Neutral Citation Number: **[2024] EWHC 2986 (Comm)**

Case No: CL-2023-000839

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: 25 November 2024

Before :

DAME CLARE MOULDER DBE
SITTING AS A JUDGE OF THE HIGH COURT

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Between :

(1) BUGSBY PROPERTY LLC **(2) BUGSBY INVESTMENTS LIMITED**	**Claimants**
- and -	
(1) OMNI BRIDGEWAY (FUND 5) CAYMAN INVT. LIMITED **(2) THERIUM LITIGATION FINANCE A IC**	**Defendants/ Intended Respondents**

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Jamie Carpenter KC (instructed by **CANDEY Limited**) for the **Claimants**
Robert Marven KC and Theo Barclay (instructed by **Taylor Wessing LLP**) for the **First Defendant**
Joseph Sullivan (instructed by **Addleshaw Goddard LLP**) for the **Second Defendant**

Hearing date: 11 November 2024

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APPROVED JUDGMENT

This judgment was handed down remotely at 10.30am on 25th November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Dame Clare Moulder DBE :

1. This is the reserved judgment of the Court on the application (the "Application") of the Claimants, Bugsby Property LLC ("Bugsby") and Bugsby Investments Limited ("BIL"), for the assistance of the Court in appointing an arbitrator, pursuant to section 18 of the Arbitration Act 1996 (the "Act").

2. The Application was supported by a witness statement dated 1 December 2023 from Mr Steven Marcus, a Director of Bugsby Advisory Limited, which advises BIL.

3. In response and in opposition to the Application there is a witness statement dated 29 January 2024 from Mr Alistair Croft, a director and the Senior Investment Manager and Senior Legal Counsel at Omni Bridgeway (UK) Limited.

4. Mr Neil Purslow, Chief Investment Officer of Therium Capital Management Limited, which acts as UK sub-advisor to the Second Defendant, also filed a witness statement dated 2 February 2024.

Background

5. The Defendants, Omni Bridgeway (Fund 5) Cayman Invt. Limited ("Omni") and Therium Litigation Finance A IC ("Therium") provided litigation funding to Bugsby for part of the proceedings which Bugsby brought against LGIM Commercial Lending Limited and Legal & General Assurance Society Limited (together "L&G") ("the L&G Proceedings").

6. Therium provided funding pursuant to a litigation funding agreement dated 23 February 2018 ("the Therium LFA"). Omni provided funding pursuant to a litigation funding agreement dated 19 July 2021 ("the Omni LFA"), to which BIL and Therium were also parties.

7. On 27 July 2022, the Court handed down a judgment in the L&G Proceedings in Bugsby's favour.

8. On 10 November 2022, the Parties entered into a variation agreement to the Omni LFA ("the Variation Agreement"). The purpose of the Variation Agreement was stated in the Recitals (inter alia) to amend the Omni LFA to: (i) amend the terms on which Omni would continue to provide funding to Bugsby to continue to prosecute

the claim, including at the consequentials hearing; and (ii) set out the entitlements of Omni, Therium, and Bugsby from recoveries made in prosecution of the claim.

9. Before the hearing of the appeals in the L&G Proceedings Bugsby reached a settlement with L&G.

10. There is now a dispute as to whether the Therium LFA and Omni LFA are enforceable and as to the amount of the claim proceeds out of which the Defendants may be paid.

11. Bugsby's dispute with Therium is currently the subject of an LCIA arbitration pursuant to an arbitration agreement in the Therium LFA. This Application is solely concerned with the forum for determination of Bugsby's dispute with Omni.

12. Omni has purported to commence arbitration of its dispute with Bugsby pursuant to Section 10.2 of the Specific Terms of the Omni LFA ("Section 10.2"). The respondents to that arbitration are Bugsby, BIL and Therium as the other parties to the Omni LFA. Mr Stuart Isaacs KC has been appointed as an arbitrator by the LCIA. The Claimants have disputed his jurisdiction and a hearing on jurisdiction has been listed before Mr Isaacs KC on 9 December 2024.

13. The Court had the benefit of written and oral submissions from Counsel for the Claimants, Omni and Therium. Although Therium would not be party to the arbitration which the Claimants now seek to commence, Therium also resisted the Application as it was concerned to ensure that it was not exposed to the costs of two separate dispute resolution processes concerning the same dispute between Omni and Bugsby.

The Application

14. It is the Claimants' case on the Application that:

    i) by Clause 19.2 of the Variation Agreement ("Clause 19.2"), the parties agreed that any party shall be entitled to refer any dispute in relation to the interpretation enforcement, or adjudication of the Variation Agreemen or the Omni LFA to an independent King's Counsel for resolution;

ii) the Claimants exercised their right to do so on 2 November 2023;

iii) Clause 19.2 further provides that an independent King's Counsel shall be appointed by agreement of the relevant Parties to the dispute, or, if no agreement can be reached, the independent King's Counsel shall be appointed by the Chair of the General Council of the Bar of England and Wales (known as the Bar Council);

iv) Omni has refused to agree the appointment of a King's Counsel as arbitrator and has blocked the appointment of such arbitrator by the Bar Council.

15. Omni's case is that, construed in its contractual and commercial context, Clause 19.2 is obviously not an arbitration clause.

16. In the alternative Omni's case is that:

i) Clause 19.2 is limited in scope and the issue of the enforceability of the Omni LFA must be resolved by the LCIA arbitration under Section 10.2; or

ii) the Court should not exercise its discretion in circumstances where the substantive issues in dispute between the parties have already been referred to an arbitrator in the LCIA arbitration.

Section 18

17. Section 18 of the Act provides:

"(1) The parties are free to agree what is to happen in the event of a failure of the procedure for the appointment of the arbitral tribunal.
There is no failure if an appointment is duly made under section 17 (power in case of default to appoint sole arbitrator), unless that appointment is set aside.
(2) If or to the extent that there is no such agreement any party to the arbitration agreement may (upon notice to the other parties) apply to the court to exercise its powers under this section.
(3) Those powers are—
(a) to give directions as to the making of any necessary appointments;
(b) to direct that the tribunal shall be constituted by such appointments (or any

one or more of them) as have been made;

(c) to revoke any appointments already made;

(d) to make any necessary appointments itself.

(4) An appointment made by the court under this section has effect as if made with the agreement of the parties.

(5) The leave of the court is required for any appeal from a decision of the court under this section."

18. It was common ground that the test for the exercise of the Section 18 discretion was set out by Males J in *Silver Dry Bulk Company Limited v Homer Hulbert Maritime Company Limited* [2017] EWHC 44 (Comm) at [25]-[29] from which I note:

"*Section 18 has been described as a "gateway" provision (Noble Denton Middle East v Noble Denton International Ltd [2010] EWHC 2574 (Comm), [2011] 1 Lloyd's Rep 387 at [6]) which, as I understand it, means that it provides a way of getting an arbitration started, or at least prevents arbitral proceedings from being aborted by a failure in the agreed appointments process, but does so without requiring the final determination of issues affecting the arbitral tribunal's jurisdiction which are better decided in some other way, for example by the tribunal itself under section 30 (applying the kompetenz-kompetenz principle) or by the court (but only with the agreement of the parties or the tribunal) under section 32.*

…

"Good arguable case" is an expression which has been hallowed by long usage, but it means different things in different contexts. For the purpose of an application under section 18, I would hold that what must be shown is a case which is somewhat more than merely arguable but need not be one which appears more likely than not to succeed. I shall use the term "good arguable case" in that sense. It represents a relatively low threshold which retains flexibility for the court to do what is just, while excluding those cases where the jurisdictional merits are so low that reluctant respondents ought not to be put to the expense and trouble of having to decide how to deal with arbitral proceedings where it is very likely that the tribunal has no jurisdiction. In this connection it is important to remember that crossing the threshold of "good arguable case" means that the court has power to make one of the orders

listed in section 18(3). It remains for consideration whether it should do so as a matter of discretion.

…

Once it is determined that there has been a failure of the appointment procedure and that when necessary the claimant can satisfy the good arguable case test, the court has a discretion whether to exercise any of the section 18(3) powers. The section does not prescribe how the discretion should be exercised and it must ultimately depend on all the circumstances of the case. As a general proposition I would respectfully agree with Moore-Bick J in The Lapad at [24] that respect for the principle of party autonomy and the desirability of holding parties to their agreement "together provide strong grounds for exercising the Court's discretion in favour of constituting the tribunal except in the small number of cases in which it can be seen that the arbitral process cannot result in a fair resolution of the dispute"…". [emphasis added]

19. The issues which arise on the Application are therefore:

    i) Whether there is a good arguable case that the tribunal has jurisdiction to determine the disputes referred (*London Steam-Ship Ltd v Kingdom of Spain* [2021] EWCA Civ 1589 at [58]). This requires the Claimants to show a good arguable case that (a) Clause 19.2 is an arbitration agreement and (b) that the dispute is within the scope of Clause 19.2 in circumstances where an arbitration has commenced under section 10.2;

    ii) if (i) is satisfied, whether in the circumstances the Court should exercise its discretion under section 18.

The relevant contractual provisions

20. Clause 19 of the Variation Agreement provided:

"19.1 This Amendment Agreement shall be governed by and construed in accordance with the law of England and Wales.
19.2 If a dispute arises in relation to the interpretation, enforcement, or adjudication of this Amendment Agreement or the Omni Funding Agreement, the Parties agree that any Party to that dispute shall be entitled to resolve the dispute by referring it to an independent King's Counsel who will be instructed to provide the Parties with a

final and binding opinion, with the costs of the independent King's Counsel to be borne equally by the relevant Parties to the dispute, in the first instance with the independent King's Counsel having power to determine who should bear the costs of such determination based on whose position is upheld. The independent King's Counsel shall be appointed by agreement of the relevant Parties to the dispute, or, if no agreement can be reached, the independent King's Counsel shall be appointed by the Chair of the General Council of the Bar of England and Wales (known as the Bar Council).
19.3 Clause 19.2 supersedes and replaces Specific Term 10.3 of the Omni Funding Agreement.
19.4 A Party may refer a dispute to an independent King's Counsel by sending a written notice of its intention to do so to the other Parties' addresses for service of communications and notices set out in clause 22. For the avoidance of doubt, email communication shall suffice for notice under this clause 19.4
19.5 Subject to clauses 19.2, 19.3, and 19.4, the Parties submit to the exclusive jurisdiction of the court of England and Wales for the purpose of any action to interpret, enforce, or otherwise adjudicate the terms or any other aspect of this Amendment Agreement." [emphasis added]

21. As is expressly provided in Clause 19.3, Clause 19.2 superseded and replaced Section 10.3 of the Specific Terms of the Omni LFA.

22. Section 10 of the Specific Terms of the Omni LFA provided that:

"10.1 Without prejudice to the operation of Specific Terms 3 and 10.3, in the event of a dispute arising out of or relating to this Agreement, including any question regarding its existence, validity or termination, the parties shall first seek settlement of that dispute by mediation in accordance with the London Court of International Arbitration (LCIA) Rules, which Rules are deemed to be incorporated by reference to this Specific Term 10.1.
10.2 If the dispute is not settled by mediation within 14 dates of the commencement of the mediation, or such further period as the parties shall agree in writing, the dispute shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference to this Specific Term 10.2. In any

mediation, or, if applicable, arbitration commenced pursuant to this Specific Term 10:

10.2.1 the language to be used in the mediation and in the arbitration shall be English;

10.2.2 the governing law of the mediation or arbitration shall be the substantive law of England and Wales; and

10.2.3 in any arbitration:

(a) the number of arbitrators shall be one;

(b) the seat, or legal place, of arbitration shall be London, United Kingdom.

10.3 If the dispute arises out of any of the issues described in this Specific Term 10.3, the Parties agree that such a dispute would constitute exceptional urgency and a Party shall be entitled, without following the process described at Specific Terms 10.1 and 10.2, to resolve the dispute by referring it to an independent Queen's Counsel, to be appointed by agreement between the relevant Parties, or, if not agreed, appointed by the Chairman of the Bar Council for that purpose, for a final and binding opinion. The Parties agree that matters of exceptional urgency are:

10.3.1 a dispute between the Claimant, Therium and/or Omni Bridgeway as to the calculation of Omni Bridgeway's entitlements under Specific Term 4; and

10.3.2 a dispute between the Claimant and Omni Bridgeway as to the exercise by Omni Bridgeway of a right of termination, excluding in the circumstances contemplated by Specific Term 8.1.1 and/or 8.1.2 by reference to the Third Party Disclosure Opinion whereby for the purposes of paragraph 13.2 of the Code of Conduct the Claimant and Omni Bridgeway agree that the opinion of counsel already received will be determinative (for the avoidance of doubt, Therium does not have a right of referral under this Specific Term 10.3.2);

10.3.3 a dispute between Therium and Omni Bridgeway as to the interaction between the Therium Funding Agreement and this Agreement; and

10.3.4 a dispute between the Claimant, Therium and Omni Bridgeway as to the exercise by the Claimant of a right of a termination."

Whether there is a good arguable case that Clause 19.2 is an arbitration agreement

23. The Claimants submitted that they have a good arguable case that Clause 19.2 is an arbitration agreement.

24. Section 6 of the Act provides that:

"(1) In this Part an "arbitration agreement" means an agreement to submit to arbitration present or future disputes (whether they are contractual or not)."

25. The issue of whether Clause 19.2 is an arbitration agreement is a question of construction (*David Wilson Homes v Survey Services Limited (in liquidation)* [2001] EWCA Civ 34 at [11]) and not much assistance can be gained from authority (*David Wilson Homes* at [12]).

26. Some guidance was provided in *Re Carus−Wilson v Green* (1887) 18 QBD 7 and a passage in the judgment of Lord Esher MR referred to in the judgment of *David Wilson Homes* at [12]:

"The question here is whether the umpire was merely a valuer substituted for the valuers originally appointed by the parties in a certain event, or arbitrator. If it appears from the terms of the agreement by which a matter is submitted to a person's decision, that the intention of the parties was that he should hold an inquiry in the nature of a judicial inquiry, and hear the respective cases of the parties, and decide upon evidence laid before him, then the case is one of an arbitration. The intention in such cases is that there shall be a judicial inquiry worked out in a judicial manner. On the other hand, there are cases in which a person is appointed to ascertain some matter for the purpose of preventing differences from arising, not of settling them when they have arisen, and where the case is not one of arbitration but of a mere valuation. There may be cases of an intermediate kind, where, though a person is appointed to settle disputes that have arisen, still it is not intended that he shall be bound to hear evidence or arguments. In such cases it may be often difficult to say whether he is intended to be an arbitrator or to exercise some function other than that of an arbitrator. Such cases must be determined each according to its particular circumstances." [emphasis added]

27. The Claimants submitted that in this case:

i) The intention of the parties was that pursuant to Clause 19.2 the KC should hold an inquiry in the nature of a judicial inquiry, and hear the respective cases of the parties and decide upon evidence laid before him;

ii) the intention was to settle disputes as and when they arise and not to prevent them from arising;

iii) the opinion of the KC is expressly stated to be binding.

28. In *David Wilson Homes*, Longmore LJ was dealing with a clause in an insurance policy in the following terms:

"… any dispute or difference arising hereunder between the Assured and the Insurers shall be referred to a Queen's Counsel of the English Bar to be mutually agreed between the Insurers and the Assured or in the event of a disagreement by the Chairman of the Bar Council."

29. The Claimants relied on passages from the judgment of Longmore LJ at [13] and [14]:

"[13] For my own part, it seems to me that the clause in the present case falls fairly and squarely into Lord Esher's first category, where the intention is that the inquiry is to be in the nature of a judicial inquiry and that the Queen's Counsel is to hear the respective cases of the parties and decide on evidence before him. That is what Queen's Counsel are normally expected to do when matters are referred to them, and all the more so if the formality of the position is such that, if there is disagreement as to the identity of the Queen's Counsel, he is to be appointed by the Chairman of the Bar." [emphasis added]

[14] In the present case, the parties cannot, with respect to the judge, have intended a reference to a Queen's Counsel as an expert or for a non−binding opinion, because in that way no finality could be achieved. They must in my judgment have wanted a binding result, and the clause thus constitutes an arbitration agreement."

30. It was submitted for the Claimants that given the breadth and potential significance of the disputes that could be referred to a KC under Clause 19.2 which might involve factual disputes or difficult questions of interpretation, it must have been intended that the reference should be in the nature of a judicial enquiry.

31. However there is no such express provision in the language of Clause 19.2 and no express provision for submissions and evidence. In *David Wilson Homes* the language referring the dispute to a Queen's Counsel was general and non-specific: it

provided for disputes to be "*referred to a Queen's Counsel of the English Bar*". By contrast the language in this case is more specific, stating that the Parties are entitled to resolve the dispute by referring it to a King's Counsel but with language that the King's Counsel will be "*instructed*" to "*provide the Parties with an opinion".*

32. It was submitted for the Claimants that the word "*opinion*" was not significant since Clause 19.2 provided in its terms that a decision is to be final and binding. It was submitted for the Claimants that there is no need for an arbitration clause to refer to an arbitrator or arbitration: *David Wilson Homes* at [10]:

"… there is no need for a clause which deals with reference of disputes to say in terms that the disputes are to be referred to an "arbitrator" or to "arbitration" … for present purposes, the important thing is that there should be an agreement to refer disputes to a person other than the court who is to resolve the dispute in a manner binding on the parties to the agreement…".

33. The Variation Agreement appears to be a professionally drafted contract. One can therefore infer that the words such as "*opinion*" are likely to have been carefully chosen and the Court is entitled to accord more weight to the natural meaning of the language of a professionally drafted contract: *Sara & Hossein Asset Holdings v Blacks Outdoor Retail* [2023] 1 WLR 575 at [29]. I do not accept the submission for the Claimants that the phrase *"referring it to an independent King's Counsel*" implies that the parties would be heard and evidence called. I see no basis in the language for such an inference. In my view the language of the KC being "*instructed to provide … [an] opinion*" points strongly to the contrary.

34. Further the competing interpretations of the language of Clause 19.2 have to be considered in context. The key distinction from the position in *David Wilson Homes* is that in this case, there are two provisions which on the Claimants' case provide for arbitration. The question arises in this case therefore whether the parties intended to provide for two inquiries in the nature of a judicial enquiry where there would be submissions and evidence.

35. I reject the submission for the Claimants that the Court should look at Clause 19.2 within the structure of the Variation Agreement as a separate agreement and not within the context of Section 10.2 in the Omni LFA. That seems to me to be entirely

wrong in circumstances where the Variation Agreement is as its title makes clear: "*Variation Agreement to the Funding Agreement dated 19 July 2021*".

36. When Clause 19.2 is read in the context of Section 10.2, it is clear that Section 10.2 provides for arbitration under the LCIA rules. Clause 19.2 provides for no particular procedure and on the Claimants' case any arbitral process would therefore be ad hoc.

37. In my view the context of Clause 10.2 would strongly suggest that Clause 19.2 was intended to be a different process from Clause 10.2 and not in the nature of an arbitration.

38. Since Longmore LJ in *David Wilson Homes* was dealing with a single clause not competing or overlapping dispute resolution clauses and different language, and he is clear that it is a question of construction of the relevant clause, it seems to me that his reasoning in reaching his conclusions on the wording of that clause are of little if any assistance to the present case.

39. If it is necessary to reconcile this with *David Wilson Homes*, it seems to me that this case falls into the third category identified by Lord Esher MR:

> *"There may be cases of an intermediate kind, where, though a person is appointed to settle disputes that have arisen, still it is not intended that he shall be bound to hear evidence or arguments. In such cases it may be often difficult to say whether he is intended to be an arbitrator or to exercise some function other than that of an arbitrator. Such cases must be determined each according to its particular circumstances."*

40. It was submitted for the Claimants that the idea that the appointed KC might determine disputes without hearing from the parties in a judicial manner would be "*wholly uncommercial to the point of absurdity*".

41. However although the Court can have regard to commercial commonsense when balancing competing interpretations, it seems highly unlikely that the parties intended to have two arbitral processes both of which would involve submissions and evidence.

42. The Claimants submitted that the procedure under Clause 19.2 gave flexibility and was intended as a speedier alternative arbitral process to the LCIA process. However

it was submitted for the Claimants that this did not mean that Section 10.3 was not an arbitration agreement.

43. Although the Claimants have now identified a difference in terms of the rights of appeal from an LCIA arbitration and an appeal under an arbitration which is not subject to LCIA rules, there is nothing to suggest that this was contemplated by the parties at the time of entering into the contract: the opinion under Clause 19.2 is expressly stated to be final and binding with no reference to any rights of appeal.

44. In my view the right of appeal from a non LCIA arbitration, now relied on by the Claimants as a key difference, is inconsistent with the notion of a speedier alternative being provided by Section 10.3 (now Clause 19.2).

45. The Claimants relied on the reasoning of Simon Brown LJ at [21] of the judgment in *David Wilson Homes*:

"…it makes business sense only if it provides for a final and binding determination of whatever dispute or difference is referred − if, in short, it is an arbitration agreement."

That statement in the judgement of Simon Brown LJ cannot in my view be relied on out of its context or without regard to the provision being construed in that case. Simon Brown LJ was there addressing whether the clause was a non-binding ADR.

46. The Claimants also relied on the House of Lords decision in *Arenson v Casson* [1977] AC 405. In that case the parties had agreed that the fair value of shares to be transferred from the appellant to Archy Arenson would be determined by the auditors of the company acting as experts and not as arbitrators, and that this valuation would be final and binding on both parties. The issue before the House of Lords was whether the respondents could establish a case for their immunity.

47. The Claimants relied on the indicia referred to in the judgment by Lord Wheatley at p428 C-E:

"Then later my noble and learned friend, after quoting a passage from Cockburn CJ. in In re Hopper (1867) L.R. 2 Q.B. 367, 372-373, said, at p. 763:

"In In re Hopper Cockburn C.J., with whom Blackburn and Lush JJ. agreed, was in effect saying that the question as to whether anyone was to be treated as an arbitrator depended upon whether the role which he performed was invested with the characteristic attributes of the judicial role. If an expert were employed to certify, make a valuation or appraisal or settle compensation as between opposing interests, this did not, of itself, put him in the position of an arbitrator. He might, e.g., do no more than examine goods or work or accounts and make a decision accordingly. On the other hand, he might, as in In re Hopper, hear the evidence and submissions of the parties, in which case he would clearly be regarded as an arbitrator. Everything would depend upon the facts of the particular case. I entirely agree with this view of the law."

I likewise agree with my noble and learned friend's summation of the law. The indicia are as follows: (a) there is a dispute or a difference between the parties which has been formulated in some way or another; (b) the dispute or difference has been remitted by the parties to the person to resolve in such a manner that he is called upon to exercise a judicial function; (c) where appropriate, the parties must have been provided with an opportunity to present evidence and/or submissions in support of their respective claims in the dispute; and (d) the parties have agreed to accept his decision.

(4) Applying the foregoing tests to the present case it is clear to me that the respondents here cannot pray in aid the appellant's pleadings to satisfy the requirements of immunity. On the contrary, they appear to negative the claim. In this regard I agree with and adopt the analysis and rejection by my noble and learned friend Lord Simon of Glaisdale of Mr. Dillon's submissions in support of his contention that the requirements for immunity have been satisfied in the present case. I agree with Mr. Muir Hunter's submission that the valuation here was not to decide a dispute or difference but to avoid a dispute or difference. There is nothing in the appellant's pleadings and relevant documents to suggest that a dispute or difference between the parties existed and was being remitted to the respondents for a judicial (or quasi-judicial) determination, and nothing to suggest that the remit was so treated." [emphasis added]

48. It is important to note that prior to these passages Lord Wheatley stated at p427D-E:

"…In view of the different circumstances which can surround individual cases, and since each case has to be decided on its own facts, it is not possible to enunciate an all-embracing formula which is habile to decide every case. What can be done is to set out certain indicia which can serve as guide-lines in deciding whether a person is so clothed. The indicia which follow are in my view the most important, though not necessarily exhaustive…."

49. Accordingly, I do not see that the passages relied on by the Claimants provide the Court with any binding test or indicia which can be applied without more: it is clear that everything depends on the facts of the particular case.

50. The Claimants also relied on the judgment of Lord Fraser in *Arenson* where he referred to the fact that an arbitrator deals with a dispute which has already arisen whereas a valuer is called in before a dispute arises. Lord Fraser said at p441H-442B:

"The force of the argument for the respondents seems to me to lie in the difficulty of stating a logical reason for denying to a mutual valuer, who is instructed to assess the value of property, knowing that the vendor and purchaser have agreed in advance to be bound by his valuation, the same immunity as is given to an arbitrator. It seems to me, with all respect to my noble and learned friend, Lord Salmon, that their functions are in many ways similar. Both are giving decisions which will bind parties with conflicting interests. Both have a duty to act impartially between the parties. Both can reach their decision by using their own skill and judgment without hearing evidence, and, unless they have immunity, both are liable to be shot at from opposite sides. The main difference between them is that the arbitrator, like the judge, has to decide a dispute that has already arisen, and he usually has rival contentions before him, while the mutual valuer is called in before a dispute has arisen, in order to avoid it."

51. In my view, as is clear from the passage above, the Claimants sought to take Lord Fraser's remarks which were directed to the scope of immunity out of context and the remarks do not represent a binding statement as to the difference between an arbitrator and a valuer for the purposes of construing a dispute resolution clause.

52. Of greater relevance to the present case is the judgment in *Langham House Developments Ltd v Brompton Securities Ltd and another* [1980] 2 EGLR 117 where the Court had to construe a rent review determination clause but there was also a

separate provision for arbitration. The relevant provision in clause 4(6) provided for a determination by a valuer:

"…After such notice has on each occasion been given the rent payable from the end of the year of the said term to which it applied shall be such sum as shall within the period of one month from the service of the said notice be agreed between the landlord and the tenant or in default of such agreement shall be determined by a chartered surveyor nominated by the President for the time being of the Royal Institution of Chartered Surveyors to be that at which having regard to the terms of this underlease (other than the amount of rent currently payable) the demised premises might reasonably be expected to be let in the open market by a willing lessor to a willing lessee there being ignored the matters set out in the Landlord and Tenant Act 1954 section 34(1) (as amended by the Law of Property Act 1969) and any statutory restrictions on the amounts of rentals."

53. Sir Robert Megarry V-C held that the subclause required the surveyor to perform his task as a valuer because although this was not clear from the particular subclause, the provision had to be read in context and when read in context there was a "*striking*" contrast between the language of the arbitration clause and the valuation provision in issue:

"I turn to the third question in the summons. Is the chartered surveyor nominated by the president for the time being of the Royal Institution of Chartered Surveyors to perform his task as an arbitrator or is he to do it as a valuer, without any process of arbitration? <u>Looking at the subclause by itself, I can see some force both in Mr Ellis' answer of "arbitrator" and in Mr Dyson's answer of "valuer." But the subclause does not stand by itself</u>. The clause immediately preceding it, clause 4(5) runs as follows:

If the demised premises are damaged or destroyed by any of the insured risks and the insurance in respect thereof has not been vitiated by any act or omission of the tenant or of any person claiming title to any part of the demised premises through it then the rents hereby reserved or a proper proportion thereof according to the extent of the damage shall abate and in case of difference touching this proviso the same shall be referred to the award of a single arbitrator to be appointed by the President for the time being of the Royal Institution of Chartered Surveyors and in accordance with the

provisions of the Arbitration Act 1950 or any statutory modification thereof for the time being in force.

When one puts clause 4(5) and clause 4(6)(a) side by side, the contrast is striking. Clause 4(5) reeks of arbitration. It uses language such as "in case of difference," "award," "single arbitrator" and "Arbitration Act 1950." Clause 4(6)(a) uses none of these words: there is merely a "sum" to be "determined" by a chartered surveyor on the basis stated. None of Mr Ellis' ingenuities seem to me to come within striking distance of prevailing against this clear contrast. The lease was drafted by a draftsman (with the singular including the plural, and the masculine the feminine) who knew very well how to make it plain that there was to be an arbitration: and knowing this, clause 4(6)(a) was drafted in terms which neither in substance nor in form pointed in any real way to an arbitration rather than a valuation. I accept, of course, that under clause 4(6)(a) there might well be a default of agreement that arose from a positive disagreement rather than a mere failure to make or attempt to make an agreement: but in face of the contrast, that falls far short of anything that could establish clause 4(6)(a) as containing an arbitration". [emphasis added]

54. It is clear on its face that the original Section 10.3 was intended to be a faster process than arbitration under Section 10.2, categorising certain disputes as of "*exceptional urgency"* which were capable of being referred to a KC for an opinion. Even though there is no reference in Clause 19.2 to disputes which are urgent, the language of referring disputes to a KC for an opinion has been retained. This supports an inference that Clause 19.2 was also intended to provide a simpler and swifter process than the arbitral process in Section 10.2.

55. It was submitted for the Claimants that the parties intended to remove Section 10.2 and that it was retained "*by mistake"* but it was submitted that this is for the arbitrators to decide. The Claimants further submitted that Clause 19.2 also governs disputes in relation to the Variation Agreement and the intention apparent from the wording is that an arbitral process should be available in relation to the Variation Agreement.

56. In my view there is nothing to support the submission for the Claimants that the parties intended to remove Section 10.2 as well as replace Section 10.3. Clause 19.3

of what appears to have been a professionally drafted contract, refers only to replacing Section 10.3:

"19.3 Clause 19.2 supersedes and replaces Specific Term 10.3 of the Omni Funding Agreement."

The Claimants seek to ignore the express language of the Agreement which is clear and there is no basis for disregarding this clear and unambiguous language.

57. As to whether Clause 19.2 provides for an arbitral process in relation to the Variation Agreement, that assumes that which it sets out to prove and has to be weighed against the language of Clause 19.2 and the context of Section 10.2.

Conclusion on good arguable case that Clause 19.2 is an arbitration agreement

58. For this Application to succeed, the Claimants must show a case which is "*somewhat more than merely arguable*" but need not be one which appears more likely than not to succeed.

59. In my view this case falls far short of a good arguable case. As in *Langham House* the contrast between the language of Section 10.2 and Clause 19.2 could not be clearer or more "*striking*".

60. The Claimants submitted that the references in Section 10.2 to the seat of the arbitration, the language, the governing law and the number of arbitrators were in effect unnecessary boilerplate and of no consequence, serving merely to "*reinforce*" that it was an LCIA arbitration.

61. In my view the significance of these detailed provisions of Section 10.2 is that they show that the parties provided in detail for the arbitration agreement and had the parties wished to provide for an alternative method of arbitration in Section 10.3 (as replaced by Clause 19.2) they would have done so in clear language. Instead, Clause 19.2 does not provide for submissions or evidence or an award. It does not use the language of arbitration and refers to an opinion not an award or a decision. There is no good commercial reason which outweighs the clear language read in context. The Claimants are therefore forced to advance an argument that Section 10.2 was retained

"*by mistake*" but as referred to above, this argument as a matter of construction, fails to get off the ground in face of the clear language of Clause 19.3.

62. Although Males LJ in *Silver Dry* described "*good arguable case*" as a "*relatively low threshold"*, he acknowledged that there are some cases "*where the jurisdictional merits are so low that reluctant respondents ought not to be put to the expense and trouble of having to decide how to deal with arbitral proceedings where it is very likely that the tribunal has no jurisdiction.*"

63. In my view, for the reasons set out above, the Claimants have failed to show a good arguable case that Clause 19.2 is an arbitration agreement and the Application falls to be dismissed.

Scope of Clause 19.2

64. In the light of my conclusion above it is not necessary to address the scope of Clause 19.2. However for completeness I will address the further arguments which were advanced orally for the Claimants in relation to the scope of Clause 19.2. For the purposes of this section I have therefore assumed, contrary to my findings above, that there is a good arguable case that Clause 19.2 is an arbitration agreement.

Claimants' submissions in relation to the scope of Clause 19.2

65. It was submitted for the Claimants that there is a good arguable case that the dispute falls within Clause 19.2 and that there is jurisdiction under Clause 19.2 even though an arbitration has already been commenced by Omni under Section 10.2.

66. It was submitted for the Claimants that there was a good arguable case that the current dispute falls within the scope of Clause 19.2: that Clause 19.2 was "*unusually worded*" and "*mixes*" different concepts of interpretation, enforcement and adjudication. It was therefore submitted that the parties were not using "*carefully chosen words*" and the Court should not give the words "*narrow technical meanings*".

67. It was submitted for the Claimants that as a matter of construction Section 10.2 is of no effect: there is a complete overlap between Section 10.2 and Clause 19.2; the intention of Clause 19.2 was to capture all disputes; both provide for arbitration and this means that there is no longer a coherent relationship between Section 10.2 and

19.2 such that there must be an "*obvious mistake*" and what was intended was for Clause 19.2 to replace Section 10.2 and 10.3.

68. In the alternative it was submitted for the Claimants that there is a good arguable case that there is jurisdiction under Clause 19.2 even though an arbitration has been commenced under Section 10.2 on the basis that Clause 19.2 amounts to a "*permissive*" arbitration agreement and the authorities show that the parties can make an election to invoke the permissive arbitration provided that the parties have not waived their rights to go elsewhere. The Claimants relied on *NB Three Shipping Ltd v Harebell Shipping Ltd.* [2004] EWHC 2001 (Comm) and *The Law Debenture Trust Corporation plc v Elektrim Finance B.V.* [2005] EWHC 1412 (Ch).

Good arguable case that as a matter of construction Section 10.2 is of no effect

69. The Claimants relied on Clause 19.5 which deals with the jurisdiction of the Court in relation to the Variation Agreement:

> *"19.5 Subject to clauses 19.2, 19.3, and 19.4, the Parties submit to the exclusive jurisdiction of the court of England and Wales for the purpose of any action to interpret, enforce, or otherwise adjudicate the terms or any other aspect of this Amendment Agreement*."

70. The Claimants relied on *Barclays Bank v Nylon Capital LLP* [2011] EWCA Civ 826 at [27] in support of a submission that Clauses 19.2 and 19.5 must cover the same ground:

> *"…As arbitration will usually be an alternative to a court for the resolution of all the disputes between the parties, it would not accord with the presumed intention of sensible businessmen to draw fine distinctions between similar phrases to allow a part of the dispute to be outside the arbitration and allocated to the court…"*

71. It was submitted for the Claimants that the language of Clause 19.2 should be construed broadly in relation to Clause 19.5 and that Clause 19.2 could not have a different meaning when construed for the purposes of the Omni LFA.

72. Clause 19.2 has to be construed by considering the natural meaning of the language of Clause 19.2 against the context. If the parties had intended Clause 19.2 to cover the

same range of disputes as Section 10.2 one would have expected in a professionally drafted contract for the same language to have been used in Clause 19.2 of the Variation Agreement and the fact that the language of Clause 19.2 ("*a dispute arises in relation to the interpretation, enforcement, or adjudication of* [the Omni LFA]") is different from Section 10 ("*in the event of a dispute arising out of or relating to this Agreement, including any question regarding its existence, validity or termination*") suggests that the parties intended the words to have a different meaning and further suggests, given that Clause 19.2 was only to replace Section 10.3, that the parties intended that Clause 19.2 was to be narrower in scope than Section 10.2. I do not therefore accept that there is any basis in this professionally drafted contract to conclude that the parties were not using "*carefully chosen words*" such that the usual and "*narrow technical meanings*" should be rejected.

73. In my view Clause 19.5 does not assist on the meaning of the language in Clause 19.2 when construed in the context of Section 10 and Clause 19.3. Clause 19.5 provides that the English courts have jurisdiction to determine disputes "*subject to*" Clause 19.2. It therefore merely begs the question as to the scope of Clause 19.2.

74. In my view the passage relied on by the Claimants in *Barclays Bank* does not establish any presumption in favour of a wide interpretation where there are two forms of arbitration which are contemplated by Section 10.2 and Clause 19.2. At [28] after the passage relied on by the Claimants in the judgment of Thomas LJ he said:

"…Therefore, quite unlike the position under agreements with arbitration clauses (as exemplified by Fiona Trust), <u>the parties have chosen two alternative forms of dispute resolution. There is, therefore, no presumption in favour of giving a wide and generous interpretation to the jurisdiction of the expert conferred by the expert determination clause as the reasoning in Fiona Trust is inapplicable</u>. The simple question is whether the dispute which has arisen between the parties is within the jurisdiction of the expert conferred by the expert determination clause or is not within it and is therefore within the jurisdiction of the English court. It is a question of construction with no presumption either way…".

75. In my view therefore, even if I were wrong to conclude that there was no good arguable case that Clause 19.2 is an arbitration agreement, the Claimants have failed

to show a good arguable case that that there is jurisdiction under Clause 19.2 on the basis that as a matter of construction Section 10.2 is of no effect and is replaced in its entirety by Clause 19.2.

76. The Claimants submitted that the subject matter of the present dispute extended beyond the issue of the enforceability of the Omni LFA to issues of the amount of the claim proceeds and it would be "*commercially absurd"* for the Claimants to be able to invoke Clause 19.2 in relation to the dispute in respect of the claim proceeds but to have a different arbitration in relation to the issue of enforceability of the Omni LFA.

77. However this submission ignores the context of the structure of Section 10 with provision for an arbitration under Section 10.2. It is a coherent and commercial construction to construe Clause 19.2 as narrower than Section 10.2 and as such disputes which fall outside Clause 19.2 will fall within Section 10.2. There is no commercial reason to give the language of Clause 19.2 anything other than its usual meaning.

78. It follows that the Claimants have not shown a good arguable case that Clause 19.2 would extend to the issue of the enforceability of the Omni LFA.

Good arguable case that there is jurisdiction under Clause 19.2 even though an arbitration has already been commenced by Omni under Section 10.2

79. The Claimants submitted that the word "*entitle*" in Clause 19.2 show that the parties are entitled to invoke Clause 19.2 and submitted that it would be "*commercially absurd*" if the Clause 19.2 right was lost by one party starting an arbitration first under Section 10.2. It was submitted that the Claimants have not waived their rights under Clause 19.2 as they have done nothing in the Section 10.2 arbitration which would amount to a waiver.

80. In *Harebell Shipping*, the contract provided for the English courts but gave an option to one party to take a dispute to arbitration as follows:

"47.02 The courts of England shall have jurisdiction to settle any disputes which may arise out of or in connection with this Charterparty but the Owner shall have the option of bringing any dispute hereunder to arbitration."

81. The court proceedings had started but there was a right for the Owner to elect to arbitrate. At [11] of the judgment the Court held:

> *"…although Charterers are limited to action in the English Court, Owners are given the right to bring proceedings in any court which has jurisdiction by virtue of a Convention and Charterers waive objections on grounds of forum non conveniens; Charterers are required to provide a place for service within this jurisdiction whereas Owners are not; Charterers are constrained not to challenge enforcement of any judgment 'which is given or would be enforced by an English Court' whereas Owners are not. It seems to me that clause 47.02 gives Owners a right to stop or stay a court action brought against them, at their option. This gives the clause some practical effect and was designed to apply in circumstances such as these. If Charterers seek to bypass the Owners' determination to have disputes resolved by arbitration as contemplated by Clause 47.10, then Owners' option of bringing the disputes to arbitration remains, continuing Owners' control over the issue of arbitration or court. Charterers can obtain no advantage from 'jumping the starting gun'. Whilst I can see the force of the submission as to the words 'bringing any disputes' and the absence of the word 'refer'; it is, in my view putting too much weight on what is a point of semantics. The sense of the whole of Clause 47 is clear, I think. It seems to me that the option granted by clause 47.02 is not open ended. It would cease to be available if Owners took a step in the action or they otherwise led Charterers to believe on reasonable grounds that the option to stay would not be exercised…"* [emphasis added]

82. In *Law Debenture* there was again an option for one party to elect to arbitrate or to bring court proceedings. The issue was "*the question of the true construction and effect of clause 29, and in particular whether, in the events which have happened, Law Debenture are contractually entitled to litigate the present dispute (and to stop the guarantor pursuing a parallel arbitration dealing with the same matters) or whether it is obliged to arbitrate them.*"

83. The Court held at [42] that:

> *"Thus clause 29.7 has the effect of giving Law Debenture an option which the Elektrim parties do not have. They may litigate, but the Elektrim parties can be*

forced to arbitrate (unless litigation is started, in which case they can counterclaim). Law Debenture cannot be forced to arbitrate if it wishes to commence its own proceedings covering the same subject matter. I have difficulty in seeing any arguable limits, let alone any substantive limits, on the rights of Law Debenture in that respect. The one limit that probably exists is that Law Debenture cannot blow hot and cold, as Mr Glick accepted. If Law Debenture starts an arbitration it would have waived its right (or option) to go by way of litigation. By the same token, if it participates sufficiently in an arbitration, it may well be held to have waived its rights to exercise its option. Subject to that, it has its clear rights." [emphasis added]

84. The decisions in *Harebell* and *Law Debenture* were based on the construction of a clause which gave a choice to one party between court proceedings and arbitration and this is in my view a significant and material difference. I reject the submission for the Claimants that it would be "*commercially absurd*" if the Clause 19.2 right was lost by the other party starting an arbitration first under Section 10.2. It seems to me that the parties have expressly agreed in the contract to two forms of arbitration for the resolution of disputes, one which is expressed to be mandatory (following mediation) and one permissive. In my view there is nothing absurd about concluding that the right for the permissive arbitration is lost once a mandatory arbitration under Section 10.2 has been started by either party. Both parties contemplated arbitration and agreed to an LCIA arbitration as the mandatory route. The parties thus implicitly agreed that on the mandatory route of an LCIA arbitration there would be in effect more limited rights of appeal than if the arbitration was not under LCIA rules. It would not therefore frustrate or negate the intention of the parties to allow an LCIA arbitration to proceed and for the "*permissive right*" for the arbitration under Clause 19.2 to have been lost once the mandatory arbitration under Section 10.2 has started.

85. For these reasons on the alternative case advanced for the Claimants in relation to the scope of Clause 19.2, I find that, even if I were wrong to conclude that there was no good arguable case that Clause 19.2 is an arbitration agreement, the Claimants have failed to show that there is a good arguable case that in circumstances where an arbitration has been commenced by Omni under Section 10.2, there is jurisdiction under Clause 19.2.

Whether in the circumstances the Court should exercise its discretion under s18

86. In the light of my conclusions above it is not necessary to address the exercise of discretion under Section 18. However for completeness I will address the issue, albeit briefly. Accordingly for the purposes of this section I have assumed, contrary to my findings above, that there is a good arguable case that Clause 19.2 is an arbitration agreement and a good arguable case that the dispute falls within Clause 19.2 and that even though an arbitration has already been commenced by Omni under Section 10.2, there is jurisdiction under Clause 19.2.

87. It is the Claimants' case that the words of Males J in *Silver Dry* indicate that there are strong grounds for the exercise of the discretion on the basis of the respect for the principle of party autonomy and the desirability of holding parties to their agreement.

88. The Claimants submitted that the final words in *The Lapad* did not mean that where another arbitral tribunal had been appointed the discretion should not be exercised: in *The Lapad* Moore Bick J said at [24]:

"Mr. Lord submitted that the court has an unfettered discretion under section 18 of the Arbitration Act to appoint or refuse to appoint an arbitrator, subject only to the need to act judicially. Certainly, section 18 itself does not lay down any principles that might limit the scope of the court's discretion (although section 19 requires it to have due regard to any agreement between the parties as to the qualifications required of the arbitrators) and in Frota Oceanica Brasileira S.A. v Steamship Mutual Underwriting Association (Bermuda) Ltd (The 'Frotanorte') [1996] 2 Lloyd's Rep. 461 the Court of Appeal held that the discretion conferred by section 10 of the former Arbitration Act 1950 was indeed unfettered. However, is it important in my view to have proper regard to the nature of the arbitral process and in particular to the greater recognition now accorded to the principle of party autonomy which is explicitly recognised for the first time in section 1(b) of the 1996 Act. Respect for this principle and the desirability of holding the parties to their agreement together provide strong grounds for exercising the court's discretion in favour of constituting the tribunal except in the small number of cases in which it can be seen that the arbitral process cannot result in a fair resolution of the dispute. In R. Durtnell and Sons Ltd v The Secretary of State for Trade and Industry [2001] 1 Lloyd's Rep. 275 Judge Toulmin C.M.G., Q.C. held, having regard to section 1 of the Act, that an application under section 18 should be refused if the court considers that

it is impossible to obtain a fair resolution of the dispute by an impartial tribunal without unnecessary delay or expense. While I agree that the court should refrain from making an appointment if it is satisfied that the resulting tribunal would not be impartial or that for some other reason the proceedings could not lead to a fair resolution of the dispute, I think that the court should be slow to concern itself with questions of delay or expense. As sections 15 and 68 of the Act make clear, the parties are free to decide for themselves the constitution of the tribunal and the procedure to be followed. Sometimes this results in greater delay or expense than would be incurred if the dispute were resolved by litigation, but that does not provide sufficient grounds in my view for refusing to constitute the tribunal. Whereas the ability to reach a fair resolution of the dispute goes to the heart of the arbitral process, delay and expense do not, unless they are so serious as to undermine that fundamental requirement." [emphasis added]

89. It was submitted for the Claimants that the Defendants' complaints about prior conduct are not relevant to the exercise of the Court's discretion.

90. It was submitted for Omni that the Court should look at the particular facts and that the Court should take into account how the Section 10.2 arbitration came about and that the arbitrator which is already in place pursuant to Section 10.2 will decide the issue.

91. It is in my view relevant to the exercise of the Court's discretion that the mandatory arbitration started by Omni under Section 10.2 was not an attempt to circumvent the parties' agreement for the resolution of disputes but was started by Omni in accordance with its undertaking to the Court in the Order of 2 October 2023:

"As soon as practicable ... to commence proceedings claiming the appropriate relief."

92. I also note that under the arbitration commenced under Section 10.2 it is already a live issue whether Clause 19.2 displaces Section 10.2 and should therefore the arbitrator take the view that Clause 19.2 is an arbitration agreement which displaced Section 10.2, Clause 19.2 would be followed and the autonomy of the parties will not be undermined.

93. In my view respect for the principle of party autonomy and the desirability of holding parties to their agreement does not mean that in this case the Court should exercise its discretion under Section 18. The parties provided in their contractual arrangements for two different methods of arbitration, one mandatory and the other permissive. Given that the mandatory route has been started for good reason, in my view the parties should be held to their agreement and the Claimants cannot now invoke the permissive route under Clause 19.2. In the exercise of the Court's discretion I give no weight to the Claimants' stated reason that it wishes to elect for an arbitration under Clause 19.2 having regard to the rights of appeal which that route allows: this is not a rationale which appears from Section 10 and Clause 19.2 to have been in the contemplation of the parties at the time of entering into the contract and in any event the parties agreed to a mandatory LCIA arbitration with limited rights of appeal. Refusing to exercise the discretion under Section 18 is therefore consistent with the desirability of holding the parties to their agreement.

Conclusion on the Application

94. For the reasons set out above I find that:

    i) the Claimants have not shown a good arguable case that Clause 19.2 is an arbitration agreement;

    ii) even if I were wrong on that, the Claimants have not shown a good arguable case that the tribunal has jurisdiction to determine the disputes under Clause 19.2 in circumstances where an arbitration has commenced under Section 10.2.

95. In the alternative, for the reasons set out above, in the circumstances I decline to exercise the discretion of the Court under Section 18.

96. The Application therefore falls to be dismissed.