Equally whilst MOU would, of course be receiving Royalties from Artcrafts (as MOU points out), the spacing of royalty payments under the Licence Agreement is spread across the year, and it does not follow that there would be assets which were readily available at the time of any judgment in Artcrafts' favour. MOU's position is also that Artcrafts would not be able to off-set royalty payments against MOU's liabilities.
80. In such circumstances I do not consider it would be just for Artcrafts to be confined to a remedy in damages.
81. Turning to the position of MOU, I am satisfied that MOU would be adequately compensated under Artcrafts' undertaking as to damages in the event that MOU succeeded at trial, and as such the possibility that MOU might succeed at trial is no bar to the granting of the relief suffered. In this regard I do not consider it at all likely that MOU would suffer anything like the same level of damage in the event that the interim injunction is granted. Artcrafts will continue to perform the Licence Agreement and pay the Royalties to MOU. If and to the extent that MOU did not make any sale that it would otherwise have made, it is likely that the same sale would be made through Artcrafts, directly or indirectly, and hence result in an increased payment of Royalties by Artcrafts to MOU. In such circumstances I do not consider that the hypothetical losses MOU posits would arise. MOU need not fear selling to a retailer (large or small) that has a website for fear of breach of the injunction, provided that MOU complies with the terms of the injunction as to notice and prohibition in contractual terms. Nor do I accept that MOU has suffered loss in relation to SSENSE. The evidence is that SSENSE was notified of the position by Artcrafts, SSENSE has complied, and as far as Artcrafts is aware, this has not stopped SSENSE selling the footwear within Canada (or elsewhere outside the Territory). MOU alleges that Artcrafts' communications with SSENSE caused it to cease placing orders with MOU, but it is a matter for SSENSE as to whether it places future orders. The backdrop to any consequences in relation to SSENSE is that MOU breached the Licence Agreement in that regard, and has to bear the consequences of its own actions.

82. Artcrafts also gives the usual cross-undertaking in damages in Schedule A to the Draft Order, and there is nothing to suggest that Artcrafts would not be able to pay any damages awarded in favour of MOU (very much the reverse – see Ponziani 1 at [68] as to Artcrafts’ audited financial position).
83. In such circumstances, I do not consider that there is any doubt as to the respective inadequacy and adequacy of damages respectively, as addressed above, which comes down firmly in favour of Artcrafts. However, lest it be thought that there were any doubt in that regard, I have also considered and determined where the balance of convenience lies.

E.4 THE BALANCE OF CONVENIENCE

84. I am satisfied that the balance of convenience, in terms of balancing the risk of prejudice (or as it has sometimes been expressed, the relative risk of injustice) comes down firmly in favour of the granting of the injunction sought. The course which is likely to cause the least irremediable prejudice is to grant the injunction. If an injunction were refused and MOU turned out to be wrong, the damage to Artcrafts is likely to be very considerable with the consequent damages being inadequate as difficult to quantify or measure, and with no certainty that any damages award would be met resulting in irremediable prejudice to Artcrafts, whereas in contrast I do not consider that MOU would suffer prejudice, still less irremediable prejudice, in being held to the contractual obligations under the Licence Agreement, and in circumstances where any loss (should MOU succeed at trial) could be recompensed in damages and recovered from Artcrafts. The granting of the injunction would also maintain the status quo under the terms of the Licence Agreement until the trial takes place.

E.5 THE GRANTING OF INJUNCTIVE RELIEF AND IN THE TERMS SOUGHT

85. In the above circumstances, and in the exercise of my discretion, I consider it just and convenient to grant the injunctive relief sought. I am satisfied that this is the course which will best ensure that the court is able to do justice after a determination of the merits at trial, the granting of the injunction being the more likely to produce a just result.
86. In terms of the breadth of the relief sought I am satisfied that it is no wider than is necessary to achieve that end. I will repeat the injunctive relief sought at this point for ease of reference:-

“Until trial or further order, in relation to the Licence Agreement [MOU] shall not directly or indirectly:

- (1) manufacture, distribute, sell, advertise or promote the Products anywhere in the Territory (including the USA);
- (2) supply Products to any person, firm or company whom [MOU] knows to have distributed, advertised, promoted, sold or otherwise disposed of Products in the Territory (including the USA) or to have sought to or to intend to take any such step;

(3) supply a third party, who is acting in the course of business, with Products unless [MOU]:

(a) makes that person aware of [Artcrafts'] exclusive licence and authority to manufacture, distribute, sell, advertise and promote Products throughout the Territory (including the USA); and

(b) makes it a contractual term of any agreement with that person that they must not infringe [Artcrafts'] sole and exclusive licence and authority to manufacture, distribute, sell, advertise and promote Products throughout the Territory (including the USA)”

87. The language of sub-paragraph (1) relates to the Clause 2.1.1 of the Licence Agreement and, on any view, is appropriate. Sub-paragraph (2) relates to the language of Clause 7.1.1 of the Licence Agreement and is also clearly appropriate. In oral submissions, Mr Coppel KC submitted that such language could catch a third party who had sold (in error) one pair of footwear into the Territory and that would prevent MOU selling to them again. That is a *reductio ad absurdum*. Quite apart from the fact that the wording of the Order is to be construed restrictively, and subject to *de minimis* (as noted by Mr Tolley KC on behalf of Artcrafts), were such a scenario to occur, as I pointed out at the hearing, the consent of Artcrafts to a sale could be sought, and if not forthcoming, an application made to Court under the liberty to apply (on which application the party acting unreasonably would be at risk on costs).
88. I am satisfied that sub-paragraph (3) is essential given the differences in interpretation between the parties as to the obligation of “all reasonable endeavours” in Clause 7.1.1, and the fact that, in consequence, MOU does not consider it is under any obligation to do either of those things (despite there being very much more than a serious issue to be tried that MOU is contractually required to do the same), with the result that such injunctive relief is necessary to avoid any such future (and further) breaches of the Licence Agreement and consequences of the same as already addressed.
89. I have already noted that MOU has, despite Ms Tichborne agreeing to inform third parties of Artcrafts' exclusive licence on day two of the hearing, declined to give an undertaking in the form of sub-paragraph (3)(a), whilst it has never been willing to give an undertaking in the form of sub-paragraph 3(b) either.
90. While accepting that sub-paragraph 3(a) would not now be problematic, Mr Coppel KC submitted that sub-paragraph 3(b) should only refer to any “new” agreement, as it could cause difficulties if there was an existing contract without such prohibition. I consider that this submission was more theoretical than real in circumstances in which MOU has not adduced any evidence that any such contract actually exists. Once again, were there to be any such contract, I have no doubt the parties could correspond to resolve any difficulty, and absent such resolution there is the liberty to apply in the Order.
91. In the above circumstances I grant the interim injunction against MOU in the terms sought, and until trial or further Order.

F. THE SUMMARY JUDGMENT APPLICATION (LICENCE TERMINABLE WITHOUT CAUSE ON REASONABLE NOTICE)

92. MOU pleaded at paragraph 23 of the Defence and Counterclaim that, “**On its true construction** (including clause 29.3) the Licence is determinable unilaterally on reasonable notice” (emphasis added). This assertion had not been asserted by MOU previously, including in the Previous Proceedings. In the Previous Proceedings, and whilst declaratory relief was sought by Artcrafts against MOU that purported material breach notices served by MOU were not valid, it is somewhat surprising if, as MOU now alleges, the Licence Agreement was terminable on reasonable notice that MOU had not asserted that previously, and gone down that route previously, as a rather easier route than seeking to terminate the Licence Agreement for material breach, not least in circumstances in which it is saying that it “wishes to end the Licence lawfully at the earliest moment”, as it now pleads at paragraph 64 of the Defence and Counterclaim, which is itself a rather odd plea that Artcrafts separately applies to strike out on the Strike Out Application.
93. It will be noted that, in the Defence and Counterclaim, MOU placed all its eggs in the “construction” basket alleging that on its “true construction” the Licence Agreement was terminable on reasonable notice. As will shortly be seen, the Licence Agreement contains express provisions as to its term (and its renewal), as to its termination for breach, and even termination without breach in specified circumstances (including by MOU).
94. This is hardly an auspicious start for the plea that is sought to be advanced by MOU. Perhaps in recognition of that, and again for the first time in MOU’s Skeleton Argument immediately before the hearing of Artcrafts’ Summary Judgment Application seeking the dismissal of MOU’s plea that the Licence Agreement was terminable on reasonable notice, MOU stated at [76(2)] of its Skeleton Argument as follows:-
- “By way of alternative, Mou will seek to amend its Defence and Counterclaim by adding (1A) to §23 which would read “Further or in the alternative to (1), the Licence had an implied term (implied because it was so obvious that it did not need to be articulated and/or because it was inherent in the Licence and/or because it was necessary in order that the Licence operate in a commercially rational way) that the Licence is determinable unilaterally on reasonable notice.” and by adding “and (1A)” to §23(2). The basis for implication is in the same terms as currently set out in §14(2) [3/32] and should cause no difficulty or additional effort for Artcrafts.”
95. Despite raising this argument for the first time immediately before the Summary Judgment hearing MOU did not apply to make such an amendment or provide a draft Amended Defence and Counterclaim before the hearing. A draft was only forthcoming on the second day of the hearing (and at my request). It is perhaps surprising, if MOU thought the point to be worthy of argument, that MOU had not raised the point previously (either by pleading it in the first place or as an immediate

riposte to the Summary Judgment Application). In any event, MOU was right that the amendment did not cause any difficulty or additional effort for Artcrafts for, as MOU candidly acknowledges, the alternative plea raises no new arguments and raises the very same points, as it puts it, “the basis ... is the same” – but with the additional hurdle that, in relation to any implied term, MOU has to grapple with the express terms of the Licence Agreement as to term and termination head on (given their apparent inconsistency with the term sought to be implied), in what is a bespoke contract negotiated by lawyers on each side.

96. It will be appreciated that the Summary Judgment Application, and MOU’s pleas, engage legal principles as to summary judgment, the construction of contracts, the implication of terms, and when a contract will be terminable on reasonable notice. The applicable principles are well known, and again were common ground before me. In such circumstances they can be briefly stated in the next section (Section F.1), before applying those principles to the facts.

F.1 APPLICABLE PRINCIPLES

F.1.1 SUMMARY JUDGMENT

97. The court may grant summary judgment under CPR 24.3 if it considers that (a) “the claimant has no real prospect of succeeding on the claim or issue”, and (b) “there is no other compelling reason why the case or issue should be disposed of at a trial”.
98. The principles governing applications for summary judgment are summarised in the oft-cited decision of *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]:
- (1) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success.
 - (2) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable.
 - (3) In reaching its conclusion the court must not conduct a "mini-trial".
 - (4) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents.
 - (5) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial.
 - (6) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case

would add to or alter the evidence available to a trial judge and so affect the outcome of the case. On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction.

99. The burden of showing that a case has no real prospect of success lies on the party who makes that assertion: *ED & F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472 at [9].

F.1.2 CONSTRUCTION OF CONTRACTS AND IMPLICATION OF TERMS

100. The leading authority on contractual construction remains *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173. As stated by Lord Hodge at [10]-[15]:
- (1) The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement.
 - (2) This is not a literalist exercise focused solely on a parsing of the wording of the particular clause. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning.
 - (3) Interpretation is a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. In striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause, it must be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest, and it must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.
 - (4) This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its

commercial consequences are investigated. Once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.

101. The law on implied terms was authoritatively restated in *Marks & Spencer plc v BNP Paribas* [2015] UKSC 72; [2016] AC 742 by Lord Neuberger:
- (1) The process of implying a term is distinct from, and normally occurs subsequently to, interpretation.
 - (2) For a term to be implied, it (a) must be necessary to give business efficacy to the contract such that the contract would lack commercial or practical coherence without it or so obvious that it goes without saying, (b) must be capable of clear expression, and (c) must not contradict any express terms of the contract.
 - (3) It is not enough to show that had the parties foreseen the eventuality which in fact occurred they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred.
 - (4) The court is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time at which they were contracting.
102. In relation to the implication of rights of termination specifically:
- (1) Where a contract has no express provision for termination, the court may imply a power to determine it on reasonable notice: *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1948] AC 173 (HL), 203; *Staffordshire AHA v South Staffordshire Waterworks Co* [1978] 1 WLR 1387, 1395-6.
 - (2) Where the contract is not for an unlimited time, but is for a fixed term, there is normally no room to imply further terms as to the termination of the agreement: *Kirklees Metropolitan BC v Yorkshire Woollen District Transport Co Ltd* (1978) 77 LGR 448, 453-4; *Jani-King (GB) Ltd v Pula Enterprises Ltd* [2007] EWHC 2433 (QB), [60]-[66].
 - (3) Where an agreement already contains express terms for termination, and the parties have therefore given careful consideration to defining the circumstances in which the agreement should be terminated, it will be especially difficult to imply further such terms: Lewison, *The Interpretation of Contracts* (8th ed), paragraphs 6.171-6.172; *Jani-King* at [64]; *Colchester & East Essex Co-op Ltd v. Kelvedon Labour Club & Institute Ltd* [2003] EWCA Civ 1671, [8] to [12].

F.2 APPLICATION OF THE PRINCIPLES ON THE SUMMARY JUDGMENT APPLICATION

F.2.1 INTRODUCTION

103. Artcrafts seeks summary judgment on the question of whether MOU has a real prospect of success or a more than fanciful case that on a proper construction of the Licence Agreement, alternatively pursuant to an implied term, the Licence Agreement is determinable unilaterally without cause on reasonable written notice from one party to the other (“the Termination on Notice Term”).
104. I have already noted that there is (to date) no application notice or accompanying draft amended Defence and Counterclaim served by MOU to amend its Defence and Counterclaim to advance a plea as to the alleged implied term sought. No formal point is taken by Mr Tolley KC, on behalf of Artcrafts, as to this, but he rightly points out that, on established principles, no permission to amend should be granted if a proposed amendment stands no real prospect of success. It is also accepted that, for the purpose of the Summary Judgment Application, I should take MOU’s case at face value, including its pleaded assertion (strongly denied by Artcrafts) that the Licence Agreement is a relational contract. I proceed on that basis when construing the Licence Agreement and considering the implication of any term.

F.2.2 THE EXPRESS TERMINATION PROVISIONS

105. The starting point (and Artcrafts submits, the end point, and conclusion) is that the Licence Agreement already contains express provisions which expressly regulate the circumstances under which each party can terminate the contract. It is therefore inconsistent with those provisions on termination to interpret the Licence Agreement as allowing one party to terminate in a manner and in circumstances which are not expressly stated, or to imply a term to that effect. It is therefore important to consider the express termination provisions of the Licence Agreement.
106. Clause 21 defines the term of the Licence Agreement:

“21. TERM

21.1 This Agreement shall commence on the Commencement Date and shall continue in force for five (5) Years from the Commencement Date (the “Initial Term”).

21.1.1 Upon the expiry of the Initial Term, this Agreement shall automatically be renewed for further periods of five years (the “Renewal Terms”) unless the Licensee notified to the Licensor at least six month prior each expiry dates that it wishes this Agreement not to be renewed and PROVIDED THAT the Licensee has not committed any Material Breach which is not curable at the time the Term expires. For the purposes of this renewal clause, the Parties agree that in case an event that may be the cause of termination of this Agreement has occurred without having been notified to the defaulting

party within the term referred to by clause 29.1, no Material Breach will be considered having taken place.”

107. The first, and key, point to note is that the Licence Agreement provides for its duration (for a 5 year term), and that term is renewed in accordance with the express provisions of Clause 21, i.e. it will automatically renew unless the Licensee (Arccrafts) notifies to the Licensor (MOU) at least 6 months prior to each expiry date that it wishes the Agreement not to be renewed (thereby giving Arccrafts the right to decide not to renew beyond the 5 years). That is subject to the proviso that Arccrafts has not committed any Material Breach which is not curable at the time the Term expires. For the purposes of the renewal clause (Clause 21) the parties have agreed that in case an event that may be the cause of termination of this Agreement has occurred without having been notified to the defaulting party within the term referred to by Clause 29.1, no Material Breach will be considered to have taken place.
108. Clause 29.1 provides that “Events of termination may lead to the termination of this Agreement only if such event is notified in accordance with the notice provisions in clause 25 to the defaulting party within sixty-six (66) Business Days after the relevant circumstances are known to the injured party”. This is but one of the provisions relating to termination which has been clearly crafted by the parties to set out when termination will be possible.
109. “Material Breach” is defined as “a breach which is a direct action of the breaching party and which causes serious negative consequences to the non-breaching party” (this provision therefore relates to each of MOU and Arccrafts).
110. Clause 22.1 then sets out the circumstances under which the Licensor (i.e. **MOU**) may terminate the contract:

“22. EVENTS OF TERMINATION

22.1 **Without prejudice to any other right under this Agreement.** the Licensor shall be entitled to terminate this Agreement with immediate effect by giving notice to the Licensee in the event that:

22.1.1 the Licensee goes into liquidation (other than voluntary liquidation for the purpose of a *bona fide* reconstruction or amalgamation the terms of which have been approved in writing in advance by the Licensor) or is dissolved, struck off, insolvent or bankrupt or unable to pay Its debts as they mature or suffers the appointment of a receiver, administrative receiver or administrator of the whole or any part of its assets or suffers any similar appointment or process under the law of its place of incorporation or domicile;

22.1.2 the Licensee challenges the validity of the Licensor's rights in or to the Trade Marks or any other Intellectual Property Rights of the Licensor in any country of the world during the continuance of this Agreement;

22.1.3 there is a change of Control in the Licensee, notwithstanding anything to the contrary stated in this Agreement It Is agreed by the Parties that any person who holds an interest in the Licensee (shares or other rights in or to the Licensee) at the Commencement Date may freely dispose or transfer by whatever means his/her shares or interests in the Licensee to another person who has an interest (shares or other rights in or to the Licensee) at the Commencement Date;

22.1.4 Royalties which are due and payable are not received by the Licensor by the due date (save as a result of an act of Force Majeure) and the Licensee fails to pay them within ten (10) Business Days of notice having being given by the Licensor,

22.1.5 the Licensor's appointed auditors discover incorrect reporting of that data affecting the calculation of the Royalties payable to the Licensor over one Year and (i) the discrepancy is higher than 5% of the amount due in the audited Year; and (ii) there has been already one such discrepancy higher than 2.5%, discovered by the Licensor's appointed auditors in the same Term or in two consecutive years; or

22.1.6 for two consecutive Years (whether or not in the Initial Term or any Renewal Term) the Minimum Licence Payment is all the Royalty due and payable by the Licensee to the Licensor pursuant to clause 15.1”

(emphasis added)

111. It will be seen, therefore, that Clause 22.1 sets out a number of circumstances in which MOU may terminate the Licence Agreement. I emphasise the words “Without prejudice to any other right under this Agreement”, because the rights there granted to MOU to terminate are without prejudice to any other rights under the agreement (including any other rights to terminate).
112. In this regard Clause 29.3 of the Agreement provides, “Save as otherwise provided by this Agreement the rights and remedies of the parties in connection herewith are cumulative **and are not exclusive of any rights or remedies provided by law**” (emphasis added). Clause 29.3 is an important provision as it makes clear that the rights provided for under the Agreement (such as in Clause 22) are not exclusive of any rights or remedies provided by law, which would prima facie include the common law right to terminate for repudiatory or renunciatory breach - a further way the Licence Agreement could be terminated without any notice and at any time, by either party should the circumstances justifying such termination arise.
113. It will be seen that MOU’s rights of termination are **not** limited to circumstances in which Artcrafts is in breach of contract. In this regard I consider that Clause 22.1.6 is of particular importance. It is a provision which allows MOU to terminate in circumstances where Artcrafts is not even in breach of contract, and indeed has met the Minimum Licence Payment in terms of Royalty due and payable, but only the

Minimum Payment for 2 consecutive years. This again demonstrates that the parties have carefully crafted circumstances in which particular parties (here MOU) may terminate the Licence Agreement, and even in the absence of any breach by the counterparty.

114. Clause 22.2 then sets out particular circumstances in which the Licensee (i.e. **Artcrafts**) may terminate the Licence Agreement:-

“22.2 Without prejudice to any other right under this Agreement. the Licensee shall be entitled to terminate this Agreement with immediate effect by giving notice to the Licensor in the event that:

22.2.1 the Licensor goes into liquidation (other than voluntary liquidation for the purpose of a bona fide reconstruction or amalgamation the terms of which have been approved in writing in advance by the Licensee) or is dissolved, struck off, insolvent or bankrupt or unable to pay its debts as they mature or suffers the appointment of a receiver, administrative receiver or administrator of the whole or any part of its assets or suffers any similar appointment or process under the law of its place of Incorporation or domicile;

22.2.2 the Licensor repeatedly fails to timely, diligently and in an efficient and collaborative manner fulfil its obligations set forth by clauses 7, 8.1. and 8.7. but without prejudice to the exercise by the Licensor of its rights under clauses 15.11 and 15.13.”

115. Clause 22.3 then sets out circumstances in which either the Licensor (**MOU**) or the Licensee (**Artcrafts**) may terminate the Licence Agreement:-

“22.3 Either party to this Agreement ("First Party") may terminate this Agreement by notice to the other party (“Second Party”) if the Second Party:

22.3.1 shall commit a Material Breach which is incapable of remedy; or

22.3.2 shall in any two consecutive Years or twice in either the Initial Term or any Renewal Term commit a Material Breach which is capable of remedy provided that in the event that the First Party shall have given notice to the Second Party of the full particulars of the Material Breach and requiring it to be remedied within thirty-two (32) Business Days and the Second Party shall have failed to remedy the same following which the First Party shall have given notice to the Second Party that the aforementioned Material Breach remains unremedied and requiring it to be remedied within a further period of 12 Business Days and on the expiry of such further

period of twelve (12) Business Days the Second Party has failed to remedy the Material Breach.”

116. Once again, it will be seen that Clause 22.3 is a carefully crafted provision dealing with termination for Material Breach which either party may avail itself of in the event of a Material Breach, and within the time periods specified.
117. Clause 22.4 is an even more detailed provision as to what was to happen when there was an event of termination, and with a view to salvaging the relationship: which again shows the care with which the parties had contracted, and which is the very antithesis of the agreement, on its true construction, being terminable by either party on reasonable notice (such a term being simply inconsistent with such a regime):-
- “22.4 Notwithstanding anything else in this Agreement, upon an event of termination coming into existence, the parties, prior to take any action that might lead to the dissolution of this Agreement, shall use all their best efforts to salvage this Agreement and to that effect shall engage in bona fide negotiations involving the decision takers in each party aimed at removing the cause of distress and may seek the assistance of third party mediators and counsellors to facilitate this end. Provided that the parties behave in a bona fide way at all times in the negotiations then if no settlement is reached the termination of this Agreement may (at the option of the First Party) become effective 66 Business Days from notice being given pursuant to clause 22.3.”
118. Standing back for a moment, the effect of these provisions, considered individually and cumulatively, is that there was an express, and comprehensive, suite of provisions governing both the duration of the Licence Agreement, and its termination, and by either party, including without fault (or breach of contract), and with provisions designed to keep the Licence Agreement alive if at all possible, in what was clearly a long term relationship. I can see no scope (given the terms in Clause 22) for such a contract, on its true construction, providing for termination on reasonable notice.
119. Yet further, if the Licence Agreement was properly to be treated as a relational contract (which I assume for present purposes, contrary to Artcrafts’ position, it is), a relational contract would be entirely consistent with such terms (especially Clause 22.4), in contrast to one where either party could terminate it on reasonable notice, which it might be thought was again the very antithesis of such a contract (certainly one with such carefully crafted terms as to termination as are to be found in the Licence Agreement, and with associated provisions protective of the continuance of the relationship, such as Clause 22.4).
120. Clauses 23 and 24 then go on to deal with Force Majeure and the Consequences of Termination respectively, relevant only in that they again show that the parties have put their minds to such situations and addressed the same in express detailed provisions that cater for such circumstances, which I consider are further hallmarks of the parties having set out their entire agreement in the express terms of the Licence Agreement.

121. In this regard, the parties also chose to include, at Clause 27, an express Entire Agreement clause, and whilst such a clause would not necessarily exclude the implication of terms (where they were not inconsistent with express terms), it again shows the approach of the parties to record their agreement in detailed express provisions including as to duration, renewal, and the circumstances in which either party may terminate the Licence Agreement, and to the exclusion of any other agreement or understanding.
122. In this regard Clause 27 provided:-

“27. ENTIRE AGREEMENT

27.1 This Agreement together with the documents referred to herein constitute the whole agreement and understanding between the parties relating to the subject matter of this Agreement and supersede any earlier agreements which shall be deemed to have terminated without claim for compensation or otherwise but without prejudice to any rights or liabilities accruing prior to the date of this Agreement.

27.2 The parties acknowledge that in entering into this Agreement they have not relied on any representation or undertaking, whether oral or in writing, save such as are expressly incorporated in this Agreement (and save for any fraudulent misrepresentations or any other representations it would be unreasonable in law to exclude”

F.2.3 DISCUSSION: TRUE CONSTRUCTION OF THE LICENCE AGREEMENT

123. MOU’s first, and only existing, plea is that “**On its true construction** (including Clause 29.3) the Licence is determinable unilaterally on reasonable notice” (emphasis added) - i.e. that as a matter of construction of the Licence Agreement either party is entitled to terminate the contract without cause by giving reasonable written notice to the other party.
124. A preliminary, but no less powerful, point is that if this had been the objective common intention of the parties, they would surely have provided for it expressly given the care with which they agreed very detailed contractual provisions as to termination.
125. No basis is identified by MOU as to how, as a matter of construction, the Licence Agreement is to be, and can be, so construed, not least given the detailed express provisions in relation to termination that have been quoted and addressed above, which are clearly inconsistent with such a construction, and which also evidence the lack of any lacuna in the Licence Agreement, or scope for the construction that MOU advocates.
126. There is no obvious candidate in any of the other provisions of the Licence Agreement that would provide support for such a construction of the Licence Agreement, read as a whole, which is hardly surprising given the fact that parties have agreed detailed provisions as to contract duration, renewal, and termination by either

- party (including in certain instances without breach), and subject to the saving provisions in Clause 22.4.
127. Nor has MOU either pleaded, or pointed to in its Skeleton Argument, or its factual evidence, or in the oral argument before me, to any other provision(s) of the Licence Agreement that would support such a true construction. The reference to Clause 29.3, which provides, “Save as otherwise provided by this Agreement the rights and remedies of the parties in connection herewith are cumulative and are not exclusive of any rights or remedies provided by law”, offers no assistance to MOU on the question of construction, nor does it further the argument on implication of terms (considered separately below), not least because it is trite law that no term will be implied that is inconsistent with the express terms (such as those in Clause 22).
 128. Clause 22.1 entitles MOU to terminate the contract immediately in a whole variety of scenarios (including where there has been no breach – such as Clause 22.1.6), Clause 22.2 confers similar rights on Artcrafts, and Clause 22.3 confers further rights on either party (as applicable) to terminate for Material Breach. Such clauses provide no support for MOU’s construction, and indeed are inconsistent with it (which is itself fatal to such construction). Equally Clause 22.4, in mandating that the parties use their best efforts to preserve the contract by entering into negotiations, is also contrary to an objective common intention that, at the time the Licence Agreement was entered into, the parties intended that one party should have the right to unilaterally bring the contract to an end for any reason or no reason at all.
 129. The factual matrix, as set out in the evidence before me, lends no support to the construction advocated by MOU (inconsistent as that construction is with the ordinary and natural meaning of the words used by the parties), nor is it, or could it, be suggested by MOU that there could be further evidence in relation to factual matrix before or at trial that could change the position. Nor do considerations of a businesslike interpretation, a commercial construction or a commonsense approach to construction support MOU’s construction. On the contrary, very much the reverse. This is a carefully drafted, and detailed commercial contract with understandable (and sensible) provisions as to termination, with Artcrafts’ construction being redolent of a businesslike construction of a commercial contract, in contrast to MOU’s construction, which is not.
 130. The evidence, from both Mr Ponziani and Ms Tichborne, is that the Licence Agreement was the product of negotiation between the parties and was professionally drafted by lawyers. Both parties had the benefit of legal representation and advice at the time they entered into the contract. This points in favour of giving effect to the ordinary and natural meaning of the words in the detailed express provisions of the Licence Agreement. It also tends against any suggestion that there was a “lacuna” or “oversight” to be filled by the true construction of the Licence Agreement viewing it as a whole, not that MOU has ever made any suggestion of a “lacuna” or “oversight”, no doubt because any such suggestion would be risible. It would not be credible to suggest that the parties, and their lawyers, had failed to cater for the situations in which they agreed that the agreement could be terminated, given the very detailed express provisions in that regard, including those intended to save the agreement if it was in difficulties.

131. As already noted, and even assuming (for present purposes) that the Licence Agreement is a relational contract, there is nothing in the nature of such a contract, crafted as it would be by the express terms of the particular agreement in question, including the express termination provisions addressed above, which would support MOU's construction. Indeed (and as also already noted), it might be thought that termination on reasonable notice was the very antithesis of such a contract (certainly one with such carefully crafted terms as to termination as are to be found in the Licence Agreement, and with associated provisions protective of the continuance of the relationship such as Clause 22.4).
132. In such circumstances I am satisfied that MOU's plea that on its true construction the Licence is determinable unilaterally on reasonable notice is not more than merely arguable, or more than merely fanciful, it is unarguable, and I am satisfied that there is no other compelling reason why the issue should be disposed of at trial. Accordingly, I grant Artcrafts summary judgment on such plea and MOU's associated claim for relief.

F.2.4 DISCUSSION: THE ALLEGED IMPLIED TERM

133. It is trite that the process of implication occurs after the express terms of the contract are given their proper construction. The position, then, is that MOU is attempting to imply a term in relation to termination on reasonable notice into a contract which has provided, in detail, for the circumstances in which each party can terminate, and which does not extend to such circumstances on its true construction. Once again that is not an auspicious start for the implication of such a term.
134. MOU's alternative plea (to like effect as its true construction plea and on the very same facts and arguments) that it would wish to advance hereafter, per MOU's draft amendment provided on day two of the hearing, and for which no permission has yet been applied for or granted, is as follows (at [23(2)]):-
- “Further or alternatively, ... the Licence had an implied term (implied because it was so obvious that it did not need to be articulated and/or because it was inherent in the Licence and/or because it was necessary in order that the Licence would operate in a commercially rational way) that the Licence is determinable unilaterally on reasonable notice.”
135. It is common ground that no permission to amend should be granted for an amendment that would not have any reasonable prospect of success which strictly speaking would be a matter for when any such application to amend was actually made. Nevertheless, I have, considered the draft plea that is before me in the context of the Summary Judgment Application (notwithstanding that it had not even been foreshadowed, still less drafted, at the time of the Summary Judgment Application), as the associated arguments have been fully argued before me.
136. There is a fundamental (and fatal) reason why no such term can arguably be implied into the Licence Agreement and that is because it is simply inconsistent with the express terms of the Licence Agreement (and the specific provisions of Clause 22), which is fatal to the implication of any such term as it runs contrary to the “cardinal

rule” as stated in *Marks and Spencer* that any implied term must not contradict any express terms of the contract.

137. An implied term that the Licence Agreement is terminable on reasonable notice is simply inconsistent with the express contractual terms in Clause 22 of the Licence Agreement. It would completely cut across a number of the contractual provisions (and requirements) contained therein, such as the need to serve notices of Material Breach (in Clause 22.2) or resolve any disputes according to the stated procedure (in Clause 22.4). The inconsistency is at its most acute in relation to Clause 22.3, which expressly contemplates termination by notice to the other party but only if the conditions stated in Clauses 22.3.1 and 22.3.2 are satisfied. The term that is sought to be implied would allow termination for no reason at all and is flatly inconsistent with the express (and carefully crafted) contractual regime that does not allow termination on reasonable notice and provides for termination only in specified defined circumstances and if specified defined procedures are followed.
138. Yet further, even where there have been serious breaches of contract (Material Breach under Clause 22.3) the specific procedures in Clause 22.4 have to be followed with a view to salvaging the Licence Agreement, which is the very antithesis of either party having an unqualified, and unregulated, get out of terminating the Licence Agreement on reasonable notice.
139. Still further, it is not even as if Clause 22 only caters for situations in which one party or the other is in breach. As has been seen, Clause 22.1 (granting a number of termination rights to MOU) include ones where there is not even a breach of contract (Clause 22.1.6). There would be no need for such clauses, and they would be rendered otiose, if either party could simply terminate the agreement on reasonable notice.
140. The alleged implied term is also contrary to Clause 21, which allows Artcrafts to extend the Licence Agreement in five-year terms. If MOU had the right to terminate the contract simply by giving reasonable notice at any time (which MOU argues would be six months’ notice in an untethered plea in the draft amended Prayer unsupported by anything in the main body of its draft amended Defence and Counterclaim), the benefit of a long term contract to Artcrafts (no doubt due to the need for substantial investment) would be circumvented entirely, and lost.
141. It is no exaggeration to say that the proposed implied term would “drive a coach and horses” through the express terms of the Licence Agreement.
142. In circumstances where the alleged implied term is inconsistent with express terms of the Licence Agreement as identified above, no such term can arguably be inferred, and no such amendment could, or should, be allowed, which is the end of the matter.
143. However, I would add that, as is recognised in *Lewison, The Interpretation of Contracts (8th ed)* at [6.172], and illustrated in numerous authorities, even if an implied term is not actually inconsistent with an express term or terms, where an agreement contains express terms for termination, and therefore the parties have addressed their minds to defining the circumstances in which the agreement should be terminated, it will be difficult to imply further such terms (footnotes omitted):-

“So, too, where the agreement already contains terms for termination, it will be difficult to imply further such terms. In *Re Berker Sportscraft Ltd’s Agreements*, a dress designer and a dress manufacturer entered into an agreement for the manufacture of dresses. The designer was to receive a commission on goods sold, and the agreement was determinable in the event of the commission not reaching a certain figure. Jenkins J held that no further terms for termination could be implied. Similarly, in *Colchester and East Essex Co-Operative Society Ltd v Kelvedon Labour Club and Institute Ltd*, a licence to use a car park was automatically terminable only in certain specified events. It was held that no general power of termination could be implied.”

144. This is such a case where it would not have been appropriate to imply such a term on established principles (which I address further below), even if the term had not been inconsistent with express terms.

145. As is also recognised in *Lewison* at [6.171], and as is the case here:-

“Where the contract is not for an unlimited time, but is for a fixed term, there is even less likely to be room for implying further terms as to the termination of the agreement. In *Kirklees Metropolitan Borough Council v Yorkshire Woollen District Transport Co Ltd* [(1978) 77 L.G.R. 448], an agreement between a company and two local authorities provided that during a period of 99 years neither of the local authorities should operate public transport services. In return the company was to pay the authorities a percentage of its profits. A successor to the company sought to imply a term that the agreement should determine if the company became unable lawfully to operate public transport services. Walton J held that “by no stretch of the imagination” could such a term be implied.

In *Jani-King (GB) Ltd v Pula Enterprises Ltd*,⁵¹⁵ Judge Coulson QC refused to imply a term that a fixed-term contract could be terminated on reasonable notice.

As he put it:

“... the whole point of a commercial contract which will last for a particular period (or until a specified event has happened) is that the contracting parties are committed to both the contract and each other for a known period. It seems to me that it would make a nonsense of such an arrangement if either party could give notice of termination at any time during the term, with minimal consequences, because, say, that party has received a more attractive proposal from someone else.”

146. Whilst every case turns on its own facts, and on the terms of the contract under consideration, a useful illustration of the applicable principles on facts bearing some similarity to the present, is the case of *The Burke Partnership (a firm) v The Body Shop International Ltd* [2023] EWHC 2897 (Ch). This concerned a dispute about whether franchise agreements were capable of being extended for ongoing 5-year periods or whether there was an implied term that they were terminable on reasonable notice. The clause in that case (Clause 3) provided as follows:-

“(a) This Agreement shall come into force on the Commencement Date and shall continue in force for a period of Five Years thereafter (subject nevertheless to prior determination in accordance with the Clause 11 hereof) provided that the Operator shall be entitled to terminate this Agreement on any anniversary of the Commencement Date by giving to the Company at least one month’s prior written notice of termination and any such termination shall be without prejudice to the rights of either party hereto in respect of any antecedent breaches of the terms of this Agreement PROVIDED ALWAYS in the event of the Company’s industrial property rights being declared invalid the Operator may give one months [sic] prior written notice of termination”

147. The judge in *Body Shop* (David Mohyuddin KC sitting as Judge of the High Court) rejected the proposed implied term because it conflicted with the express provisions for the determination of the agreements, the agreements did not lack practical or commercial coherence, and the term was not so obvious that it goes without saying against the relevant factual matrix (matters that are equally apposite in the present case), stating at [103] as follows:-

“103. I reject TBSI’s case that a term should be implied into the Agreements that upon the expiry of a reasonable time they are terminable by TBSI on reasonable notice for the following reasons: (i) there is already express provision for the determination of the Agreements, which do not continue in perpetuity (see paragraph 87(i) above), with which the term sought would conflict. It cannot therefore be implied; (ii) the Agreements do not lack commercial or practical coherence in the absence of the desired term which is not necessary in order to give them business efficacy. The parties are committed to their respective obligations under the Agreements including TBSI’s ability to amend the Method with which TBP is obliged to comply; (iii) against the factual matrix existing at the time the Agreements were entered into, the term sought is not so obvious that it goes without saying; and (iv) TBSI’s case that the terms of the Agreements are now “hopelessly out of date” such that there must be implied a term enabling it to terminate on reasonable notice is not one that it could have advanced when the Agreements were entered into.”

148. For his part, Mr Coppel KC referred to the decision of Buckley J in *In re Spenborough Urban District Council’s Agreement* [1968] Ch 139. This case

concerned an agreement between a local authority and the defendant company to regulate the discharge of the defendant's trade effluents into the public sewer belonging to the local authority. A previous contract between them was expressly terminable by either party on three months' notice and authorised the local authority to terminate the agreement immediately on a breach. The new contract replaced and varied the previous agreement, authorising the local authority to terminate the agreement immediately on breach but making no express provision for determination on notice. The question was whether a term that the agreement was determinable at any time by either party giving reasonable notice to the other could be implied. On the facts of that case Buckley J held that such a term could be implied and the local authority was therefore entitled to terminate.

149. The passage that is most commonly cited from *Spensorborough* as a statement of general principle, including in *Staffordshire AHA v South Staffordshire Waterworks Co* [1978] 1 WLR 1387 and *Colchester & East Essex Co-op Ltd v Kelvedon Labour Club & Institute Ltd* [2003] EWCA Civ 1671, is a passage that was not directly applicable in that case itself (in that there was provision for termination on breach, at least by one party):-

“Authority establishes that, where an agreement does not in terms confer on the parties or one of them a power to determine the agreement, whether such a power should be inferred is a question of construction of the agreement to be determined in accordance with the ordinary principles applicable to such a question ... Since ex hypothesi such an agreement contains no provision expressly dealing with determination by the party who asserts that this should be inferred, the question is not one of construction in the narrow sense of putting a meaning on language which the parties have used, but in the wider sense of ascertaining, in the light of all the admissible evidence and in the light of what the parties have said or omitted to say in C the agreement, what the common intention of the parties was in the relevant respect when they entered into the agreement.

It is of the nature of this problem that he who asserts that the parties intended something which they omitted to state expressly must demonstrate that this was so ... An agreement which is silent about determination will not be determinable unless the facts of the case, such as the subject matter of the agreement, the nature of the contract or the circumstances in which the agreement was made, support a finding that the parties intended that it should be determinable, but there is, in my judgment, no presumption one way or the other.”

150. *Spensorborough* was not actually a case where the agreement was entirely silent about determination as the relevant contract did confer upon the local authority the power to terminate, but only upon the defendant's breach. However it was not a case (such as *Body Shop* or the present) where there were extensive provisions as to termination, where there were provisions giving particular parties the ability to terminate in specific circumstances or where (as here and in *The Body Shop*) the implied term was

inconsistent with the express terms. The reason gave by Buckley J for implying a term appears at page 152F:

“If at this point I pause to ask myself whether in the light of these circumstances it is commercially sensible to suppose either that the corporation, when it entered into the 1951 agreement, intended to assume obligations to which it would have no power to put an end except on a breach by the defendant, or that the defendant, when it entered into the agreement, thought that the corporation intended to assume such obligations, I think that the answer should be "No".”

151. These are very different facts to the present. Far from giving rise to unilateral rights of termination on breach by one party or as being favourable to one party with no equivalent rights for the other (as in *Spenborough*) Artcrafts and MOU clearly owe each other extensive obligations of performance under the Licence Agreement, and they have expressly agreed a detailed regime to remedy any alleged breaches of the contract, failing which the non-breaching party may terminate (subject to engagement in the clause 22.4 process), and yet further they have agreed extensive provisions in respect of termination even where there is no breach, as well as provisions seeking to save the agreement should a Material Breach occur, and within a specific contractual time frame (Clause 22.4). This is the very antithesis of a contract whereby either party can walk away on notice (on MOU’s proposed pleaded case in 6 months).
152. I do not consider that there is anything in *Spenborough* that assists MOU in relation to the implied term it seeks. Whilst Mr Coppel KC suggested that it would be necessary for business efficacy or obvious that the parties must be able to exit the Licence Agreement without cause on reasonable notice in circumstances in which it is said that the parties could not have intended that MOU, being a single-director/founder company, would bind itself to a “work-intensive licence agreement for an eternity, with no requirement that the parties continue the collaborative approach that had brought them together” I can see no basis for such a submission. First, that is not an accurate characterisation of the Licence Agreement having regard to its provisions as to duration (in Clause 21.1), and termination (in Clauses 22.1 to 22.3). Secondly, it ignores the provisions seeking to “salvage the Agreement” (in Clause 22.4) which are the very antithesis of simply allowing the parties to walk away. Thirdly, it ignores the detailed (and mutual) termination provisions that gives each of MOU and Artcrafts their own bespoke termination provisions (in Clauses 22.1 and 22.2) as well as termination for Material Breach (available to either) in Clause 22.3. Fourthly, it ignores the fact that the Licence Agreement is a bespoke, and carefully drafted, Licence Agreement drafted with the involvement of lawyers to address a suite of circumstances in which termination is possible (all of which is inconsistent with an ability to terminate on reasonable notice). Fifthly, (in the above circumstances) the implied term is neither necessary for business efficacy nor so obvious that it goes without saying (indeed very much the reverse).
153. Clause 29.3 also provides that the rights and remedies of the parties in connection with the Licence Agreement are cumulative and are not exclusive of any rights or remedies provided by law, so if the relationship were to fall apart due to the actions or inactions of the other party they would also have the common law rights to terminate for repudiatory or renunciatory breach. Given the arsenal of available means by which

the Licence Agreement can be terminated by either party there is certainly no lacuna, and no reason to imply the term sought on any of the bases on which a term may be implied.

154. I would also note that it is somewhat ironic that MOU is arguing that the Licence Agreement is a relational contract (which I have assumed for the purpose of the Summary Judgment Application it is) as I consider that many of the characteristics of a relational contract are inconsistent with the proposed implied term, and the alleged ability of either party to walk away on notice pursuant to such implied term. In *Bates v Post Office (No 3)* [2019] EWHC 606 (QB) at [725] Fraser J (as he then was), identified characteristics of relational contracts as including, “[t]he contract will be a long-term one, with the mutual intention of the parties being that there will be a long-term relationship”, “[t]he parties will be committed to collaborating with one another in the performance of the contract”, and “[t]he contract in question will involve a high degree of communication, cooperation and predictable performance based on mutual trust and confidence, and expectations of loyalty”. A term allowing the contract to be terminated for no reason at all upon giving the other party reasonable notice does not sit well with a mutual intention and expectation to be in a long-term relationship collaborating with one another in the performance of the contract.
155. Ultimately, even if there had not been the insuperable obstacle to the implication of the alleged term that it is inconsistent with express terms of the Licence Agreement, one only has to consider what is asserted as the basis for the alleged implied term to see that no such term could even arguably be implied as, contrary to MOU’s plea:-
- (1) Such a term is not so obvious that it did not need to be articulated (very much the reverse)
 - (2) Such a term is not inherent in the Licence (for all the reasons already addressed in Section F.2.3 above, and it is also inconsistent with various express terms in Clause 22)
 - (3) Such a term is not necessary in order that the Licence would operate in a commercially rational way (again very much the reverse, the Licence operates in a perfectly rational and commercial way as between MOU and Artcrafts allowing termination in a whole variety of (balanced) termination provisions, whilst recognising the long-term nature of the Licence Agreement).
156. Accordingly, MOU cannot even arguably bring itself within any of the circumstances in which a term may be implied into a contract, and no such amendment should be allowed. MOU’s case that the Licence Agreement is determinable unilaterally without cause on reasonable written notice has no real prospect of success, and I am satisfied that there is no other compelling reason why the issue should be disposed of at trial. Accordingly, I grant summary judgment in favour of Artcrafts on the same.

G. THE STRIKE OUT APPLICATION

157. By the Strike Out Application Artcrafts applied to strike out a number of paragraphs of the Defence and Counterclaim (specifically paragraphs 14, 17, 31(4) and 61 to 64). However, and as appears below, matters developed during the course of the hearing, with the result that little remains for determination in that regard at this time. I will,

however, identify the applicable principles first, before turning to the particular paragraphs in question.

G.1 APPLICABLE PRINCIPLES

158. The Court may, pursuant to CPR 3.4(2), strike out a statement of case which discloses no reasonable grounds for bringing or defending the claim. As stated by Snowden LJ in *King v Kings Solutions Group Ltd* [2021] EWCA Civ 1943, [2022] Bus LR 184, at [62]-[63]:

“Statements of case should be as concise as the nature of the case allows and should plead only material facts, that is to say those which are necessary to formulate a cause of action or defence, not background facts or evidence. It is wrong in principle to plead matters which do not support or relate to any of the remedies sought. To do so is likely to complicate or confuse the fair conduct of proceedings.

Statements of case should only set out the facts that go to make up each essential element of the cause of action relied upon.”

159. It is generally inappropriate on a strike out application to conduct what is in effect a mini-trial involving protracted examination of the documents and facts as disclosed in the written evidence (see *Three Rivers District Council v Bank of England (No 3)* [2001] UKHL 16, [2003] 2 AC 1 at [96]-[97]). Provided that a statement of case raises some question fit to be tried, it does not matter that the case is weak or unlikely to succeed. By contrast, where the statements plead matters which disclose no reasonable grounds for defending the claim such that they do not amount in law to a defence to the claim even if true, they should be struck out.
160. As was said by Tugendhat J in the case of *In Soo Kim v Youg Geun Park & Others* [2011] EWHC 1781 (QB) at [40]-[41]:

“40 ... where the court holds that there is a defect in a pleading, it is normal for the court to refrain from striking out that pleading unless the court has given the party concerned the opportunity of putting right the defect, provided that there is reason to believe that he will be in a position to put the defect right. ...

41 In those circumstances I conclude that it was wrong in principle for the Master to strike out the claim without giving the Claimant an opportunity of rectifying the defect in his case...”

161. As will appear below, the approach identified by Tugendhat J is of relevance to the paragraphs sought to be struck out.

G.2 THE PARAGRAPHS SOUGHT TO BE STRUCK OUT

162. Artcrafts applied to strike out paragraph 14 of the Defence and Counterclaim in which MOU pleaded various allegations concerning a contention that the Licence

Agreement is a “relational contract” such that there is an implied term imposing additional obligations upon the parties. That is denied by Artcrafts. However for present purposes the key point to note is that whilst MOU purports to plead alleged breaches of the alleged term, in particular at paragraphs 61 and 62 of the Counterclaim, culminating in a plea at paragraph 63 that, “By reason of the said breaches, D has suffered loss and damage in the form of reduced royalties arising from sales of the Product being less than they would have been had there not been a breach of the implied term”, MOU does not provide any Particulars of Loss and Damage, and (even more fundamentally) does not plead any claim for relief in respect thereof. Absent such a claim for relief paragraph 14 and the associated pleas at paragraphs 61-63 are liable to be struck out.

163. However, on the second day of the hearing MOU made clear that it intended to apply to amend its Defence and Counterclaim to add Particulars of Loss and Damage (even if in general terms) and more importantly to add appropriate claim(s) for relief (which if appropriate might cure the alleged defects complained about by Artcrafts, and which had led to the Strike Out Application needing to be made).

164. The draft that was provided included the following (new) claims for relief:-

“(3) A declaration that C has breached the implied term alleged at paragraph 14(2) above as alleged at paragraph 61 above.

(4) A declaration that by reason of C having breached the implied term alleged in paragraph 14(2) above as alleged in paragraph 61 above and of the preservation in clause 29.3 of the Licence of C’s rights and remedies, C [sic] was and remains entitled to accept the said breach and thereby bring the Licence to an end and/or claim damages for the same.

(5) Damages”

165. At the hearing I indicated that whilst the proposed amendment in (5) above would appear to be unproblematic (subject also to amending paragraph 63 to provide Particulars of Loss and Damage), the declaration in (3) did not seem to be the sort of declaration usually made by the Court (the Court would simply determine, and make findings at trial, as to whether the alleged implied term existed and was breached), and there would appear to be all sorts of potential difficulties with (4).

166. As to (4) the main body of the pleading did not contain pleas on which any such claim for relief could be founded. For example, was it said that the alleged implied term was a condition or that it was an innominate term and there had been a sufficiently serious breach of the same? None of that was pleaded. Or was it being said that by reason of any breach of the alleged implied term Artcrafts were in repudiatory breach of the Licence Agreement? No such plea is made in the main body of the Defence and Counterclaim to such effect, assuming common law rights were maintained in the Licence Agreement. Yet further, absent such a plea, and a plea that such repudiatory breach had been accepted, an unaccepted repudiatory breach is a “thing writ in water” (and Artcrafts could in the meantime have ceased to be in (alleged) repudiatory breach). Yet further, if what was being alleged was that Artcrafts was in repudiatory breach the norm would be for MOU to accept that (or not) and take its chances as to

whether it was thereby (or by any purported termination for breach of the implied term) itself in repudiatory breach, which Artcrafts, if it considered MOU's conduct was itself repudiatory, could itself accept, thereby terminating the Licence Agreement with MOU being liable in damages to it. Yet further, the Court would not normally be asked to make a declaration as to a hypothetical at a particular point of time, and before a party had acted upon it (not least given that the position could have changed since).

167. Mr Coppel KC acknowledged, on behalf of MOU, that there were potential difficulties with MOU's proposed plea, as formulated, and that MOU would need to go away and consider what amendments it wished to apply to make in an attempt to cure the defects in its Defence and Counterclaim which had led to the Strike Out Application. Equally, Mr Tolley KC acknowledged on behalf of Artcrafts that it would be inappropriate for the Court to rule upon the Strike Out Application in relation to such parts pending an amendment application and a properly formulated draft amendment which might well cure the need for the paragraphs to be struck out.
168. Accordingly matters were left that the Court should not rule on the Strike Out application in relation to paragraphs 14, 17(3) and paragraphs 61 to 63 at this time, and I do not do so.
169. That left the Strike Out Application in respect of paragraph 31(4) and paragraph 64. It is no longer necessary to strike out the former (as MOU proposes to delete it by way of amendment). As to the latter this is a somewhat unusual, informational, plea that "By reason of the aforesaid D wishes to end the Licence lawfully at the earliest moment". I can see no proper basis for such plea. It does not plead material facts, the plea is not necessary for any cause of action, and it does not support or relate to any remedy claimed. I accordingly strike it out.

H. THE USA APPLICATION

170. I can deal with the USA Application in short order. Whilst MOU does not accept that it is appropriate to make the declaration sought (and its opposition to such declaration was maintained to the bitter end), it is, I am satisfied, clear beyond peradventure, that the Court should make the declaration sought.

H.1 DECLARATIONS: THE APPLICABLE PRINCIPLES

171. The court has a discretionary power to grant a declaration under section 19 of the Senior Courts Act 1981. CPR Part 40.20 provides that the court "may make binding declarations whether or not any other remedy is claimed."
172. Once again the parties were in agreement as to the applicable principles. A convenient statement of the principles is to be found in *The Bank of New York Mellon v Essar Steel India Ltd* [2018] EWHC 3177 (Ch), at [21]:

"The power to grant declaratory relief is discretionary. When considering the exercise of the discretion, in broad terms, the court should take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there are other special reasons why or

why not the court should grant the declaration. More specifically:

(1) There must, in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them. However, the claimant does not need to have a present cause of action against the defendant. A present dispute over a right or obligation that may only arise if a future contingency occurs may well be suitable for declaratory relief and amount to a real and present dispute.

(2) Each party must, in general, be affected by the court's determination of the issues concerning the legal right in question.

(3) The fact that the claimant is not a party to the relevant contract in respect of which such a declaration is sought is not fatal to an application for a declaration, provided that the claimant is directly affected by the issue. In such cases, however, the court ought to proceed very cautiously when considering whether to make the declaration sought.

(4) The court will be prepared to give declaratory relief in respect of a "friendly action" or where there is an "academic question", if all parties so wish, even on "private law" issues. This may be particularly so if the case is a test case or the case may affect a significant number of other cases, and it is in the public interest to decide the point in issue.

(5) The court must be satisfied that all sides of the argument will be fully and properly put. It must, therefore, ensure that all those affected are either before it or will have their arguments put before the court. For this reason, the court ought not to make declarations without trial.

(6) In all cases, assuming that the other tests are satisfied, the court must ask: is this the most effective way of resolving the issues raised? In answering that question, the court must consider the other options of resolving the issue."

173. The parties in their skeleton arguments (though not in oral argument) also referred to a number of other cases including *Gouriet v Union of Post Office Workers* [1978] AC 435, *Financial Services Authority v Rourke* [2002] CP Rep 14, *Rolls-Royce plc v Unite the Union* [2009] EWCA Civ 387, [2010] 1 WLR 318, *Pavledes v Hadjisavva* [2013] EWHC 124 (Ch), *Juul Labs, Inc & Ors v MFP Enterprises Ltd (t/a 'Smoke Nation' & Ors)* [2020] EWHC 3380 (Pat), *Emerald Pasture Designated Activity Company & Ors v Cassini SAS & Anor* [2021] EWHC 2443 (Ch), *Bhattacharya v Omni Capital Partners Ltd* [2020] EWHC 1644 (Ch), and *Quantum Advisory Ltd v Quantum Actuarial LLP* [2023] EWHC 1338 (Ch). Whilst I bear such cases in mind, I do not consider that they add materially to the principles stated in *BNY Mellon*, or require separate consideration.

H.2 THE DECLARATION SOUGHT

174. By the USA Application, Artcrafts seeks a declaration that “the USA forms part of [Artcrafts’] exclusive Territory under the Licence Agreement and has done so on a permanent basis since 1 January 2015”. This reflects the declaration and relief that is sought at 1(a) in the Prayer in the Particulars of Claim.
175. MOU’s pleaded position (supported by a Statement of Truth) is to deny that the USA forms part of Artcrafts’ exclusive Territory. In this regard in the Defence and Counterclaim at [31(3)] MOU denied, “...that the USA was included as an Exclusive Territory under the Licence from 1 January 2015”.
176. It is not necessary to rehearse the history of the debate between the parties that has already been referred to earlier (to put in context why it was a breach of the Licence Agreement to sell into the USA). Artcrafts submitted that it had long since submitted proof (if it needed to submit proof) that the requirement of 5000 sales had been satisfied. MOU denied it had done so (until service of Barreveld 1 and the exhibits thereto on 29 February 2024).
177. On 28 March 2024 Ms Tichborne served her statement in response to the applications before the Court (supported by a Statement of Truth). At the outset, in paragraph 2 of her statement she stated, amongst other matters that:-
- “Mou now has sufficient evidence that establishes that at the end of the year ending 31 December 2014 sales of Products (as defined in the Licence) in the USA exceeded 5,000 pairs, as a result of which with effect from 1 January 2015 the USA became included in the list of Territories in Schedule 2 to the Licence and became regulated by and under the Licence.”
178. As has already been noted, it is accepted on behalf of MOU that this amounts to a CPR Part 14.2(1) admission on which Artcrafts can seek judgment (CPR Part 14.4(1)).
179. Notwithstanding the admission in Tichborne 1 (set against the inconsistent pleaded case in the Defence and Counterclaim) MOU’s stance has been, and remains, that “there is no need for a declaration in relation to the USA” given the statements in Tichborne 1 (see paragraph 15 of Wiseman’s letter dated 10 May 2024).
180. MOU did not, however, apply to amend the Defence and Counterclaim to align its statement of case with the admission of Ms Tichborne. Indeed a draft amendment to the Defence and Counterclaim was only supplied immediately before the start of the second day of the hearing (after I indicated that it would assist for such a draft to be supplied so that everyone was clear as to what MOU’s case now was). The draft that was supplied, as is accepted by Mr Coppel KC, did not make all the amendments that would need to be made to align with Ms Tichborne’s admission and MOU’s case going forward, with the result that a further draft will have to be supplied before approval can be given. The draft did, however, plead that MOU, “now admits that the United States of America remained in Schedule 2 to the Licence after 31 December 2014”.

181. In circumstances in which Artcrafts claims the very declaration that is sought in the relief claimed in the Particulars of Claim, that was originally disputed, but Ms Tichborne now admits the same, and it is now proposed to amend the Defence and Counterclaim to admit the same, it is obviously appropriate to make the declaration sought.
182. There has been a real and present dispute between the parties as to the existence or extent of the legal right (whether the USA is an exclusive Territory) and each party is affected by the determination of the issue as declared, the declaration is one that is actually sought in the proceedings to which Artcrafts is entitled, justice dictates that it be made, it would serve a useful purpose, and there is a good reason for making the declaration. In this regard the Order in which the declaration is recorded can be shown to any relevant third party (in case of need), and it is important that there is certainty as to what territories are exclusive territories not least in circumstances where there have already been admitted breaches of the Licence Agreement by MOU in relation to the USA. All sides of the argument have been properly put.
183. In this regard I am satisfied that the making of the declaration sought is the most effective way of resolving the issue that has been raised, and I do not consider that any other way of resolving the issue would be equally satisfactory. In this regard I reject the suggestion that Ms Tichborne's admission suffices, or that any allowed amendment to the Defence and Counterclaim would suffice. Each of those justifies Artcrafts being granted the relief sought in its Particulars of Claim, and in the USA Application, by making the declaration sought. In the above circumstances I make the declaration sought.
184. I would only add that it has been necessary for Artcrafts to issue (and argue) the USA Application to obtain the declaration that has been ordered. Neither the alleged reasons why the admission was not made earlier, nor the fact that Ms Tichborne did make an admission in her witness statement, was any reason for MOU not to accede to the making of the declaration sought, and which Artcrafts has succeeded in persuading the Court to make.