Neutral Citation Number: [2023] EWHC 2627 (Comm)

Case No: CL-2023-000685

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

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

Date: 20/10/2023

Before :

MR JUSTICE JACOBS

- -

Between :

Therium Litigation Funding A IC

Applicant

- and -

Bugsby Property LLC

Respondent

- -
- -

Joseph Sullivan (instructed by **Addleshaw Goddard LLP**) for the **Applicant**
Jamie Carpenter KC, Duncan McCombe and Guy Olliff-Cooper (instructed by **Candey Limited**) for the **Respondent**

Hearing dates: Monday 16th October 2023

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Approved Judgment

This judgment was handed down at 10.30am on Monday 20th October by circulation to the parties or their representatives in court, by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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MR JUSTICE JACOBS

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A: Introduction

1. Therium Litigation Funding A IC ("Therium"), the applicant in these proceedings, applies for an asset preservation/freezing order against the Respondent ("Bugsby"). The application is made pursuant to section 44 of the Arbitration Act 1996. A similar application for an asset preservation order (but not a freezing order) was made on a without notice basis by Omni Bridgeway (Fund 5) Cayman Invt. Ltd ("Omni") and was granted by Cotter J on 2 October 2023 following an out-of-hours application. Therium gave notice of its separate application, and I ordered that it be listed to be heard together with the return date for Omni's application which had been fixed for Monday 16 October 2023. Both Therium and Omni are litigation funders who each made a litigation funding agreement ("LFA") with Bugsby.

2. The skeleton arguments served on behalf of Therium, Bugsby and Omni prior to the hearing raised a large number of disputes. In addition to the applications of Therium and Omni, there was a separate application issued by Bugsby to set aside the injunction granted by Cotter J. Bugsby's former solicitors, Stewarts Law ("Stewarts"), had also issued an application for, in substance, a similar asset preservation order, but on a different basis. As will become apparent below, each of Therium, Omni and Stewarts makes claims in respect of settlement monies which Bugsby had received following the compromise of a dispute with two entities in the Legal & General Group ("L&G").

3. A central question raised by Bugsby, in response to the applications of both Omni and Therium, was whether there was a serious issue to be tried in relation to the proprietary claims which they asserted. Bugsby's key defence to those proprietary claims is based on the very recent decision of the Supreme Court in *R (PACCAR) v Competition Appeal Tribunal* [2023] UKSC 28 ("*PACCAR*"). That case decided, contrary to the views apparently held by many in the industry (and contrary to both decisions in the case below) that third party litigation funders, whose remuneration was to be by way of a share of any damages recovered, were providing "claims management services" within the meaning of section 58AA (3) of the Courts and Legal Services Act 1990 ("the 1990 Act"). That section provides, in relevant part:

> "**58AA Damages-based agreements...**
>
> (1) A damages-based agreement which ... satisfies the conditions in subsection (4) is not unenforceable by reason only of its being a damages-based agreement.
>
> (2) But [(subject to subsection (9))] a damages-based agreement which ... does not satisfy those conditions is unenforceable.
>
> (3) For the purposes of this section—
>
> > (a) a damages-based agreement is an agreement between a person providing advocacy services, litigation services or claims management services and the recipient of those services which provides that—
> >
> > > (i) the recipient is to make a payment to the person providing the services if the recipient obtains a specified financial benefit in connection with the matter in relation to which the services are provided, and

> (ii) the amount of that payment is to be determined by reference to the amount of the financial benefit obtained;"

4. Lord Sales, delivering the leading judgment in *PACCAR*, said at [13] that:

> *"*The court was told that if LFAs of this kind, whereby the third party funders play no active part in the conduct of the litigation, but are remunerated by receiving a share of any compensation recovered by their client, are DBAs within the meaning of section 58AA, the likely consequence in practice would be that most third party litigation funding agreements would by virtue of that provision be unenforceable as the law currently stands".

5. A "DBA" as referred to in that quotation (and later in this judgment) is a "damages-based agreement" within the meaning of section 58AA.

6. Both Omni and Therium submitted, however, that their proprietary claims could survive the *PACCAR* decision, and that there was a serious issue to be tried in that regard. If so then the proprietary injunction which Omni had obtained and sought to continue, and the proprietary injunction which Therium sought to obtain, could be granted. Since the relevant LFAs concluded by both parties contained provisions for the resolution of disputes by arbitration in accordance with the rules of the London Court of International Arbitration ("LCIA"), the final decision on the issues raised by the parties would be a matter for the arbitrators.

7. The written submission of Mr Carpenter KC, for Bugsby, invited the court to set aside a substantial amount of court time (2 days) to hear full argument on the issues raised by the various applications, but in particular the question of whether the claims of Omni and Therium under their LFAs could survive the *PACCAR* decision. It is clear from the correspondence, and court proceedings that Bugsby has itself issued, that Bugsby wishes to ventilate its arguments in court rather than arbitration proceedings, where full rights of appeal are potentially available. By contrast, both Omni and Therium wish to arbitrate their respective claims against Bugsby, and thus to resolve the issues in LCIA arbitration proceedings in accordance with the parties' agreement. Hence, the applications of both Omni and Therium were for injunctive relief in support of arbitration proceedings.

8. Following argument at the start of the hearing on 16 October 2023, I decided that it would not be appropriate for the court to set aside a further 2 days for hearing, when the central argument was whether there was a "serious issue to be tried". It seemed to me that such an issue should be readily capable of being ventilated in the course of the day which was available for the hearing. Indeed, if the point at issue required argument stretching over 2 days and – as a letter from Bugsby's solicitors, Candey had indicated, would potentially engage the appeal courts as well – then the question of whether there was a "serious issue to be tried" could be said to answer itself. It is well-established that it is no part of the Court's function, at this stage of the litigation, to decide "difficult questions of law which call for detailed argument and mature consideration": see White Book Vol 2 para 15-8 (3).

9. I therefore said that I would hear argument on "serious issue to be tried" during the course of the day. Having taken instructions, Mr Carpenter then accepted that certain of Omni's arguments did raise a serious issue to be tried (but not those raised by Therium) and accordingly that his client would give undertakings whose substance would be to preserve the sum of £13,133,956.56 which Omni claimed. Omni did not seek to preserve any more than that sum. This resolved the substance of the application made by Omni, and the hearing then proceeded with Therium

(represented by Mr Joseph Sullivan) making his submissions as to why there was a serious issue to be tried, and Mr Carpenter responding on behalf of Bugsby. At the conclusion of the argument, I said that I wished to consider the arguments further before giving a decision. Mr Carpenter's client then, helpfully, offered an undertaking which would preserve the position until Friday 20 October 2023 so as to enable me to give judgment. This, therefore, is my judgment on the "serious issue to be tried" point which is central to Therium's application for a proprietary injunction.

B: Factual background

10. As described above, Therium is a litigation funder which funded litigation pursued by Bugsby against L&G. Subsequent to Therium's initial involvement, further funding was provided for that litigation by Omni and Therium. That litigation was successful following a trial before Robin Knowles J, although Bugsby was awarded substantially less by way of damages than it had claimed: see [2022] EWHC 2001 (Comm). Permission to appeal was granted to both sides of that litigation and the appeal was listed to be heard for four days beginning on 10 October 2023.

11. The contractual arrangements between the parties, which are described in section C below, set out how "Claim Proceeds" should be distributed in the event of (amongst other things) judgment or settlement in Bugsby's favour. (Where the context so requires, I will use in this judgment the capitalised terms which are contained in the contractual agreements). Therium's case is that these contractual arrangements also provided that payment of any such sums should be made to Bugsby's solicitors and that the sums should be held on trust for Therium/Omni pending completion of the contractual mechanism for the distribution of the proceeds. As described below, the broad contractual mechanism is that, in the first instance, any Claim Proceeds are to be paid to Bugsby's solicitors, to be held on trust pending distribution of those Claim Proceeds in accordance with a "waterfall" arrangement, set out in a priorities agreement. Therium contends that this ensures that the entirety of the funds are protected, pending the carrying out of that waterfall: if there is any dispute as to any parties' entitlement, the funds are kept safe under the trust whilst that dispute is resolved.

12. Therium's evidence, in the form of an affidavit from Mr Neil Purslow, the Chief Investment Officer of Therium Capital Management Ltd, describes how Bugsby was dissatisfied with the level of damages it had obtained. The damages were insufficient to afford Bugsby any return on the litigation, since the damages would be exhausted by payments due to the funders, its former solicitors and its insurers. It is not necessary, for the purposes of the argument on "serious issue to be tried" to recount the detail of what has transpired.

13. The recent developments which prompted the (out of hours) application to Cotter J by Omni are as follows. Bugsby has changed solicitors on a number of occasions during the course of the litigation. It was represented for some time by Stewarts, which claims to be owed some £2,052,273.66. Stewarts were replaced by Signature Litigation ("Signature"), and they have in turn been replaced by Bugsby's current solicitors, Candey.

14. Prior to the hearing of the appeal against the judgment of Robin Knowles J, Bugsby and the opposing party (L&G) compromised the appeal. A settlement sum of £27,636,512 was then transferred to Candey. In broad terms, Therium and Omni contend that the involvement of Candey, and the transfer of funds to that firm, was in breach of various agreements and undertakings that had previously been given including in the most recent agreement between the parties, the Variation Agreement made on 22 November 2022.

15. On 27 September 2023, Candey informed Therium (and Omni) of the amount of the settlement sum, and that it had already transferred £4,874,650 to a Bugsby company, and that it anticipated transferring a further sum of £2,210,095.39. On the morning of 2 October 2023, Candey indicated that they anticipated instructions to transfer the entirety of the remainder of the sums to Bugsby but that they would hold the remaining proceeds for 24 hours expiring at noon on 3 October 2023. This led to the urgent without notice application for a proprietary injunction made to Cotter J and heard out of hours over the phone. Therium had asked to attend that hearing, but in the event it took place in Therium's absence. As previously described, Cotter J granted the injunction with a return date of 16 October 2023. On 10 October 2023, Therium issued its own application for an injunction, and (as previously described) I directed that this should be fixed for 16 October 2023 as well.

C: The Contracts

16. The parties entered into the following contracts:

    a. A funding agreement between Therium and the Respondent dated 23 February 2018 ("the Therium LFA").

    b. A Priorities Agreement between Therium, Bugsby and its then-solicitors, Forsters LLP dated 23 February 2018.

    c. A funding agreement between Omni and the Respondent (to which a company related to Bugsby and Therium itself, were also party) dated 19 July 2021 ("the Omni LFA").

    d. An Amended and Restated Priorities Agreement between Therium, Omni, Bugsby, Stewarts Law, Signature and Partner Re (an insurer) dated 19 July 2021 ("the APA").

    e. A variation agreement between Omni, Therium, Bugsby and a company related to Bugsby dated 10 November 2022 ("the Variation Agreement").

17. The parties' arguments referred to a large number of contractual terms, and the Appendix to this judgment sets out the detail of the principal contractual terms relied upon. In this section, I will refer to the most important contractual terms relied upon by Therium in support of its proprietary claim, and the overall shape and effect of the parties' agreements in so far as they bear on that issue.

18. The first agreement made was the Therium LFA. This contains a definition of "Claim" (by reference to a Schedule) and "Claim Proceeds" as follows:

> "Claim" means the claim, details of which are set out in the Schedule;
>
> "Claim Proceeds" means any and all value due to and/or received by, directly or indirectly, on behalf of, or in lieu of payment to, the Claimant in connection with or arising out of the Claim as a result of any judgment, award, order, settlement arrangement or compromise, (including payment of any damages, compensation, interest, restitution, recovery, judgment sum, arbitral award, settlement sum, compensation payment, costs and interest on costs), whether in monetary or non-monetary form, whether actual or contingent, and before deduction of any taxes which the Claimant may be liable to pay in respect of the Claim Proceeds;
>
> SCHEDULE

> Claim: Claims and causes of action against the Defendant which relate to, are in respect of, result from or are connected with the Claimant's attempt in the period 2015 to 2017 to acquire Olympia, the well-known property and business asset.

19. These definitions are broad and would in my view (at least to the requisite standard of serious issue to be tried) capture the entirety of the proceeds of the settlement which has been paid by L&G and which is now held (less payments out which have been made) by Candey. Bugsby advances an argument, which I address in Section H below in the context of "quantum", which posits that this definition is qualified by certain subsequent agreements, and that therefore some portion of the settlement sum is not captured by the definitions in the Therium LFA. Therium has substantial responses to that point, also described in Section H.

20. Clause 13 of the Therium LFA, and in particular Clause 13.1, is the critical provision relied upon by Therium in support of its proprietary claim. The relevant parts of Clause 13 are as follows:

> 13.1 The Claimant agrees to hold any Claim Proceeds received by it, or by the Solicitors on its behalf, upon trust for Therium throughout the Trust Period on terms that Therium shall be entitled to such part of the Claim Proceeds as shall be equal to the total of all amounts due under the terms of this Agreement to Therium (as the same may be reduced in accordance with the Priorities Agreement).
>
> 13.2 The Parties agree that any Claim Proceeds received in monetary form shall be paid into the Solicitors' client account immediately upon receipt. In the case of any Claim Proceeds received in non-monetary form, the Claimant shall either deliver the Claim Proceeds to the Solicitors or pay to the Solicitors as soon as is reasonably practicable the market value of the Claim Proceeds determined in accordance with clause 13.3.
>
> 13.8 On receipt of any Claim Proceeds, the Claimant shall instruct the Solicitors (for which purpose the Solicitors shall be hereby deemed to be instructed) to provide Therium with such information as Therium reasonably requires to enable Therium, or the Solicitors at Therium's request, to prepare a draft Claim Proceeds Account which Therium (or the Solicitors as the case may be) shall deliver to each of the parties to the Priorities Agreement for agreement.
>
> 13.9 Once the draft Claim Proceeds Account is agreed or deemed to be agreed pursuant to the Priorities Agreement (whichever is the earlier), the Parties agree that the Solicitors shall forthwith pay out the Claim Proceeds in accordance with the agreed Claim Proceeds Account.

21. The effect of these provisions (again at least to the requisite standard of "serious issue to be tried") is, as Therium submitted, that Bugsby agreed to hold any Claim Proceeds (as defined therein) received by it or by the Solicitors on its behalf upon trust for Therium on terms that Therium was entitled to such parts of the Claim Proceeds as shall be equal to the total of all amounts due to it under the terms of the agreement and the Priorities Agreement.

22. Clauses 13.8 and 13.9 of the Therium LFA thus provided for an account to be drawn up setting out how the Claim Proceeds should be distributed in accordance with the Priorities Agreement. At the time when the Therium LFA was concluded, the parties to the Priorities Agreement were

Therium, Bugsby and Forsters (solicitors then acting for Bugsby). However, there were thereafter further developments in relation to the funding of the claim, in particular with the involvement of Omni. Thus, in July 2021, the Amended and Restated Priorities Agreement or APA was concluded by a much larger number of parties: Therium, Omni, Bugsby, Stewarts Law, Signature, and the insurer.

23. Clause 3 of that APA provided for the priorities, and Clause 4 provided a mechanism for the determination of the parties' rights and entitlements to the Claims Proceeds. Clause 4.1 of the APA specifically referred back to Clause 13 of the Therium LPA, and I do not consider (at least to the serious issue to be tried standard) that the APA fundamentally affects the existence of the trust arrangements created by Clause 13. The effect of the APA, when read alongside the LFA concluded by Omni, is that the trust now has a larger number of beneficiaries, and a different distribution priority, than was the case when the Therium LFA and the original Priorities Agreement stood alone. This is in my view (again at least to the serious issue to be tried standard) reflected in the various terms of the Omni LFA. Clause 7.1 of the Omni LFA provided that the Therium LFA governed the funding advanced by Therium, although in the event of any inconsistency between the terms of the Therium LFA and the Omni LFA, the terms of the Omni LFA would take priority. Clause 5 of the Omni LFA provided that Claim Proceeds were to be held in accordance with the Omni LFA, the Therium LFA and the APA.

24. Clause 3 of the APA sets out the waterfall of payments to be made out of the Claim Proceeds. In summary, it provides as follows:

    (a) First, Therium and Omni would be repaid the funding they had provided and any claims paid out by Partner Re (the adverse costs insurer) would be repaid. In the event that the Claim Proceeds were insufficient to pay these sums, they would be applied to each receiving party pari passu on a pro-rata basis in proportion to their entitlements.

    (b) Secondly, Stewarts would be paid such sums as required to bring them up to 100% of their base fees, Signature would be paid such sums as required to bring them up to 100% of their base fees, and Therium and Omni would each be paid sums to bring them up to their total entitlement to fees. Again, in the event that the Claim Proceeds were insufficient to pay these sums, they would be applied to each receiving party pari passu on a pro-rata basis in proportion to their entitlements.

    (c) The APA goes on to provide for further payments lower down in the waterfall, however those payments are not material to the present application.

25. In November 2022, the parties concluded the Variation Agreement. This provided for Omni and Therium to provide certain further funding to Bugsby (clause 3), subject to the satisfaction of certain conditions, including the provision of undertakings mentioned above (clause 4). It also made certain amendments to the waterfall under the APA (clause 5). Clause 5.6 provided that none of the changes to the waterfall affected the funders' proprietary rights and other rights to the Claim Proceeds under the Therium LFA and the Omni LFA. Clause 8.1 of the Variation Agreement provided express confirmation that the Therium LFA and the Omni LFA remained in effect and continued to bind the parties subject to the terms set out in the Variation Agreement (and clause 8.2 provided that in the event of conflict, the terms of the Variation Agreement would take priority). I have not reproduced all of these provisions in the Appendix.

D: The claim and the defence

26. Therium's claim against Bugsby is for a declaration that Bugsby holds the Claim Proceeds (as defined in the Therium LFA) on trust for it on the terms set out in the Therium LFA, together with a claim for payment of the sums due to it under the waterfall under the APA. In the alternative, Therium claims restitution.

27. Therium's calculation of the waterfall is in summary as follows:

    (a) Therium - £16,372,985.90.

    (b) Omni - £9,601,553.86.

    (c) Stewarts Law - £652,271.66.

    (d) Insurer's contingent premium - £1,009,700.58.

28. At the present stage, these figures have not been agreed by the parties. It appears that Omni's claim is higher (£13,133,956.56) and so is the claim of Stewarts. The dispute resolution mechanism in Clause 4 of the APA has not yet operated.

29. The principal defence of Bugsby, advanced in the context of the "serious issue to be tried" argument, is unenforceability pursuant to the decision in *PACCAR.* It is common ground that that case decides, in so far as relevant for present purposes, that Therium does provide "claims management services" and that section 58AA of the 1990 Act is therefore engaged in relation to litigation funders such as Therium. There is therefore no dispute that any claim for the "5% of any recovery excess £37,569,295", as set out in the Schedule to the Therium LFA, would be unenforceable. In fact, there was no recovery by Bugsby in excess of that sum. There was, however, no dispute that the question of enforceability of other aspects of the LFA must be judged by reference to the agreement as made, rather than the events as they have transpired.

30. Although the *PACCAR* case provides the starting point for Bugsby's defence, it was common ground that the case did not address the arguments, now advanced by Therium, as to why *PACCAR* is not fatal to its claim. Accordingly, I was not referred to anything in the *PACCAR* decision which assists in resolving the key issues which were debated before me.

31. It was also, at least initially, argued by Bugsby that the trust arrangement in the Therium LFA was itself varied by the Variation Agreement, such that there is no longer any trust in favour of Therium. However, at the end of his submissions, Mr Carpenter did not pursue this point: i.e. he accepted that there was a serious issue to be tried on that point.

32. In the event that I were to decide that there is a serious issue to be tried on Therium's case that their claims can survive *PACCAR*, there were a number of "quantum" points argued by Bugsby concerning the amount which should be covered by any injunction. These are discussed in Section H below.

E: Legal principles

33. Therium contends that its claim arises under the Therium LFA and the APA, and it is therefore a claim which falls within the scope of the arbitration agreement at clause 29 of the Therium LFA and clause 12 of the APA. Mr Carpenter did not challenge this proposition at the hearing.

34. It was therefore not disputed that the Court has jurisdiction to grant the relief sought by Therium pursuant to section 44 of the Arbitration Act 1996, which provides that the Court may grant an order for the preservation of property or for an interim injunction if the matter is urgent and if the arbitral tribunal has no power or is unable for the time being to act effectively. Bugsby did not argue that these conditions for relief were not fulfilled.

35. It was also common ground that the well-known *American Cyanamid* test applies to asset preservation orders in support of proprietary claims: *Madoff Securities International Ltd v Raven and others* [2011] EWHC 3012 (Comm). It is necessary to show that:

(a) There is a serious issue to be tried;

(b) The balance of convenience is in favour of an injunction (including consideration of whether damages are an adequate remedy);

(c) It is just and convenient to make the order sought.

36. The Court will be more ready to grant interim remedies in order to preserve trust assets (i.e. where the applicant has a proprietary claim) than where the claim is a personal one: *Republic of Haiti v Duvalier* [1990] 1 QB 202 per Staughton LJ at p213-4. *Gee on Commercial Injunctions* (7th Edition) at 7-011 states that: "A court has never hesitated to exercise its strongest powers to preserve a trust fund in interlocutory proceedings".

37. As will already be apparent, the critical question in the present case is whether there is a serious issue to be tried, and it was on this issue that the argument focused. If there was such a serious issue, then Bugsby did not, except in relation to arguments as to the quantum of Therium's injunction (see Section H below), suggest that the balance of convenience favoured refusing an injunction, or that it was not just and convenient to grant it. The essential reason why the balance of convenience favours an injunction is that there is evidence that Bugsby is insolvent, and therefore the release of the settlement monies to Bugsby (if no injunction were granted) would in practice mean that any award by the arbitrators in favour of Therium might well be of no practical utility.

F: Is the entire agreement unenforceable?

38. Therium submits that there is a serious issue to be tried as to whether or not the entire agreement is unenforceable. Therium relies upon the decision of the Court of Appeal in *Zuberi v Lexlaw Ltd* [2021] EWCA Civ 16. This case was referred to by the Supreme Court in *PACCAR* but was not overturned.

39. *Zuberi* concerned a solicitor's firm's contract of retainer which included a DBA, in clause 9.1, which entitled the firm to 12% of the client's recoveries. The retainer also contained a clause, clause 6.2, which required the client to pay costs and expenses in the event of early termination. There was no early termination, and the client entered into a settlement of her claim with the bank that she had sued. The firm then sought the 12% of the settlement sum. There was no argument concerning the invalidity of clause 9.1 itself. The client's argument was that the obligation to pay costs and expenses in the event of early termination was contrary to the relevant regulations (in particular Regulation 4 of the Damages-Based Agreements Regulations 2013). The question was whether, as Lewison LJ said at [1], the existence of that clause invalidated the whole contract. The client's argument failed, so that the solicitors were entitled to recovery of the full amount. Lewison LJ and Coulson LJ reached that result by a different route to that taken by Newey LJ.

40. Therium's argument relies upon the approach of Lewison LJ in paragraphs [33] and [34]. He said as follows:

> "[33] There are two possible views of what the DBA consists of. One view is that if a contract of retainer contains any provision which entitles the lawyer to a share of recoveries, then the whole contract of retainer is a DBA. In other words, a DBA is a contract which includes a provision for sharing recoveries. But another view is that if a contract of retainer contains a provision which entitles a lawyer to a share of recoveries; but also contains other provisions which provide for payment on a different basis, or other terms which do not deal with payment at all, only those provisions in the contract of retainer which deal with payment out of recoveries amount to the DBA.
>
> [34] In my judgment, there are good reasons for preferring the latter view. First, the object of the legislation was to permit the remuneration of lawyers by means of a share of recoveries. Second, the only part of the common law that needed to be changed to achieve that purpose was the rule against champerty. As I have said, at common law the contract of retainer, shorn of clause 9.1, would have been enforceable. There was no particular reason for Parliament to modify the other statutory and regulatory controls over lawyers' fees. Third, there is a presumption that Parliament does not intend to change the common law, except expressly or by necessary implication. There is no express provision which displaces the common law (except the rule against champerty). Fourth, the legislation cannot be said to be undermined by the co-existence of the common law. Fifth, the legislative scheme is far from comprehensive."

41. Coulson LJ agreed with Lewison LJ that "damages-based agreement" should be given a narrow meaning:

> "[77] First, I agree with my Lord, Lewison LJ, that the term "damages-based agreement" should be given a narrow meaning. It is the agreement between the parties relating to the payment as defined in the 2013 Regulations, namely that "part of the sum recovered in respect of the claim or damages awarded that the client agrees to pay the representative". Other elements of the agreement between the solicitor and the client, such as at which of the solicitors' offices the work will be done, or the level of expenses incurred (which is expressly excluded from the payment as defined) or, as in this case, the termination provisions, have nothing to do with the payment as defined in the 2013 Regulations, and are therefore not part of the DBA itself."

42. I consider that these passages, in particular the judgment of Lewison LJ, give rise to a principled argument on the part of Therium which raises a serious issue to be tried. The argument, in essence, is that the only unenforceable DBA element of the Therium LFA is that part of the LFA which entitles Therium to recover a percentage share of the recoveries. Thus, the DBA regime is not engaged by the provisions which entitled Therium to recover the amounts which it has paid out, and the 3 times multiple of that amount. It is those amounts which Therium now seeks to claim, and which it alleges are within the trust provided for by clause 13 of the Therium LFA and which in due course it will be entitled to receive.

43. Mr Sullivan submitted that if the LFA had simply contained the provisions which entitled Therium to recover, as its success fee, the amounts paid out and the multiple, it would not have been regarded as a DBA. He referred to an article by Professor Rachael Mulheron (Professor of

Tort Law and Civil Justice) at Queen Mary University of London: *The Funding of the United Kingdom's Class Action at a Cross-Roads* King's Law Journal 2023 (https://doi.org/10.1080/09615768.2022.2161350). The article was written prior to the appeal to the Supreme Court in *PACCAR*. She said in footnote 2:

> "This article, and the Appeal, are *not* concerned with LFAs which calculate the funder's success fee as a multiple of costs incurred, as those agreements would not offend the relevant provisions governing damages-based agreements. The LFAs discussed in this article contain a success fee which is based upon a percentage-of-recovery of damages obtained by the funded client, for it is those types of LFAs which are at issue in the Appeal."

44. Mr Carpenter accepted that the effect of *Zuberi* was that a DBA, for the purposes of Section 58AA(3), was not the whole of the agreement, but only certain parts of it. He also did not dispute the proposition that if the Therium LFA had indeed been confined to payment of the funds advanced and the multiple, it would not have been unenforceable. He was thus inclined to accept (at least for present purposes) the correctness of Professor Mulheron's view. As he said: if the funder was only charging a multiple, that would not be a DBA; it's the percentage that makes it a DBA.

45. Against that background, I consider that there is a realistic argument, applying the language of the judgment of Lewison LJ, that the relevant provisions (i.e. those providing for recovery of amounts spent, and the multiple) are "other provisions which provide for payment on a different basis" to those which entitled a lawyer to a share of recoveries. Or, applying the narrow approach of Coulson LJ, there is a realistic argument that the parts of the agreement relied upon by Therium are "not part of the DBA itself".

46. Thus, Mr Sullivan submitted that a DBA can be understood as an agreement within an agreement, in a similar way to an arbitration agreement. Whether or not that analogy is appropriate is not something which it is necessary to explore. However, the substance of his argument was that in the Therium LFA, only the provisions concerning payment of a percentage of the Claim Proceeds would amount to a damages based agreement. The remaining provisions, including those concerning the trust, the repayment of the funded sums, and the contingency fee insofar as it concerns a multiple return on those funded sums, are not damages based agreements and so do not fall foul of the decision in *PACCAR*. I agree with his submission that this point gives rise to a serious issue to be tried.

47. In reaching that conclusion, I also bear in mind that I was not referred to any authority which gives any further guidance as to how this aspect of the decision in *Zuberi* is to be applied in the context of an agreement such as the present. Thus, there is no binding authority which is contrary to Therium's submission, and in fact it is Bugsby whose argument posits that the decision has no application in the present context and can be distinguished. (*Zuberi* was considered in *Diag Human* (discussed in Section G below), but that case did not concern a DBA but rather a conditional fee agreement ("CFA")).

48. Furthermore, I bear in mind that the decision of the Supreme Court in *PACCAR* is very recent, and that the present appears to be the first case which has addressed its ramifications. This is a developing area of the law and also one which is not straightforward and where different conclusions are possible: in *PACCAR* itself, the Supreme Court reversed the Divisional Court (which had upheld the decision of the Competition Appeal Tribunal), and there was a powerful dissent. Whilst none of this means that I should shy away from addressing Bugsby's argument

that there is no serious issue to be tried, I do consider that it is an area where it is appropriate to tread carefully.

49. Mr Carpenter submitted that the point was actually very straightforward. In his written argument (which addressed the issue only briefly), he relied upon the fact that all of the payments to which Therium was entitled were only payable out of recoveries. That may be so, but I do not think that this is a determinative point. Professor Mulheron's article indicates that a success fee which is based upon a multiple of costs incurred would not offend the relevant provisions, and I understood that Mr Carpenter did not (at least for present purposes) challenge this. As Mr Sullivan submitted in reply, once it is accepted that a return of amounts disbursed, or a return based on a multiple of amounts disbursed, does not fall foul of the legislation, it cannot make any difference if those monies were to come out of recoveries.

50. In his oral argument, Mr Carpenter submitted that *Zuberi* could be distinguished: there was a big distinction between the termination/hourly rate provisions which were under consideration in that case, and the payment provisions which arise on the success of the claim in the present case. The only way in which sums would be paid would be out of recoveries: the only obligation to pay was if there was a recovery. If it was coming from recoveries, it was part of the DBA. He also drew attention to clauses 2.1 and 2.2 of the Therium LFA, which referred to payment of the "Contingency Fee" from recoveries, and how "Contingency Fee" was defined as referring to both the multiple and the percentage. The two aspects were, he submitted, welded together, and it made no sense to say that one part is DBA and the other is not.

51. Again, I did not consider that these points are so clearly right, in the light of *Zuberi*, that there is no serious issue to be tried. I have already addressed the argument based on the proposition that the payments were to come from recoveries. Mr Sullivan met the point about the multiple and percentage being "welded together" as being a point based on form rather than substance. In my view, that is a potential answer to the point.

52. In reaching my conclusion that there is a serious issue to be tried on this point, I do not express a view one way or the other as to who has the better of the argument. It is not the function of the court to do so at the present stage. Ultimately, the evaluation of the parties' arguments will be for the arbitrators. For the reasons given, I am satisfied that is indeed a serious issue which they will need to resolve.

G: Severance

53. In view of my conclusions on unenforceability, Therium does not need to rely upon its severance argument in order to establish a serious issue to be tried as to the enforceability of the trust arrangements on which it relies. However, I consider that there is also a serious issue to be tried on severance.

54. The general principles concerning severance are summarised in paragraph 7 of the judgment of Lewison LJ in *Zuberi* by reference to the leading Supreme Court case on severance:

> "[7] The criteria that must be fulfilled before severance is possible are that (a) the offending provision can be removed without modifying or adding to other terms of the agreement; (b) the remaining terms continue to be supported by adequate consideration and (c) the removal of the unenforceable part of the contract does not change the nature of the contract, such that it is not the sort of contract that the parties entered into at all: *Egon Zehnder Ltd v Tillman* [2020] AC 154"

55. Bugsby's argument as to why severance was unavailable focused on the third requirement, and the very recent decision of the Court of Appeal in *Diag Human v Volterra Fietta* [2023] EWCA Civ 1107, in which Mr Carpenter appeared for the successful respondents to the appeal. That case did not concern a DBA concluded by litigation funders. It concerned a CFA concluded by solicitors. The CFA was unenforceable because it failed to comply with legislation governing CFAs. The solicitors sought to save a right to payment of the discounted fees by severing the rest of the agreement. The Court of Appeal, upholding the judge, held that severance was not possible. This was because severance would so alter the character of the agreement that it would become not the sort of contract that the parties entered into at all. Stuart-Smith LJ, who gave the leading judgment in the court, expressed this point as follows:

> "[40] Applying these principles, I would hold that to implement the severance proposed by the solicitors would fundamentally change the nature of the contract so that, upon severance, it would cease to be the sort of contract into which the parties had originally entered. The September 2017 Agreement, whether it was a new contract or a variation of the February 2017 Agreement, was a CFA with a substantial proportion of the solicitor's proposed remuneration being conditional upon the contingencies outlined in paragraph 3, that being the stated consideration for the discounting of the solicitors' normal fees under paragraph 2 of the side letter. Upon severance, it would become a conventional retainer providing simply for the solicitors to charge at a discounted rate, with no conditional element at all. The fact that severance would remove the stated consideration for the solicitors' agreement to discount their fees emphasises the difference in the nature of the contract before and after severance – before severance the solicitors discounted their fees in return for the prospect of success fees; after severance they discounted their fees for no consideration. The present case cannot be moulded so as to be analogous to either Beckett or Tillman: there is no question of severing one part of the provisions for conditional fees and leaving the rest in place since that would be an exercise in futility: the character of the contract would remain that it was an unenforceable CFA."

56. Stuart-Smith LJ went on to hold that if this conclusion was wrong, severance would be precluded as being contrary to public policy:

> **"**[62] Even if I were wrong in this conclusion, I would hold that severance is precluded as contrary to public policy. The principal effect of severance would be to permit partial enforcement of the unenforceable CFA. As was pointed out during submissions, if the client lost the arbitration, the effect of allowing severance would be that the solicitors would recover precisely the same amount of their fees as if the CFA had been held to be enforceable. That is not, in my view, a tolerable outcome. Nor is it any answer to submit that there is no disadvantage to the client in enforcing the discounted fee element in respect of work carried out for and at the client's request. The regime imposed by the 1990 Act is concerned with conflicts of interest giving rise to potential harm to clients: see *Garrett* per Dyson LJ at [38]-[39]."

57. On behalf of Bugsby, Mr Carpenter submitted that this decision was directly applicable to the DBA in the present case, and that there is no serious issue on severance to be tried. He said that the relevant provisions (section 58 of the Courts and Legal Services Act 1990 in the case of CFAs and section 58AA in the case of DBAs) had the same result: contracts would be unenforceable if there was non-compliance with the requirements for enforceability. Both regimes served the purpose of client protection: they were not concerned with champerty.

Severance of the provisions relating to payment of a percentage of damages would change the character of the agreement. If Therium had only been charging a multiple, it would not be a DBA: it was the percentage that made it a DBA.

58. I do not consider that this line of argument is so persuasive as to preclude there being a serious issue to be tried on this point. The decision in *Diag Human* does not concern a DBA, and there is ample room for legitimate argument as to whether or not the considerations which prevented severance in the context of a CFA can be transposed into the DBA context. Indeed, the fact that the two types of agreements are not necessarily analogous can be seen in the *Diag Human* case itself. The solicitor appellants there relied upon the decision in *Zuberi* as supporting their argument on severance. The judge (Foster J) rejected the argument, including because (as summarised by the Court of Appeal at paragraph [52]:

> "… different public policy considerations applied which tended to favour enforceability in *Zuberi* and which were not transferable to the proscription against continuing to act for a client under a conditional fee arrangement".

59. Stuart-Smith LJ then went on to say:

> "[53] In my judgment, Foster J was right to reject the solicitors' submissions based on Zuberi, essentially for the reasons that she gave. The starting point is the terms of section 58(2)(a), which I have set out above at [19] above. As I have already indicated, that definition of a CFA precludes splitting off the provisions for payment of the solicitor's discounted fees and treating them as not forming part of the (unenforceable) CFA. I accept the client's submission that the discounted fee provisions which the solicitors seek to enforce are part of the core agreement that make the September 2017 Agreement a CFA. Second, the provision for discounted fees is not analogous to the "termination" provision in Zuberi. Third, the considerations of public policy which supported Lewison LJ's narrow construction of the meaning of a DBA are absent in a case involving CFAs such as the present."

60. These passages indicate that the decision on severance in *Diag Human* cannot simply be read across and applied by analogy to the issue of severance in the DBA in issue here. As Mr Sullivan pointed out, there are some significant differences between the legal regime concerning CFAs when compared to DBAs. They are governed by different sections of the 1990 Act. There is also a different common law and statutory background. A CFA is illegal at common law, because of the prohibition on champertous agreements. A CFA is illegal unless it satisfies the requirements of the CFA regime in the 1990 Act; see *Diag Human* at para [20]. It can be argued that there is no equivalent public policy in relation to LFAs: there was no dispute that in principle these are lawful and do not offend policy (see e.g. *Chapelgate Credit Opportunity Master Fund v Money* [2020] EWCA Civ 246, referring to prior authority). Accordingly, the effect of section 58AA is not to authorise what would otherwise be illegal agreements, but rather to render unenforceable legal agreements which do not satisfy its requirements. It can be argued, reasonably, that there is no public policy objection to a severance which removes those provisions in a litigation funding agreement which place the agreement within the regime, leaving behind an entirely lawful agreement to which the regime does not apply.

61. Accordingly, a non-compliant CFA may well present a more difficult case for severance than a LFA which includes a DBA. Whether or not that is so is a serious issue, with which the arbitrators will need to grapple. That will include the central question of whether the character of the agreement would be changed by severance. Mr Sullivan submitted that removal of

offending provisions would not change its character: following severance, there would be an agreement for funding and obligation to repay in return. Mr Carpenter of course submitted to the contrary. There is no direct authority on the point, and in my view the court cannot and should not try give an answer to this issue now, when the only question is whether there is a serious issue to be tried. In my view, there clearly is.

62. In view of these conclusions, Therium has established that there is a serious issue to be tried in relation to its argument in support of the existence of a proprietary claim and which would potentially defeat Bugsby's unenforceability case. It is not therefore necessary to consider the arguments as to whether, in the event that there was no serious issue to be tried on its proprietary claim, there would be a sufficient "good arguable" restitutionary claim so as to justify a freezing injunction.

H: "Quantum" arguments

63. In relation to the quantum of the injunction sought by Therium, Bugsby submitted that this should be limited to the sums currently held by Candey (£20,551,766.61), and should therefore not extend to the £7,084,745.39 which has been released to Bugsby. Therium submitted that the injunction should extend to the entirety of the proceeds of the settlement received by Bugsby: it should not therefore be limited to the monies currently held by Candey.

64. Bugsby's arguments on this point were not set out in its skeleton argument, but were instead made orally by Mr Carpenter, and at some speed, during his submissions. These arguments focused principally on the question of whether there was a serious issue to be tried, but also embraced the questions of what was just and convenient. Since there was no transcript of the hearing, and in order to ensure that I had fully understood the points made, I asked counsel for both Bugsby and Therium to provide me with a written note of the points which they had made. The intricate and detailed nature of the arguments make them difficult to summarise and is also relevant to the question of whether there is a serious issue to be tried. I therefore set out arguments in some detail.

65. Before doing so, however, there are a number of preliminary matters to be noted.

66. First, I did not understand Bugsby to dispute Therium's case that – subject of course to the enforceability/ severance issues addressed in Sections F and G above – the effect of Clause 13 of the Therium LFA was to create a trust (or at least that there was a serious issue to be tried in that respect). In correspondence, Bugsby had argued that the trust arrangement in the Therium LFA had been varied by the Variation Agreement such that there was no longer any trust in favour of Therium. This point was addressed in detail by Mr Sullivan in his written and oral submissions, and in the course of the latter Mr Carpenter intimated that the point was still being run. However, at the end of his submissions, Mr Carpenter indicated that he was not pursuing that point.

67. Secondly, Therium's claim was, as Mr Sullivan explained, not simply a claim for payment of the sums due to it under the waterfall under the APA, but also included a claim for a declaration that Bugsby holds the Claim Proceeds (as defined in the Therium LFA) on trust for it on the terms set out in the Therium LFA. This argument is based upon the express terms of the Therium LFA, which to some extent I have discussed in Section C above. This requires Bugsby to "hold any Claim Proceeds received by it, or by Solicitors on its behalf upon trust for Therium throughout the Trust Period …". The wording therefore starts by identifying the "Claim Proceeds", and the natural meaning of these words (certainly to the standard of serious issue to be tried) is that they extend to the entirety of the Claim Proceeds. This reading makes sense in

the context of the remaining provisions of Clause 3, which then makes detailed provision for the distribution of the Claim Proceeds.

68. Thirdly, I have previously addressed in Section C the impact on clause 13 of the later agreements concluded by the parties, and have concluded (to the requisite serious issue to be tried standard) that the subsequent APA did not fundamentally affect the existence of the trust arrangements created by Clause 13; and that the effect of the APA, when read alongside the LFA concluded by Omni, was that the trust later had a larger number of beneficiaries, and a different distribution priority, than was the case when the Therium LFA and the original Priorities Agreement stood alone.

Bugsby's submissions

69. Mr Carpenter made four points.

70. Firstly, Therium makes a proprietary claim, which it puts at around £16.4 million. In support of that claim, there is no basis on which it can freeze assets worth any more than the value of the claim. It makes no difference that there may be competing creditors. If it were otherwise, a party with a claim of any size could freeze all of a defendant's assets in case there were other creditors who might have a claim on the same fund.

71. Secondly, in response to Therium's reliance on clause 13.1 of the Therium LFA as providing for all of the Claim Proceeds to be held on trust for Therium:

    (a) Clause 13.1 of the Therium LFA has necessarily been superseded by the Omni LFA, which provides:

        (i) in Specific Term ("ST") 7.1.1, for the Omni LFA to prevail over the Therium LFA "to the extent of any inconsistency between the Therium Funding Agreement and this Agreement, or in the event that clauses in the Therium Funding Agreement address the same or similar circumstances that terms of this Agreement seek to deal with…";

        (ii) in ST 5.2.1, for Bugsby to instruct the Lawyers "to hold that part of the Claim Proceeds assigned to Omni Bridgeway under this Agreement on trust for Omni Bridgeway".

        Bugsby cannot hold on trust *for Therium* sums which it is obliged to instruct the Lawyers to hold on trust *for Omni*, so post-the Omni LFA, clause 13.1 of the Therium LFA cannot have the breadth for which Therium contends.

    (b) In any event, it makes no sense to talk of sums being held on trust for Therium to which it has no entitlement. Therium's interest in the Claim Proceeds has now crystallised in an amount which Therium puts at around £16.4 million. The proposition can be tested by asking whether Therium would contend – even if it conceded that it had no entitlement to any Claim Proceeds – that nevertheless the entire Claim Proceeds are held on trust such as to give Therium a proprietary interest in the entire Claim Proceeds. If that would be an absurd proposition, then it is no different because Therium claims an entitlement to some, but not all of the Claim Proceeds.

72. Thirdly, the sums acquired by Bugsby as a result of the "Fund Loss Appeal" do not form part of the Claim Proceeds. The reasoning to that conclusion goes as follows:

(a) Under the Omni LFA, "Ancillary Proceedings" are defined as including "appeal (defence or prosecution) of any Judgment".

(b) STs 6.1 to 6.4 set out a scheme whereby, "If after a Judgment in any Proceedings, the Lawyers advise that Ancillary Proceedings are required in order to achieve a resolution of the Claims and Proceedings consistently with the Overarching Purpose, and if requested by the Claimant, Omni Bridgeway and/or Therium, in their discretion, may elect to fund or co-fund the Ancillary Proceedings and will notify the Claimant and Lawyers in writing of such election".

(c) ST 6.3 gives Omni and Therium "an exclusive right to fund or co-fund with Therium … any Ancillary Proceedings and the Claimant may not directly or indirectly seek commercial funding for any Ancillary Proceedings other than from Omni Bridgeway, an Omni Bridgeway Group Entity and Therium or Therium Group Entity or affiliate, until such time as Omni Bridgeway and Therium have confirmed in writing that they are not prepared to fund individually, or together co-fund, the Ancillary Proceedings".

(d) By ST 6.4, if Omni/Therium elect to fund Ancillary Proceedings, then "Proceedings" in the Omni LFA will include those Ancillary Proceedings.

(e) It is explicit in ST 6.4 and implicit in ST 6.3, that, if Omni and Therium decline to fund Ancillary Proceedings, then (i) Bugsby can seek funding for them elsewhere and (ii) the Ancillary Proceedings do not form part of "the Proceedings".

(f) The Amended and Restated Priorities Agreement defines "Claim" by reference to "the Proceedings", which has the same definition as in "the Funding Agreement". The Funding Agreement is the Therium LFA (see recital D to the APA).

(g) "Proceedings" is defined in the Therium LFA expressly to exclude an appeal "unless specifically agreed by Therium pursuant to clause 4.2". Clause 4.2 of the Therium LFA provides for the possibility of Therium funding an appeal, but this will have been superseded by the provisions of the Omni LFA referred to above. Accordingly, if Omni and Therium do not elect to fund Ancillary Proceedings, then the appeal in question does not form part of "the Proceedings" for the purpose of the APA.

(h) "Claim Proceeds" are defined in the APA as value etc received "in connection with or arising out of the Claim…". Accordingly, any recovery from an appeal which Omni and Therium elect not to fund does not form part of the "Claim Proceeds", which form the basis for the funders' remuneration.

(i) This makes commercial sense and the alternative would be commercial nonsense: if Bugsby obtains funding from another funder in relation to an appeal which Omni and Therium have elected not to fund, then that funder will expect a proportion of the benefit of the appeal. It would be absurd if, on top of what the new funder requires, Bugsby would have to pay Omni and Therium additional amounts by reference to the appeal, when they had the opportunity to fund it and chose not to do so.

73. Fourthly, even if Therium can establish a serious issue to be tried as to whether it has a proprietary interest in the entirety of the Claim Proceeds, it cannot be just and convenient to freeze sums which will in fact never come to Therium. This includes not only parts of the Claim Proceeds on which Therium has no claim, but also the 20% of Therium's and Omni's entitlements at the second stage of the waterfall, which are payable to Bugsby under clause 5.1 of the Variation Agreement. Even if the entirety of the Settlement Proceeds are in play, Bugsby will be entitled to a minimum of £3,468,447.08 on Therium's own figures as set out in its draft claim account.

Therium's argument

74. Therium's trust claim is based on clause 13.1 of the Therium LFA. This provides for a trust over the "Claim Proceeds", as defined in that contract. The Claim Proceeds are defined in clause 1 as, in summary, any sums received by Bugsby "in connection with or arising out of the Claim". "The Claim" is defined in the Schedule to the Therium LFA as "Claims and causes of action against the Defendant which relate to, are in respect of, result from or are connected with the Claimant's attempt in the period 2015 to 2017 to acquire Olympia, the well-known property and business asset".

75. All of the settlement sums paid to Bugsby by the underlying defendant were in settlement of that claim. Whilst it is true that there was an appeal ongoing at the time of settlement, that does not alter the fact that the payment was made in settlement of that cause of action. Accordingly, there is, at minimum, a serious issue to be tried that the entirety of those settlement sums comprise Claim Proceeds and, accordingly, fall within the scope of the trust.

76. As to the four arguments advanced by Bugsby at the hearing, Therium submitted as follows.

77. *Argument 1*. It is not wrong, as a matter of principle, for Therium to obtain an injunction in respect of a sum going beyond the value of its claim, or at least there is a serious issue to be tried. Bugsby's argument mischaracterises Therium's claim. Whilst, at the end of the waterfall process under the Amended Priorities Agreement, Therium will not seek payment of the entirety of the settlement sums, this is not its only claim. It also has a claim for a declaration of trust over the entirety of those settlement sums under clause 13.1 of the Therium LFA.

78. *Argument 2*. It is incorrect (or at least there is a serious issue to be tried) for Bugsby to contend that it is not possible for Therium to have a beneficial interest in sums in excess of those to which it would be entitled following the conclusion of the waterfall process. It *is* possible for the trust set out in clause 13.1 to exist. Three different Commercial Court judges have previously accepted that there is a good arguable case as to the existence of a trust on the basis of the same contractual term: see *Therium v Brooke* [2016] EWHC 2421 (Comm) at [14], [16] and [21]. It is a trust on terms, which provides for Therium to have a beneficial interest in the entirety of the settlement sums pending the carrying out of the waterfall process. It is immaterial that Therium will not receive the entirety of those sums following distribution under the terms of the contracts.

79. *Argument 3.* Bugsby contended that sums which were attributable to its "Fund Loss Appeal" fell outside the scope of the trust because they fell outside the definition of "Claim Proceeds". The argument proceeds on the basis that sums paid under the settlement in excess of the damages awarded by Robin Knowles J following the underlying trial fall outside the definition of "Claim Proceeds" because those sums were attributable to the appeal and were not attributable to the underlying claim. This argument was made on the basis of the definition of "Claim" in the Amended Priorities Agreement. In that agreement, "Claim Proceeds" is defined by reference to the definition of "Claim". "Claim" is defined as:

> "…the Claimant's claims and causes of action against the Defendant in the Proceedings (defined in the [Therium LFA]) (and any amendment of those claims or causes of action) and any enforcement action or subsequent proceedings relating thereto".

80. "Proceedings" is defined in the Therium LFA as:

> "…each and every litigation or arbitral proceeding issued or arising out of or in connection with the Claim including any pre-action correspondence, settlement negotiations or mediation and any enforcement proceedings to enforce payment of any judgment, order, award, or settlement agreement, brief details of which are included in the Schedule and any other proceedings which Therium agrees in writing shall be the subject of this Agreement pursuant to clause 4.3. For the avoidance of doubt "Proceedings" does not include an Appeal unless specifically agreed by Therium pursuant to clause 4.2".

81. Bugsby argued that because the definition of "Proceedings" did not include an appeal, this meant that settlement sums which were obtained as a consequence of an appeal did not fall within the scope of the definition of "Claim Proceeds". This is incorrect (or at least there is a serious issue to be tried) both as a matter of contractual construction and of fact.

82. As a matter of contractual construction, the following arguments involve a serious issue to be tried:

(a) The trust is under the Therium LFA, not the Amended Priorities Agreement. The relevant definitions of "Claim" and "Claim Proceeds" are therefore those under the former rather than the latter contract, and such definitions make no reference to "the Proceedings".
(b) Bugsby's approach ignores the final nine words of the definition of "Claim" in the Amended Priorities Agreement. Even if (which is not accepted) the appeal did not fall within the definition of "Proceedings" in the Therium LFA, the definition of "Claim" in the Amended Priorities Agreement is broader than that: it also includes "subsequent proceedings relating thereto", which would include an appeal.
(c) Even if these points were incorrect, sums paid in settlement of a claim in respect of which there is an ongoing appeal are sums paid in respect of "claims and causes of action" in the underlying proceedings. The claims and causes of action do not change between a first instance trial and an appeal – the settlement is still paid to settle those claims and causes of action. To put it another way, without the first instance trial, there would be no appeal.

83. As a matter of fact, there is a serious issue to be tried as to this point. There were several appeals before the Court of Appeal, in respect of which Therium and Omni provided some funding: see paragraph 47 of Mr Purslow's Affidavit. Even if Bugsby's case that there is no serious issue to be tried as a matter of contractual construction is accepted, it is not possible for the Court to conclude that there is no serious issue to be tried as to the factual basis for the settlement, and whether it was attributable to a settlement of appeals funded by Therium and Omni or otherwise.

84. Finally it is, in any event, unclear why (mathematically) this argument justifies Bugsby's position that the injunction should be limited to the sums in Candey's client account.

85. *Argument 4*: Bugsby argued that it would not be just and convenient to grant an injunction for sums in excess of those sums to which Therium will be entitled at the conclusion of the entire

process. This was put, in part, by reference to clause 5.1 of the Variation Agreement. This argument is misplaced.

86. First, it ignores the nature of Therium's proprietary claim. If there is a serious issue to be tried as to the existence of that trust, the only way to provide proper protection to Therium pending the arbitration is to freeze the entirety of those trust funds. Otherwise, Therium's final relief in this regard is put in jeopardy.

87. Secondly, it ignores the practical reality of the claims before the Court (this is a point which effectively renders all of these submissions regarding the quantum of the injunction academic). Therium has a claim for over £16 million out of the Claim Proceeds. Omni has a claim (on its case) for over £13 million. Together, these sums exceed the total value of the settlement sums. Both funders claim the protection of a trust, and Omni's claim has (for the purpose of its injunctive relief only) been accepted by Bugsby. Even if Therium's case has a serious prospect of success only to the level of its final entitlement under the waterfall (rather than as to the whole of the settlement sum), there will still need to be injunctive relief covering the whole of the settlement sums so as to hold the ring such that, at the conclusion of the arbitrations, the funders, together, have a right to enforce, insofar as possible, their respective entitlements.

88. Thirdly, the reliance on clause 5.1 of the Variation Agreement is misplaced. Bugsby argues that in due course it will receive payment of part of the Claim Proceeds from Therium and Omni and so it would be unfair and unjust for the entirety of those Claim Proceeds to be frozen.

89. In fact, clause 5.1 of the Variation Agreement (which in any event needs to be read together with clause 5.3), provides for payment by Therium and Omni to Bugsby of certain sums out of the sums they receive under the second stage of the waterfall. It arises only *after* they have received payment of those sums. It has no bearing on the trust and has no application at present, as Therium and Omni are yet to receive any such sums. As and when they do receive such sums, it is far from clear that they will be obliged to pay any sums to Bugsby. First, if Bugsby has dissipated any of the Claim Proceeds already paid to it, it will be liable to make payments accordingly to Therium and Omni in respect of any shortfall in their entitlement under the waterfall. Secondly, it is likely that by that time, Bugsby will have additional liabilities to Therium and Omni in the form of interest (running, under Therium's LFA, at 4% above base rate by reason of clauses 3.2 and 13.11 of the Therium LFA) and in the form of costs orders/awards made against it. Therium will be entitled to set-off these liabilities against any sums it would otherwise be liable to pay to Bugsby under clause 5.1 of the Variation Agreement. This is a particularly significant right in circumstances in which Bugsby appears to have no assets other than its claim to the Claim Proceeds. Clause 5.1 is designed, in common with the other provisions regarding the trust and payments, to protect Therium and Omni insofar as possible from an insolvency risk against Bugsby. It is neither unfair nor inconvenient for the Court to grant an injunction to continue that protection.

Discussion

90. I do not consider it necessary or appropriate to analyse all of these points. I have read and re-read the parties' arguments on these points, and the reason for requesting a note of the submissions was to ensure that I understood the points made by Bugsby (none of which had been set out in its skeleton argument) and the responses of Therium. Having read and re-read the arguments, and considered the underlying documents, I do not think that any of them are capable of being resolved in Bugsby's favour on the basis that there is no serious issue to be tried. Some of the arguments raise questions as to how to interpret lengthy clauses in a series of interrelated agreements. They all require mature consideration and full argument. The outcome

of that argument is uncertain, because there are clearly serious issues to be tried, and is a matter for the arbitrators.

91. However, I see no difficulty in principle with the starting point, and indeed the foundation, of Therium's case, which is clause 13. Clause 13.1 provides for the Claim Proceeds to be held "upon trust for Therium throughout the Trust Period on terms that Therium shall be entitled to such part of the Claim Proceeds …". This clearly creates a trust of the Claim Proceeds when in the hands of Bugsby. The existence of that trust (or at least the serious issue to be tried in that respect) must be the reason why, in the *Therium v Brooke* case to which Mr Sullivan referred, the Commercial Court made an order freezing and preserving the proceeds of litigation.

92. It also seems to me that there is a serious issue to be tried as to whether Therium is entitled, as in substance it seeks to do here, to require the assets in the trust to be preserved in their entirety. That is the effect of reading Clause 13.1 in the context of the later provisions of Clause 13. Thus, clause 13.2 provides for the Claim Proceeds received in monetary form to be paid "into the Solicitors' client account immediately upon receipt". Clause 13.8 then provides for Therium to prepare a draft Claim Proceeds Account. This is designed to lead to the distribution described in Clause 13.9:

> "13.9 Once the draft Claim Proceeds Account is agreed or deemed to be agreed pursuant to the Priorities Agreement (whichever is the earlier), the Parties agree that the Solicitors shall forthwith pay out the Claim Proceeds in accordance with the agreed Claim Proceeds Account."

93. Thus, the purpose of the trust created by Clause 13 is to facilitate the distribution in accordance with the agreed "Claims Proceeds Account". This distribution is intended to benefit all parties with an interest in the trust monies, including Therium itself. I see no reason why proceedings by Therium, to enforce the trust arrangements prior to the time when the accounting has been agreed, should be limited to the amount of Therium's potential interest in the monies. It is true that, in consequence of later agreements, other parties now have an interest in the trust monies, and I have addressed this point already: see paragraphs [23] and [68] above.

94. As far as what is just and convenient is concerned: at the present stage, when there are various parties claiming an interest in the monies, and where the amounts claimed by Therium and Omni collectively exceed the proceeds received, there is every reason for all of the trust funds to be preserved. The points made by Mr Sullivan for Therium, set out above, are persuasive.

CONCLUSION

95. Accordingly, I conclude that Therium is entitled to the proprietary injunction which it seeks, and that it should not be limited to the amounts currently held by Candey. I will hear counsel on the precise terms of the order and consequential matters.

Appendix

The Therium LFA

1. Interpretation

1.1 In this Agreement the following definitions shall have the following meanings:
"Claim" means the claim, details of which are set out in the Schedule;

"Claim Proceeds" means any and all value due to and/or received by, directly or indirectly, on behalf of, or in lieu of payment to, the Claimant in connection with or arising out of the Claim as a result of any judgment, award, order, settlement arrangement or compromise, (including payment of any damages, compensation, interest, restitution, recovery, judgment sum, arbitral award, settlement sum, compensation payment, costs and interest on costs), whether in monetary or non-monetary form, whether actual or contingent, and before deduction of any taxes which the Claimant may be liable to pay in respect of the Claim Proceeds;

"Claim Proceeds Account" means an account prepared by Therium or its nominee setting out how any Claim Proceeds are to be distributed to the parties under the Priorities Agreement;

"Committed Funds" means, in relation to each tranche of Funding incepted, the Committed Funds for that tranche of Funding as detailed in the Schedule;

"Contingency Fee" means, in respect of all tranches of Funding incepted,:

(i) the multiple of the total Committed Funds for all tranches of funding incepted; plus

(ii) the percentage of the balance of all Claim Proceeds after payment to Therium of the Reasonable Costs Sum and any other sums payable in priority to the Contingency Fee under the Priorities Agreement at the rate applicable to the last tranche of funding incepted,

as specified in the Schedule, together with any VAT payable on such amount;

"Proceedings" means each and every litigation or arbitral proceeding issued or arising out of or in connection with the Claim including any pre-action correspondence, settlement negotiations or mediation and any enforcement proceedings to enforce payment of any judgment, order, award or settlement agreement, brief details of which are included in the Schedule and any other proceedings which Therium agrees in writing shall be the subject of this Agreement pursuant to clause 4.3. For the avoidance of doubt "Proceedings" does not include an Appeal unless specifically agreed by Therium pursuant to clause 4.2;

1.2 Any reference to a Recital, Clause, Schedule or Appendix is to the relevant Recital, Clause, Schedule or Appendix of or to this Agreement and any reference to a sub-clause or paragraph is to the relevant sub-clause or paragraph of the Clause or Schedule in which it appears.

2.2 If the Recovery is insufficient to pay the Reasonable Costs Sum and the Contingency Fee in full then the Recovery shall be applied in accordance with the priority as set out in the Priorities Agreement until the Recovery has been fully applied, after which no further sum shall be payable pursuant to this Agreement.

4.2 In the event of an Appeal, then the Claimant may request Therium to provide funding in respect of the Costs of dealing with the Appeal. If Therium consents to this request, then the Costs of dealing with the Appeal shall form part of the Funding and be incorporated into the Project Plan (which, along with the Schedule, shall be deemed amended accordingly).

13. Treatment of Claim Proceeds

13.1 The Claimant agrees to hold any Claim Proceeds received by it, or by the Solicitors on its behalf, upon trust for Therium throughout the Trust Period on terms that Therium shall be entitled to such part of the Claim Proceeds 85 shall be equal to the total of all amounts due under the terms of this Agreement to Therium (as the same may be reduced in accordance with the Priorities Agreement).

13.2 The Parties agree that any Claim Proceeds received in monetary form shall be paid into the Solicitors' client account immediately upon receipt. In the case of any Claim Proceeds received in non-monetary form, the Claimant shall either deliver the Claim Proceeds to the Solicitors or pay to the Solicitors as soon as is reasonably practicable the market value of the Claim Proceeds determined in accordance with clause 13.3.

13.8 On receipt of any Claim Proceeds, the Claimant shall instruct the Solicitors (for which purpose the Solicitors shall be hereby deemed to be instructed) to provide Therium with such information as Therium reasonably requires to enable Therium, or the Solicitors at Therium's request, to prepare a draft Claim Proceeds Account which Therium (or the Solicitors as the case may be) shall deliver to each of the parties to the Priorities Agreement for agreement.

13.9 Once the draft Claim Proceeds Account is agreed or deemed to be agreed pursuant to the Priorities Agreement (whichever is the earlier), the Parties agree that the Solicitors shall forthwith pay out the Claim Proceeds in accordance with the agreed Claim Proceeds Account.

13.11 If any payment due to Therium from the Claim Proceeds is delayed due to action or failure to act on the part of the Claimant, the Claimant shall compensate Therium for the delay in making payment by paying to Therium interest on the sum delayed for the period of the delay calculated in accordance with clause 3.2.

22. Invalidity and severability

If any provision of this Agreement is or becomes invalid, illegal or unenforceable whether in whole or in part or in relation to any of the Parties to the Agreement, the validity, legality and enforceability of the remainder of the Agreement, or its validity and enforceability as against other parties, shall not be affected in any way. The Parties shall nevertheless negotiate in good faith in order to agree the tens of a mutually satisfactory provision, achieving so nearly as possible the same commercial effect, to be substituted for the provision so found to be

invalid, illegal or unenforceable and each Party shall take any step required, including executing any further or other document, in order to give effect to the Parties' intention in entering into this Agreement.

29. Law and jurisdiction

This Agreement is governed by and is to be construed in accordance with the law of England and Wales. Save for any dispute resolved finally pursuant to clause 28 above, any dispute arising out of or connected to this Agreement, including the validity or termination thereof, shall be finally resolved by a sole arbitrator under the arbitration rules of the London Court of International Arbitration (the "LCIA"). The seat of the arbitration shall be London, the language of the arbitration shall be English and the arbitrator shall be a practising member of the English Bar. The arbitrator shall be appointed by the agreement of the Parties provided that, if the Parties cannot reach agreement on the appointment of the arbitrator within 30 days, then any Party may apply to have the arbitrator appointed by the LCIA.

SCHEDULE

Claim:	Claims and causes of action against the Defendant which relate to, are in respect of, result from or are connected with the Claimant's attempt in the period 2015 to 2017 to acquire Olympia, the well-known property and business asset.

Tranche	Committed Funds	Contingency Fee
Tranche 1	£750,000	Within the period of (and including the date of) 6 months from the Commencement Date: i. 2.5x the Committed Funds for Tranche 1; plus ii. 5% of any recovery excess £37,569,295. OR After 6 months from the Commencement Date: i. 3x the Committed Funds for Tranche 1; plus ii. ii. 5% of any recovery excess £37,569,295

The Omni LFA

RECITALS

C The Therium Funding Agreement shall remain on foot and hall be superseded and amended only as set out in this Agreement. To the extent of any inconsistency between this Agreement and the Therium Funding Agreement, this Agreement shall prevail.

SPECIFIC TERMS

5.1 Therium, the Claimant and Omni Bridgeway agree that any Claim Proceeds are to be paid to the Lawyers (if money) or possession given to the Lawyers (if in non-monetary form_ to be held, if applicable, valued, and distributed in accordance with this Agreement, the Therium Funding Agreement and the Amended and Restated Priorities Agreement.

5.2 The Claimant shall irrevocably instruct the Lawyers to:

5.2.1 hold that part of the Claim Proceeds assigned to Omni Bridgeway under this Agreement on trust for Omni Bridgeway;

5.2.2 pay to Omni Bridgeway in accordance with this Agreement and the Amended and Restated Priorities Agreement the amount of the Claim Proceeds (if money) held on trust for Omni Bridgeway pursuant to Specific Term 5.2.1; and

5.2.3 to deal with any non-monetary Claim Proceeds in accordance with this Agreement and the Therium Funding Agreement.

6. ANCILLARY PROCEEDINGS

6.1 If after a Judgment in any Proceedings, the Lawyers advise that Ancillary Proceedings are required in order to achieve a resolution of the Claims and Proceedings consistently with the Overarching Purpose, and if requested by the Claimant, Omni Bridgeway and/or Therium, in their discretion, may elect to fund or co-fund the Ancillary Proceedings and will notify the Claimant and Lawyers in writing of such election. In those circumstances:

6.1.1 the Claimant will cause the Lawyers to lodge, prosecute or otherwise undertake the Ancillary Proceedings;

6.1.2 the Claimant will irrevocably instruct the Lawyers to take all reasonable steps to expeditiously prosecute the Ancillary Proceedings; and

6.1.3 Omni Bridgeway and/or Therium will pay agreed costs in connection with the Ancillary Proceedings.

6.2 If the Claimant requests funding for Ancillary Proceedings pursuant to Specific Term 6.1, Therium and Omni Bridgeway agree:

6.2.1 in the first instance Therium and Omni Bridgeway shall be provided the option of co-funding the Ancillary Proceedings on a 50/50 basis;

6.2.2 in the second instance, co-funding on terms to be agreed between Therium and Omni Bridgeway; and

6.2.3 in the third instance, Omni Bridgeway and/or Therium will be given the option to fund the Ancillary Proceeding individually.

6.3 Omni Bridgeway, or an Omni Bridgeway Group Entity, has an exclusive right to fund or co-fund with Therium (or a Therium Group Entity or affiliate) on terms to be agreed consistently with Specific Term 6.2, any Ancillary Proceedings and the Claimant may not directly or indirectly seek commercial funding for any Ancillary Proceedings other than from Omni Bridgeway, an Omni Bridgeway Group Entity and Therium or Therium Group Entity or affiliate, until such time that Omni Bridgeway and Therium have confirmed in writing that they are not prepared to fund individually, or together co-fund, the Ancillary Proceedings.

6.4 From the date of any notice issued pursuant to Specific Term 6.2 that Omni Bridgeway and/or Therium have elected to fund Ancillary Proceedings then "Proceedings" will be read in this Agreement as including all such Ancillary Proceedings.

7. THERIUM FUNDING AGREEMENT

7.1.1 the Therium Funding Agreement governs the funding advanced to the Claimant by Therium in respect of the Claims and Proceedings and that this Agreement governs the funding to be advanced by Omni Bridgeway in respect of the Claims and Proceedings and that to the extent of any inconsistency between the Therium Funding Agreement and this Agreement, or in the event that clauses in the Therium Funding Agreement address the same or similar circumstances that terms of this Agreement seek to deal with, then this Agreement shall prevail over the Therium Funding Agreement;

Ancillary Proceedings	Means: (a) recognition and enforcement proceedings (including resisting challenges to enforcement) in relation to any Judgment; and (b) appeal (defence or prosecution) of any Judgment.

APA

Definitions

1. In this Agreement the following definitions shall have the following meanings:

"Claim" means the Claimant's claims and causes of action against the Defendant in the Proceedings (defined in the Funding Agreement) (and any amendment of those claims or causes of action) and any enforcement action or subsequent proceedings relating thereto;

"Claim Proceeds" means any and all value due to and/or received by, directly or indirectly, on behalf of, or in lieu of payment to, the Claimant in connection with or arising out of the Claim as a result of any judgment, award, order, settlement arrangement or compromise, (including payment of any damages, compensation, interest, restitution, recovery, judgment sum, arbitral award, settlement sum, compensation payment, costs and interest on costs), whether in monetary or non-monetary form, whether actual or contingent, and before deduction of any taxes which the Claimant may be liable to pay in respect of the Claim Proceeds;

3. Priority for payments from Claim Proceeds

3.1. It is agreed that all sums due to any of the Parties pursuant to the Agreements shall be paid out of any Claim Proceeds in accordance with the terms of this Agreement until all such sums are discharged or until the Claim Proceeds are exhausted.

3.2. It is agreed that the Claim Proceeds shall be distributed in the following priority order:-

3.2.1. First, to reimburse Therium for all and any sums paid pursuant to the Funding Agreement, to pay Omni Bridgeway the Omni Bridgeway Reimbursement, and to reimburse claims paid or payable by Insurers pursuant to the Policy.

To the extent the Claim Proceeds are insufficient to discharge in full all sums referred to in sub-clause 3.2.1 above, the Claim Proceeds shall be applied between Therium, Omni Bridgeway and Insurers pari passu on a pro-rata basis in proportion to their entitlement to sums under that sub-clause.

3.2.2. Secondly, to pay the Outgoing Solicitors such sum as is necessary to bring them up to 100% of their SL Basic Fees, to pay the Incoming Solicitors such sum as is necessary to bring them up to 100% of the Signature Basic Fees and the Signature Deferred Fees, to pay Therium until all of its entitlements to fees pursuant to the Funding Agreement as at the date of distribution have been discharged in full, to pay Omni Bridgeway the Omni Bridgeway Commission, and to pay the Insurers the Contingent Premium (as defined in the Policy).

To the extent that the Claim Proceeds are insufficient to discharge in full all sums referred to in clause 3.2.2 above, the Claim Proceeds (after payment of all sums referred to in clause 3.2.1) shall be applied pari passu on a pro rata basis to pay the Incoming Solicitors, the Outgoing Solicitors, Therium, Omni Bridgeway and, Insurers any other sums due to them under the Agreements in accordance with this sub-clause.

4. Determination of the Parties' rights and entitlements to the Claim Proceeds

4.1. As soon as reasonably practicable after receipt of any Claim Proceeds (including any payment made pursuant to the Policy) and receipt of such information requested by Therium pursuant to clause 13 of the Funding Agreement to produce a Claim Proceeds Account, Therium, or the Incoming Solicitors at Therium's request, shall prepare a draft Claim Proceeds Account and serve a copy on each of the other Parties.

4.2. Unless, within 14 calendar days from the date of service of the draft Claim Proceeds Account, a valid Notice of Disagreement has been served on Therium by any one or more of the Parties, the draft Claim Proceeds Account shall be deemed to be agreed by each of the Parties and any part of a draft Claim Proceeds Account not the subject of a valid Notice of Disagreement served pursuant to this Clause shall similarly be deemed to be agreed.

4.3. In the event that a valid Notice of Disagreement is served in accordance with clause 4.2 above, the Parties agree to seek to resolve that disagreement within a further period of 14 calendar days, failing which any remaining matters not agreed shall be referred to Independent Counsel who shall be instructed to determine the rights and entitlements of each of the Parties to the Claim Proceeds pursuant to the Agreements and this Agreement. The Parties agree that Independent Counsel's determination on this issue shall be final and binding on each one of them.

4.4. In making any determination as to the rights and entitlements of each of the Parties pursuant to clause 4.3 above, Independent Counsel shall also be instructed to determine which one or more of the Parties should bear Independent Counsel's fees of making the determination (and, if more than one Party, the shares in which they are each to bear those fees) and the Parties agree to be bound by this determination as to liability for Independent Counsel's fees.

4.5. Pending any draft Claim Proceeds Account or any part of it being deemed to be agreed, or pending resolution of any disputed matter by Independent Counsel, the Incoming Solicitors shall hold the Claim Proceeds, or such part as is not agreed, in their client account. The Parties agree that the whole or any part of any draft Claim Proceeds Account which is deemed to be agreed pursuant to Clause 4.2 above, and any determination of Independent Counsel pursuant to Clauses 4.3 and 4.4 above, constitutes a binding and irrevocable instruction to the Solicitors to distribute that element of the Claim Proceeds forthwith in accordance with that whole or part of the Claims Proceeds Account or determination. Where a Party is directed by Independent Counsel to meet the fees of Counsel in making a determination under Clause 4.4, then

the amount of those fees, and any VAT payable thereon, shall be deducted by the Solicitors from any amount of the Claims Proceeds due to that Party.

Variation Agreement

5. Priority for payments from Claim Proceeds

5.1 To the extent that the Claim Proceeds are insufficient to discharge in full all sums referred to in clauses 3.2.1, 3.2.2, 3.2.3, and 3.2.4 of the Amended Priorities Agreement, Omni Bridgeway and Therium agree that following receipt of the Claim Proceeds paid to them under clause 3.2.2 of the Amended Priorities Agreement (after payment of all sums referred to in clause 3.2.1 of the Amended Priorities Agreement), they will each pay 20 per cent of the sum they each receive to the Claimant, or to any other persons as the Claimant may direct.

5.3 Omni Bridgeway and Therium agree to advance to the Claimant an amount equal to 10 per cent of the sums they would each receive under clause 3.2.2 of the Amended Priorities Agreement were those sums calculated on the basis that the Claim Proceeds are equal to the total amount awarded as immediately due and payable to the Claimant in the Consequentials Judgment (after taking into the amount that would be paid for sums referred to in clause 3.2.1 of the Amended Priorities Agreement). The amount advanced to the Claimant under this clause will be deducted from the amounts required to be paid by Omni Bridgeway and Therium to the Claimant under clauses 5.1 or 5.2 (whichever applies). Notwithstanding the calculation of the amount to be advanced to the Claimant, Omni Bridgeway and Therium agree that the amount to be advanced to the Claimant under this clause will be paid 63 per cent paid by Therium and 37 per cent by Omni Bridgeway.

5.6 Nothing in clauses 5.1,5.2, and 5.3 above affects Omni Bridgeway's or Therium's proprietary rights and other rights to the Claim Proceeds under the Omni Funding Agreement and Therium Funding Agreement respectively.

8. Settlement and release

8.1 The Parties agree that the Therium Funding Agreement and the Omni Funding Agreement remain in effect and continues to bind each of the Parties, subject to the terms set out in this Amendment Agreement.

8.2 For the avoidance of doubt, in the event of any conflict between this Amendment Agreement and the Therium Funding Agreement or the Omni Funding Agreement, the terms of this Amended Agreement shall take precedence.