



Commercial Court provides route to enforceability for litigation funders following PACCAR

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On Friday 20 October 2023, the Commercial Court handed down judgment in ***Therium Litigation Funding A IC v Bugsby Property LLC*** [2023] EWHC 2627 (Comm), the first case to address the consequences of the decision of the Supreme Court in ***R (PACCAR) v CAT*** [2023] 1 WLR 2594 regarding the enforceability of litigation funding agreements. The Judge found that it is arguable that parts of litigation funding agreements are enforceable, notwithstanding the Supreme Court's decision. This is likely to have a substantial impact on the industry.

In *PACCAR*, a majority of the Supreme Court held (contrary to the decisions below), that litigation funding agreements which provide for the funder to receive a percentage of damages on success comprise damages based agreements within the meaning of the Courts and Legal Services Act 1990 and, accordingly, are unenforceable unless they comply with the terms of the Regulations. The consequence of this decision appeared to be, as Lord Sales noted, that most litigation funding agreements in England and Wales would be unenforceable.

In *Therium*, Jacobs J granted the applicant litigation funder an interim proprietary injunction pursuant to section 44 of the Arbitration Act 1996, preserving the fruits of a settlement agreed in funded litigation. The application was resisted on the ground that the underlying funding agreement was unenforceable, following *PACCAR*, and so there was no "serious issue to be tried" under the *American Cyanamid* test.

The Judge held that there was a serious issue to be tried. The funding agreement in issue provided for three types of payment to be made to the funder by the funded party. First, a return of the funding provided. Secondly, a return calculated as a multiple of that funding. Thirdly, a return calculated as a percentage of damages/settlement sums above a certain threshold. Whilst the third type of payment comprised a damages based agreement and was unenforceable, the Judge held that it was arguable that this did not render the whole contract unenforceable, first because it was arguable that only the "damages based agreement" part of the contract was unenforceable (leaving the rest of the contract untouched), by analogy with the Court of Appeal decision in ***Zuberi v Lexlaw Limited*** [2021] EWCA Civ 16, or alternatively because the offending part of the agreement could be severed in accordance with the ordinary principles applicable to severance.

The dispute will now proceed to arbitration.

Joseph Sullivan of Quadrant Chambers acted for the Applicant, instructed by Richard Wise, Sivan Daniels and Amanda Templeton of Addleshaw Goddard.



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"Joe is first class. He is very clever, very astute and very client friendly. He is also very strong on his feet. The complete all rounder." (Legal 500, 2023)



Joe specialises in commercial law, banking and finance, commercial fraud and professional negligence. His practice encompasses the High Court, the Court of Appeal, the Supreme Court and arbitrations across the gamut of institutional rules. Joe is described in the Legal 500 as "A fantastic barrister who gets to the heart of issues, and expresses advice in a clear, concise and digestible manner. A first rate advocate".

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