Battles lines

Robert Marven KC, **Theo Barclay** and **Teen Jui Chow** report on a post-*PACCAR* dispute

In *Therium & Omni Bridgeway v Bugsby Property* the Commercial Court considered for the first time the practical effects of the Supreme Court's groundbreaking July 2023 decision in *R (on the application of PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28 (PACCAR).

In *PACCAR* the Supreme Court decided – contrary to the views held by funders and the decisions below – that third party litigation funding agreements (LFAs) can be damages-based agreements (DBAs) that are unenforceable if they do not comply with the Damages Based Agreement Regulations 2013 (SI 2013/609). In argument in *PACCAR*, the Supreme Court was told that the likely consequence of its decision was that most third party LFAs would be unenforceable.

The *PACCAR* decision has prompted extensive industry discussions about:

a. how to draft new LFAs so that they are enforceable; and

b. in relation to existing LFAs, what arguments can be run to avoid an unenforceability finding or to mitigate its effect.

The twin judgments in *Therium Litigation Funding A IC v Bugsby Property LLC* [2023] EWHC 2627 (Comm) and *Omni Bridgeway (Fund 5) Cayman Invt. Limited v Bugsby Property LLC* [2023] EWHC 2755 (Comm) provide the first reaction of the Commercial Court to some of those arguments, and have therefore been watched closely by funders and funded parties alike.

BACKGROUND

Two litigation funders, Therium Litigation Funding A IC and Omni Bridgeway (Fund 5) Cayman Invt. Ltd executed separate but interlinked LFAs with Bugsby Property LLC to fund Bugsby's claim against LGIM Commercial Lending Limited and Legal & General Assurance Society Limited.

Bugsby succeeded in that claim in the Commercial Court (see [2022] EWHC 2001 (Comm)). Prior to the hearing of an appeal, Bugsby decided to settle the matter in return for payment of £27,636,512 ('the claim proceeds'). The claim proceeds were paid into the client account of Bugsby's solicitors, Candey.

Relying on the *PACCAR* decision, Bugsby argued that the Therium and Omni LFAs were unenforceable, meaning that it did not owe anything to either Therium or Omni under those LFAs.

As both LFAs contained arbitration clauses, Therium and Omni applied for proprietary injunctions pursuant to section 44 of the Arbitration Act 1996 to prevent dissipation of the claim proceeds. It was common ground that the *American Cyanamid* test applied, meaning that to obtain the injunctions sought, the litigation funders had to prove that there was a serious issue to be tried as to their entitlement to the claim proceeds.

THE PARTIES' ARGUMENTS

At the start of the first hearing before Jacobs J, Bugsby conceded that Omni had raised a serious issue to be tried and therefore conceded that a proprietary injunction was justified in relation to the funds it claimed.

Perhaps surprisingly, Bugsby did not concede that Therium's arguments raised a serious issue to be tried. Jacobs J therefore had to consider them in detail.

Therium's central submission was that the claim proceeds were held on trust for it pursuant to its LFA. It made three arguments in response to Bugsby's reliance on *PACCAR*.

a. First, that by application of the Court of Appeal's decision in *Zuberi v Lexlaw Ltd* [2021] EWCA 16, it was only the clause that provided for a percentage return that constituted an unenforceable DBA, leaving the remainder of its LFA enforceable. The result was that a clause providing for a return based on a multiple of the sums invested was not a DBA and would not therefore be impacted by the *PACCAR* decision.

b. Second, and alternatively, the unenforceable parts of the LFA should be severed by application of the principles of severance laid down by the Supreme Court in *Tillman v Egon Zehnder Ltd* [2019] UKSC 32, leaving the remainder valid and enforceable.

c. Third, that if the previous two arguments failed, Therium should be entitled to restitution of the amounts of money it had paid to Bugsby under the Therium LFA.

JACOBS J'S JUDGMENT

Jacobs J agreed with Therium and held that there was a serious issue to be tried on whether the claim proceeds were held on trust for Therium. He found that there were serious issues to be tried in relation to the arguments based on *Zuberi v Lexlaw* and common law severance, which made it unnecessary to consider the restitution point. He therefore granted the proprietary injunction sought.

THE FORTIFICATION JUDGMENT

After Jacobs J's judgment was handed down, Bugsby sought fortification of Omni's and Therium's cross-undertakings in damages. A second hearing was held to determine that issue.

The test for whether fortification of a cross undertaking should be ordered in these circumstances was essentially common ground - the applicant for fortification must show:

a. A good arguable case, based on a credible evidential foundation, that it will suffer loss as a result of the injunction denying it the ability to deploy the injuncted funds.

b. A good arguable case that the parties who have given the cross undertaking may not be 'good for the money' if that loss is actually suffered.

Bugsby sought bank guarantees or payments into court of over £5m on the basis that it would itself have become a litigation funder and made that return over a year, if only it had free access to the injuncted funds, and that it was not clear that the funders were 'good for the money'.

Jacobs J determined that the loss for which fortification was sought was speculative and dismissed the fortification application on that basis. He then went on to consider, *obiter*, whether there was a good arguable case that Omni Bridgeway and Therium might not be 'good for the money'. His conclusions were that:

a. Despite not having demonstrated sufficient funds currently in the jurisdiction, Omni Bridgeway and Therium had demonstrated through evidence of their capitalisation, corporate structures and governance that there was 'no real doubt' as to their ability to meet a £5m liability.

b. As Omni Bridgeway and Therium were both well-established and respected litigation funders, there was no realistic prospect that either would take the decision to breach court orders and potentially expose their officers to committal applications merely to avoid satisfying a liability. For litigation funders to behave in that way would, Jacobs J accepted, be disastrous for their business model and reputation.

DISCUSSION

The key takeaway for both litigation funders and their lawyers is that there are a series of runnable defences to *PACCAR* enforceability arguments. The merits of those arguments will be determined in future court proceedings, or, in this case, arbitration. However, parties who have obtained funding under LFAs cannot simply walk away from their obligations by citing *PACCAR*. Funders thereby retain significant leverage over funded parties, who must expect a tough fight if they raise enforceability arguments.

Two further points merit particular attention.

The first is Jacobs J's discussion of the application of the law of severance. Bugsby relied on the recent Court of Appeal decision in *Diag Human SE v Volterra Fietta* [2023] EWCA Civ 1107 (see page 6), in which the court declined to sever clauses from a conditional fee agreement (CFA) that would otherwise render it unenforceable, on the basis that to do so would change the nature of the contract. Bugsby's argument was that the same approach would inevitably apply to DBAs by analogy. Jacobs J held that there was at least a serious issue to be tried on that point, as DBAs and CFAs are separately regulated, with different public policies underpinning that regulation.

The second point is that, following Jacobs J's second judgment, when litigation funders are required to provide cross-undertakings in damages, they may avoid giving fortification if they can adduce sufficient evidence that they have access to the sums that realistically might be used to satisfy the cross-undertaking – even if those sums are not in the jurisdiction. Jacobs J recognised that the reputations of litigation funders would be devastated if a group company failed to meet a cross-undertaking in damages and thereby breached an order of the court. He considered the suggestion that this might happen to be unrealistic. That finding will be of considerable use to litigation funders who are faced with fortification applications, or security for costs applications, but who are reluctant to tie up money indefinitely.

Robert Marven KC and Theo Barclay are barristers at 4 New Square and appeared for Omni Bridgeway in the litigation above. Teen Jui Chow is a pupil barrister at 4 New Square