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Case No: CL-2023-000682 / 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: 03/11/2023

Before :

MR JUSTICE JACOBS

Between :

**OMNI BRIDGEWAY (FUND 5) CAYMAN INVT.
LIMITED**

Claimant

- and -

**(1) BUGSBY PROPERTY LLC
(a company incorporated under the laws of
Delaware)**

(2) CANDEY LIMITED

Defendants

AND

THERIUM CAPITAL MANAGEMENT LIMITED

Claimant

- and -

**(1) BUGSBY PROPERTY LLC
(2) CANDEY LIMITED**

Defendants

**Robert Marven KC and Theo Barclay (instructed by Taylor Wessing LLP) for Omni
Bridgeway**
**Joseph Sullivan (instructed by Addleshaw Goddard LLP) for Therium Litigation Funding
A IC**

Jamie Carpenter KC, Duncan McCombe and Guy Olliff-Cooper (instructed by **Candey Limited**) for **Bugsby Property LLC**

Hearing dates: Friday 20th October 2023

Approved Judgment

This judgment was handed down remotely at 9.30am on Friday 3rd November 2023 by circulation to the parties or their representatives 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

MR JUSTICE JACOBS

A: Introduction

1. Bugsby Property LLC (“Bugsby”) applies for fortification of cross-undertakings in damages which have been provided by the two litigation funders, Omni Bridgeway (Fund 5) Cayman Investment Ltd (“Omni”) and Therium Litigation Funding AIC (“Therium”) in relation to injunctive relief that the funders have obtained. The background to the present proceedings is set out in my judgment on Therium’s application for injunctive relief – [2023] EWHC 2627 (Comm) – and it is not necessary to repeat it. I shall use the same abbreviations as are contained in that judgment.
2. Bugsby contends that each funder should provide fortification to the extent of its claimed interest in the Settlement Proceeds which have been received from L&G. The amount sought from Omni is therefore £ 3,283,489.14, and from Therium is £ 4,093,246.48. These sums collectively exceed the estimate of £ 5.14 million which Bugsby has given of its loss resulting from the grant of injunctive relief. However, Bugsby contends that each funder should provide the above sums in case one or other cross-undertakings falls away.
3. The estimate of a loss of £ 5.14 million, as potentially resulting from the grant of the injunctions, is based upon evidence from Mr Steven Marcus served on behalf of Bugsby. Mr Marcus describes himself as a director of Bugsby Advisory Ltd, which advises Bugsby Investments Ltd in matters relating to Bugsby. The substance of his evidence is that the injunctions will prevent Bugsby from deploying the Settlement Proceeds remaining in the account of its solicitors, Candey, in the potentially lucrative litigation funding market, where returns of around 30% per annum can reasonably be anticipated. The figure of £ 5.14 million is based, as I understand it, on the figure of £ 20,551,766.61 which is the total amount currently held by Candey. Bugsby has assumed a return of 25% which is somewhat lower than that achieved by established litigation funders. It has also assumed a period of 1 year, as being a reasonable length of time before the arbitrators will decide upon the validity of the litigation funders’ claims.
4. Both Omni and Therium contend, for essentially the same reasons, that fortification should not be ordered. They contend that there is no sufficient evidence to justify the figure of £ 5.14 million. They also contend that there is no sufficient case that any eventual judgment in Bugsby’s favour, pursuant to the cross-undertaking, will go unsatisfied. Each funder has adduced evidence of its financial structure and (as each would contend) underlying financial strength, whilst recognising that neither funder has assets within the jurisdiction against which Bugsby could enforce a judgment pursuant to the cross-undertaking. Each funder also relies upon the fact that it, or the group of which it forms part, is carrying out a substantial amount of litigation funding in the UK, and that it and the group would suffer significant reputational damage if it were to commit a contempt of court by defaulting upon its cross-undertaking.

B: Legal principles

5. Bugsby submitted, in its written submissions, that the exercise of the court’s discretion involved considering whether the applicant for fortification has a good

arguable case that it will suffer loss that it would not have suffered but for the injunction that is capable of intelligent estimation. In my view, that is a fair summary of the principles established in the decision of the Court of Appeal in *Energy Venture Partners Ltd v Malabu Oil & Gas Ltd* [2014] EWCA Civ 1295. A more complete summary of the principles is contained in the judgment of Calver J in *PJSC National Bank Trust v Mints* [2021] EWHC 1089 (Comm), paragraph [26]:

“It was common ground between the parties that it is a matter for the Court’s discretion as to whether or not to order fortification of an undertaking given by a claimant as the price for it obtaining freezing injunctive relief. In exercising that discretion, the Court will have regard to the principles set out in *Energy Venture Partners Ltd v Malabu Oil & Gas Ltd* [2015] 1 WLR 2309 (CA) at [52]-[54] (“*Malabu Oil*”) as follows:

i. The applicant for fortification must show a good arguable case for it, and does not have to prove the need for fortification on a balance of probabilities (*Malabu Oil* at [52]-[53]).

ii. In considering whether to exercise its discretion to order fortification, the Court will take the three criteria – which are inextricably linked factors – into account (*Malabu Oil* at [53], applied in *Phoenix Group Foundation v Cochrane* [2018] EWHC 2179 (Comm) at [14] ... :

(a) Can the applicant show a sufficient level of risk of loss to require (further) fortification, which involves showing a good arguable case to that effect?

(b) Can the applicant show, to the standard of a good arguable case, that the loss has been or is likely to be caused by the granting of the injunction?

(c) Is there sufficient evidence to allow an intelligent estimate of the quantum of the losses to be made?”

6. Calver J went on to analyse each of these criteria in more detail. In relation to the requirement that the applicant show a sufficient level of risk of loss: there must be a solid credible evidential foundation that the claimed loss has been or will be suffered (see paragraph [27 (i)]). In relation to the requirement that the loss is caused by the grant of the injunction: it is only loss which is caused or would have been caused by the preventative or coercive effect of the injunction that is recoverable under the cross-undertaking (see paragraph [27 (ii)]). In relation to the requirement that there should be sufficient evidence to allow an intelligent estimate of the quantum of losses: there must again be solid, credible evidence of future losses, and this ought ordinarily to be supported by some underlying material and ought not to be speculative (see paragraph [27 (iii)]).
7. These broad principles were ultimately not in dispute. Mr Carpenter floated an argument that the applicable test, in the context of the present injunctions, was

“serious issue to be tried” rather than “good arguable case”. Ultimately, he did not press that point, for which he cited no authority and in my view is not consistent with the cases referred to above.

8. The test of “good arguable case” is well-known in the context, for example, of freezing injunctions. The authorities in this area are summarised in *Gee: Commercial Injunctions* 7th edition, paragraphs 12-032 – 12-033 drawing on classic statements of Mustill J. It is not enough to show an arguable case, namely one which a competent advocate can get on its feet. Something markedly better than that is required, even if it cannot be said with confidence that the plaintiff is more likely to be right than wrong. It is therefore not necessary for the applicant to have a case with a better than 50 per cent chance of success.
9. Accordingly, the parties’ arguments were focused on two points, namely whether there is a good arguable case that (as Bugsby put it):
 - (1) Bugsby will suffer loss as a result of the injunctions;
 - (2) Omni and Therium are ‘good for’ their respective undertakings.

C: Good arguable case that Bugsby will suffer loss?

10. The loss in respect of which Bugsby seeks fortification concerns a business in which Bugsby has never previously participated; i.e. the business of providing litigation funding to third parties. There is therefore no evidence of any third party ever having agreed with Bugsby to accept it as the counterparty to a litigation funding transaction. The amounts sought, involving a return of 25% in the first year of participating in this business, are substantial. They are significantly higher than, for example, the successful claim for fortification in *Energy Venture Partners* where the loss was claimed by reference to the borrowing cost of monies – and where the Court of Appeal said (at [58]) that “where commercial parties are involved it is the cost of borrowing that is usually relevant”.
11. Nevertheless, the evidence indicates that Bugsby does indeed wish to enter the litigation funding market, if it can. This is understandable in circumstances where Mr Marcus and thereby Bugsby, or at least its associated companies, have acquired some knowledge of this business as a result of the various contracts concluded with Omni and Therium over the years, and as a result of looking at available information as to the returns that can be made. Bugsby’s evidence, in the form of the witness statements of Mr Marcus and to some extent the evidence of Mr Ashkhan Darius Candey, shows that there is a potential opportunity for Bugsby to enter the market. That evidence indicates the possibility of entering into co-funding arrangements with a reasonably well established litigation funder, Bench Walk Advisers LLC (“Bench Walk”). Those co-funding arrangements would involve litigation funding of cases on which Candey itself would be acting.
12. Thus, Mr Marcus was able to exhibit some “indicative terms” which were set out in an e-mail from Mr Adrian Chopin of Bench Walk dated 18 October 2023. This e-mail was therefore sent very shortly before the hearing (on 20 October 2023) when the fortification application was argued and subsequent to the time when it was issued. I was not referred to any documentary evidence, prior to the 18 October 2023 e-mail,

which indicated that Bugsby was seeking to enter this market. Mr Marven KC for Omni and Mr Sullivan for Therium submitted that the 18 October 2023 e-mail had clearly been written with a view to providing something to the court in order to support Bugsby's case. That may be so, but the e-mail has now been provided and it does support the case that Bugsby is looking to enter into the litigation funding market.

13. However, the e-mail dated 18 October, which was sent to Mr Marcus and Mr Candey, does not contain a firm offer to Bugsby. The indicative terms refer to a possibility for participation, but this is: "All subject to DD [due diligence], final docs and internal approvals". There is no evidence that Bench Walk has in fact carried out its due diligence exercise, or obtained any internal approvals. In those circumstances, I consider that it is no more than speculative as to whether the possible deal involving Bench Walk could in fact be concluded. There is no suggestion that, if the Bench Walk transaction did not eventuate, Bugsby could nevertheless enter into this market on its own as a new entrant with no track record. The Bench Walk transaction, which involves co-funding, is therefore critical to the present claim for 25%. In my view the e-mail does not provide the solid evidential foundation (to a good arguable case standard) to support Bugsby's claim that the loss claimed will be caused by the grant of the injunctions.
14. This conclusion is then reinforced by the next e-mail which Mr Chopin sent, shortly after the indicative terms had been sent. In that e-mail, he says:

"One other point has just occurred to me: as per the terms below, the co-funding option for Bugsby would have to be exercised prior to us signing an LFA and committing to a case so that we know how much of our fund to commit to each case. It will also be important for us to know that Bugsby has certainty of funds as the time the option is exercised (i.e. we can't let you exercise the option if we think you haven't got the funds to honour the contract). So if your current dispute over blocked money is ongoing, we'd need to see some other source of funds before we'd permit exercise of the option. I trust that is okay."
15. Mr Marcus responded, as follows:

"Thank you Adrian. This all makes sense. Understood that if Bugsby does not have the funds available, it will not be able to take up the options for funding."
16. Mr Marven submitted that a good arguable case on causation has to be shown, and that this involved considering whether any loss would be suffered in any event, even if no injunction were granted. He argued that no funder in the position of Bench Walk would want to risk touching funds that represented the Settlement Proceeds, in circumstances where both Omni and Therium claimed a proprietary interest in them, and that this would be the case even if no injunction were granted. The litigation funder would be taking a significant risk, and potentially exposing itself to a tracing action.

17. In response, Mr Carpenter submitted that this is not the concern that Bench Walk is expressing in the short e-mail quoted above.. The reference to “your current dispute over blocked money” concerns the funds which are currently injunctioned, and thus does not specifically address the case where there is no injunction. I accept that this may well be the case, on a fair reading of this short e-mail. However, in circumstances where Bench Walk has yet to carry out due diligence, it seems to me that Mr Marven’s point is a further powerful reason why Bugsby’s alleged potential loss is (even applying a good arguable case standard) speculative. I accept Mr Marven’s submission that it is improbable that (even absent an injunction) a litigation funder would take the risk of participating in a transaction where the funds to be advanced by its partner (a new entrant with no track record) were alleged by other reputable litigation funders to be trust funds, and where there was therefore a possibility of a tracing remedy. If there were persuasive evidence from Bench Walk that this would not be a concern, then I might take a different view. However, Mr Chopin’s emails do not address this point, or indeed describe the due diligence that Bench Walk would need to carry out prior to committing itself to a transaction with Bugsby.
18. Mr Carpenter also sought to meet the point by saying that any litigation funding would not be going to Bench Walk itself, but rather to the litigant which was seeking litigation funding. In my view, however, this point only served to add to the difficulties that Bugsby will face, and thus again reinforces the case that Omni and Therium were advancing on this issue. Bugsby is a new entrant to the market, and therefore is unable to identify any third party litigant which has in fact agreed to enter into a funding arrangement with Bugsby. Although a number of potential funding opportunities have been identified, there is no evidence from any third party litigant that Bugsby (or some associated entity of Bugsby – which is what Bench Walk’s indicative terms contemplate) would be an acceptable counterparty. It seems obvious that any such litigant would wish to carry out some due diligence before entering into a funding arrangement. This is, no doubt, why (as the evidence now indicates) litigation funders are themselves given “ratings” by the publishers of directories and receive awards (as referred to below). In my view, the reason why another litigation funder would be cautious in dealing with monies which were alleged to be trust monies must apply with equal, if not more, force to the third party litigant who would be in receipt of such monies, even absent an injunction.
19. Furthermore, there may be other reasons why third party litigants may be unwilling to deal with a new entrant such as Bugsby as its counterparty. For example, the evidence in this case shows that there have been substantial disputes between Bugsby and its litigation funders. It is not difficult to see that a third party litigant may, in those circumstances, have additional reasons for being cautious about accepting Bugsby as a counterparty. As it is, there is presently no evidence that any third party would be willing to accept Bugsby as a counterparty.
20. In these circumstances, I consider that Bugsby has failed to establish a good arguable case that the claimed loss will be suffered in consequence of the injunctions sought. In my view, the loss for which fortification is sought is speculative. I therefore dismiss the application for fortification on this basis.

D: Good arguable case that the funders are not “good” for the money.

21. It is therefore not necessary to deal with the funders’ argument that it was not credible to suggest that they would not meet any call on the cross-undertaking. I will, however, express my conclusion on this issue briefly and without describing all the evidence and argument in detail. Had it been necessary to decide the point, I would have concluded that Bugsby had not shown a good arguable case on this issue.
22. Both Omni and Therium have adduced evidence as to their ability to comply with the cross-undertakings provided, and their willingness to do so. That evidence was provided, on behalf of Omni, by Alistair Charles Croft, the Senior Investment Manager and Senior Legal Counsel at Omni Bridgeway (UK) Ltd; and on behalf of Therium by Neil Andrew Purslow, the Chief Investment Officer of Therium Capital Management Ltd.
23. The evidence describes, in respect of both companies, their organisational and funding structure. Neither of the two funders appears to have significant assets within the jurisdiction of the English court. However, it is also clear from the evidence that both of them have access to substantial funds, such that there can in my view be no real doubt as to their ability to meet a liability for £ 5.14 million between them, and indeed to meet the higher figures sought by Bugsby.
24. Accordingly, in my view, Bugsby’s exposure to potential loss, if the cross-undertaking is not fortified, would only arise if a decision were to be taken not to meet the liability, despite the existence of funds available to both funders to do so. In view of the evidence of both Mr Croft and Mr Purslow, I do not consider that there is a real risk that this would happen. A failure to meet the cross-undertaking would clearly amount to a contempt of court: see *Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295, 361 quoted at paragraph [23] of *PJSC v Mints*. In my view, such a failure would have such serious ramifications for both funders, including their wider groups, as to make it improbable in the extreme that it would happen.
25. Mr Croft’s evidence is that it would be entirely detrimental to the Omni Bridgeway Limited group’s reputation as a well-established, respected and leading global litigation funder if Omni was unwilling to meet a cross-undertaking in damages. (Omni Bridgeway Limited is an Australian listed entity that ultimately owns Omni as well as other entities). He says that Omni Bridgeway Ltd group’s established position in the litigation funding industry is demonstrated by, among other things, the fact that they won more than 10 key industry awards in 2023 alone, including being ranked by the Chambers directory as Band 1 in Litigation Funding in all major regions other than the UK. If a funder were not to meet an adverse costs order, their reputation would be seriously damaged and parties seeking funding would look elsewhere in the future. He concluded by saying that it was “commercially implausible that Omni would risk tarnishing its reputation, and the reputation of Omni Bridgeway Ltd, by not meeting a cross-undertaking in damages”.
26. On behalf of Therium, Mr Purslow’s evidence was to similar effect. He describes Therium (i.e. the Therium group, rather than the particular funding entity that is the claimant here) as a global leader in litigation finance and one of the largest litigation funders in the world. It is one of the longest established litigation funders in the UK.

He says that as a major litigation funder with substantial involvement in claims in this jurisdiction, he “can confirm that it is unthinkable that the Applicant, as an Associated Entity of Therium, would fail to comply with any order made on a cross-undertaking as damages”. He referred to the obvious desire not to fail to comply with court orders and not to be in contempt of court, and how such a course “would be disastrous for its business and reputation in the market”.

27. In my view, this evidence from both funders makes sense and is compelling.
28. Mr Carpenter relied heavily on the decision of Nugee J (as he then was) and the Court of Appeal in *Rowe v Ingenious Media Holdings Plc and others (Therium Litigation Finance AFIC and another, third parties)* [2020] EWHC 235 (Ch) and [2021] EWCA Civ 29 (CA). In that case, the Court of Appeal reversed Nugee J’s decision (subsequent to that reported at [2020] EWHC 235 (Ch)) to order a defendant to provide a cross-undertaking in return for an order for security for costs. In my view, the issue and circumstances of that case, and the evidence which had been provided by the Therium entity in that case, are entirely different from the present. There, Nugee J was dealing with a case where the Therium entity had not provided any undertaking to meet an adverse costs order against the party that it was funding, and it had not provided any “actual financial information”. By contrast, in the present case, Therium has provided financial information sufficient to enable its structure to be understood. It has also expressly provided, as indeed it had to do in order to obtain the injunction, an undertaking to the court, and the consequences of non-compliance with that undertaking have been addressed fully in its evidence (and indeed the evidence of Omni, which was not party to the *Rowe* decision).
29. Mr Carpenter also referred me to the decision of Mr Sean O’Sullivan KC in *Nederlandse Financierings-maatschappij Voor Ontwikkelingslanden NV v Societe Bengaz SA* [2023] EWHC 1948 (Comm), where the deputy judge decided to order a Dutch bank to provide fortification. I do not consider that that case establishes any general principle which can be applied to Omni and Therium. In particular, there was no evidence of reputational impact equivalent to that contained in the evidence of Mr Croft and Mr Purslow.

CONCLUSION

30. Bugsby’s application for fortification is therefore dismissed.