7th Respondent
Adam Zoubir
20h Witness Statement
Exhibit AKZ20
31 October 2024

IN THE HIGH COURT OF JUSTICE **Claim No. CL-2017-000323**
BUSINESS AND PROPERTY COURTS
OF ENGLAND & WALES
COMMERCIAL COURT (QBD)

IN THE MATTER OF GERALD MARTIN SMITH
AND IN THE MATTER OF THE CRIMINAL JUSTICE ACT 1988

B E T W E E N :

(1) THE SERIOUS FRAUD OFFICE
(2) MR JOHN MILSOM AND MR DAVID STANDISH
(as joint Enforcement Receivers in respect of the realisable property of Gerald Martin Smith)

Applicants

- and

(1) LITIGATION CAPITAL LIMITED
(a company incorporated in the Marshall Islands)
& Others

Respondents

20th WITNESS STATEMENT OF ADAM KARIM ZOUBIR

I, **ADAM KARIM ZOUBIR**, of Harcus Parker Limited, 7th Floor, Melbourne House, 44-46 Aldwych, London, WC2B 4LL, **DO SAY AS FOLLOWS**:

A. Introduction

1 I am a partner in the firm of Harcus Parker Limited, which has conduct of this matter on behalf of Harbour Fund II, L.P. ("**Harbour**"). This is my 20th witness statement in this action (the "**Proceedings**") and is made following the conclusion of the trial pursuant to which Mr Justice Foxton rendered his judgment on 18 May 2021 (the "**Directed Trial Judgment**")[1] and subsequent Consequentials Order dated 11 June 2021 (the "**Consequentials Order**") (**pages 1-20**).

[1] The Serious Fraud Office & Anor v Litigation Capital Ltd & Ors [2021] EWHC 1272 (Comm) (18 May 2021) (bailii.org)

2 Insofar as the contents of this witness statement are within my own knowledge they are true and, insofar as they are based on things I have read or which have been told to me by others, they are true to the best of my information and belief (the source of such information and belief being identified below).

3 Nothing I say in this witness statement constitutes, or is intended to constitute, a waiver of Harbour's legal professional privilege or that of the Settlement Parties (as hereinafter defined).

4 There is now shown to me a bundle of paginated documents marked AKZ-20 containing true copies of the documents to which I refer herein.

5 I make this statement in support of Harbour's application for various relief as set out in draft order provided with the application. In summary, Harbour seeks:

5.1 An order or declaration to the effect that Dr Cochrane is not permitted to seek to challenge the outcome of the Directed Trial (to include the Court's findings in relation to the ownership of Orb, and its conclusions concerning Harbour's entitlements based on its Investment Agreement), by reason of her signing the LCL Settlement Agreement as well as a deed dated 23 October 2014[2] (the "**2014 Harbour Deed**") (**pages 21 – 31**) (addressed further below);

5.2 An order or declaration to the effect that any attempt now made (whether by Dr Cochrane, Mr Thomas or anyone else) to raise arguments challenging Harbour's entitlements as found in the Directed Trial, or otherwise seeking to disturb the outcome of the Directed Trial, is an abuse of process or otherwise barred by doctrines of estoppel or similar principles, or is time barred, including (in the case of Dr Cochrane and Mr Thomas) estoppel by the terms of the Harbour Deed);

5.3 An order or declaration rejecting any argument to the effect that the Harbour IA is unenforceable by reason of the decision of the Supreme Court in R (on the application of PACCAR Inc and others (Appellants) v Competition Appeal Tribunal and others (Respondents) [2023] UKSC 28 (the "**PACCAR Decision**"), or in the alternative that it is only unenforceable in part;

[2] The Harbour 2014 Deed was signed by or on behalf of the following parties between October 2014 and December 2014. The final signatory to the deed was Stewarts who signed at the end of January 2015.

5.4 Further and other directions as may be appropriate in order that this matter may be case managed appropriately and/or;

5.5 Such further or other relief as is appropriate.

6 This application has been necessitated by the actions and conduct of the now thrice-convicted fraudster, Dr Gerald Smith ("**Dr Smith**"), and parties and entities closely associated with him, including but not limited to his ex-wife, Dr Gail Cochrane ("**Dr Cochrane**") and Messrs Nicholas Thomas and Roger Taylor ("**Messrs Thomas and Taylor**")[3], (together "**the Smith Parties**".)

7 It has become apparent over time that these parties will, regrettably, stop at nothing to frustrate the effect of the Directed Trial Judgment and Consequentials Order, whether via the pursuit of meritless litigation before this Court, the making of false allegations against the Settlement Parties in correspondence, the participation in and prolongation of related disputes in foreign jurisdictions or the direct obstruction of the authorised acts of court-appointed office holders whose role is to manage, realise and distribute assets.

8 The PACCAR Decision represents the latest hook upon which the Smith Parties seek to hang an attempt to prevent the Directed Trial Judgment and Consequentials Order taking effect.

9 Specifically, in the case of Dr Cochrane, she has argued before the Royal Court of Jersey (the "**Jersey Court**"), in the context of an application dated 21 November 2023 to recall her personal *désastre* as well as that of Orb a.r.l ("**Orb**") (i.e. her bankruptcy and its insolvency, respectively), that the rights of Harbour and others which were established at the Directed Trial should be disregarded by the Jersey Court (the "**Jersey Recall Applications**").

10 In summary (as I will explain further below), the Jersey Recall Applications are ostensibly premised on the effect of Dr Cochrane's contention, albeit not fully articulated at this stage, that "*By operation of section 58AA of the UK Courts and Legal Services Act 1990 and the*

[3] It appears that Mr Taylor has had little or no direct involvement in these proceedings since the Directed Trial. While Mr Thomas has often corresponded with Harbour and the other Settlement Parties on behalf of himself and Mr Taylor, I understand that Mr Taylor may no longer be involved in this matter on a day to day basis. Notably, as I explain further below, Mr Thomas has recently caused a letter before action to be sent to Harbour and has instructed solicitors in his sole name.

Damages Based Agreements Regulation (SI 2013/609), the Harbour IA was at all material times and is unenforceable."[4]

11 By the Jersey Recall Applications, Dr Cochrane effectively seeks to cancel or unwind her bankruptcy and the insolvency of Orb.

12 However, Harbour believes that the natural jurisdiction for the determination of arguments connected to the Directed Trial and the potential impact of the PACCAR Decision on the Directed Trial Judgment and Consequentials Order is England and Wales, given that they relate in large part to the validity and enforceability of existing findings made by the English Court, including in relation to the funding agreement entered into between Harbour and Messrs Thomas and Taylor and Orb (the "**Orb Claimants**") on 10 July 2013 (the "**Harbour IA**") (**pages 32-86**) and other matters with which this Court is familiar. As such, Harbour has sought a stay of the Jersey Recall Applications pending the determination of this Application[5].

13 In response to its stay application, pursuant to a hearing on 25 June 2024 the Royal Court of Jersey directed Harbour to *inter alia* produce to it a draft of this Application by 2 August 2024, which it did. A hearing is listed on 12 November 2024 before the Jersey Court to determine Harbour's stay application, but in the meantime Harbour considers it appropriate to proceed as intended, now that its interactions with Mr Thomas (set out below) appear to have reached their natural conclusion in terms of their usefulness.

14 In addition to (and I believe in connection with) the Jersey Recall Applications, on 11 July 2024 Harbour received a letter before action from Marriot Harrison LLP, instructed by Mr Thomas (the "**Thomas Letter Before Action**") (**pages 87-106**). According to the Thomas Letter Before Action, Mr Thomas now intends to challenge the validity of the Harbour IA in the English Courts, on the basis of the PACCAR Decision.

15 Correspondence has passed between Marriott Harrison and my firm since my firm's receipt of the Thomas Letter Before Action (**pages 107-145**), regarding appropriate pre-action steps and the applicability of the 31 March 2023 Order of Foxton J, which required Messrs Thomas and Taylor to provide evidence regarding their source of funding for any

[4] Paragraph 7 of Dr Cochrane's Amended Representation (**page 978**)
[5] Harbour had originally intended to seek a stay in reliance upon the passage through Parliament of the Litigation Funding (Enforceability) Bill, which had been expected to pass into law this year and cure with retrospective effect any PACCAR issues, but did not as a result of the calling of the election on 4 July 2024.

further application of claim against the Settlement Parties, along with disclosing any involvement of Dr Smith or related parties as well as satisfying their considerable outstanding costs orders in favour of the Settlement Parties, before any such application or claim would be allowed to proceed (the "**Debarring/Stay Directions**").

16 For context, I note that Mr Thomas' potential action has been threatened obliquely for many months and was referred to by counsel for Dr Cochrane at the Convening Hearing that took place on 6 February 2024 in respect of the Jersey Recall Applications (a note of the hearing, prepared by Harbour's Jersey lawyers, Bedell Cristin, is at **pages 146-156**). The cooperation between Mr Thomas and Dr Cochrane (doubtless both under the direction of and in conjunction with Dr Smith) is apparent both from this reference and the Thomas Letter Before Action, which expressly refers to the Jersey Recall Applications, notwithstanding the fact that he is not ostensibly involved in the Jersey proceedings.[6]

17 As indicated above, my firm has exchanged correspondence with Marriott Harrison with a view to narrowing the issues between our respective clients. This has included our provision to them of a draft of this application as filed with the Jersey Court on 2 August 2024 (including a draft of this witness statement, albeit that it has since been further developed in some respects). Despite this, it has unfortunately not been possible for the parties to narrow their differences, with the parties' positions being diametrically opposed. As part of this correspondence, we have repeatedly invited Mr Thomas to set out in detail the consequences of the relief he intends to seek – in other words – what the effect would be on the findings made in the Directed Trial Judgment as reflected in the Consequentials Order of an order declaring the Harbour IA to be unenforceable. This is an important point in circumstances where Mr Thomas' own case at the Directed Trial was advanced on the basis of proprietary rights he asserted as having arisen under the Harbour Trust, and he advanced no alternative proprietary claim. In their letter dated 25 September 2024, Marriott Harrison have said that the effect of their client's application succeeding would be that Harbour would not be entitled to any part of the assets listed in paragraph 4 of the Consequentials Order and their beneficial owners would be the Orb Claimants. No

[6] I note that in an affidavit served by Dr Cochrane on 24 September 2024 in support of the Jersey Recall Applications, Dr Cochrane stated "*while I am aware of other proceedings being taken in respect of the illegality issue and other matters, I am not acting in concert with any others*". Unfortunately, given my and my client's extensive experience in these proceedings, I do not accept that either this Court or the Jersey Court can take this suggestion at face value.

detailed analysis has been provided of how this alleged beneficial interest arises or its interaction with third party proprietary claims advanced at the Directed Trial.

18 Mr Thomas has also sought to argue that the terms of the Debarring/Stay Directions did not reflect the Court's ruling of 31 March 2023 and has sought to question the way in which the draft order was finalised, despite having been copied on all relevant correspondence with the Court regarding the same, and his comments on the draft having been provided to the Court. In particular, he suggests via Marriott Harrison that the Court's only intention was that he should be required to pay outstanding costs orders in order to pursue any claim or application against the Settlement Parties.

19 In terms of the position in relation to the outstanding costs orders, Mr Thomas has settled the outstanding costs payments to Harbour due under paragraph 25 of the costs Order of 21 October 2021, paragraph 3 of the costs order of 8 July 2022[7]and paragraph 8 of the costs order of 24 March 2023. The final costs order was settled by Mr Thomas on 22 October 2024.

20 However, Harbour considers it to be clear that, given the content of Harbour's application for a debarring order and the Court's previous experience of Mr Thomas' conduct in the Part 8 Proceedings and the revelations as to the funding of that matter, the Court intended what its order requires, i.e. that Mr Thomas should also provide evidence of both (a) the source of funding for any further claim or application and (b) the involvement of Dr Smith and Mr McNally, or any persons Mr Thomas knows the be associated with them. The Debarring/Stay Directions accordingly accurately reflect the Court's intention. Harbour's position, which my firm has conveyed to Mr Thomas's solicitors is that the terms of the Debarring/Stay Directions will apply in the event that Mr Thomas files his threatened

[7] My understanding, derived from discussions with Stewarts (privilege in relation to which is not waived) is that Messrs Thomas and Taylor were able to make this payment pursuant to a settlement reached with St Paul's Solicitors (in liquidation) ("**St Paul's**"), a firm instructed by them on various occasions in these proceedings, and previously run by Mr Andrew Crossley. My understanding is that on 16 May 2023, Messrs Thomas and Taylor filed a professional negligence claim against St Pauls (the "**St Paul's Claim**"), due to the failure by St Paul's to serve the particulars of claim in separate proceedings against Stewarts which were consequently dismissed by the court. Ultimately, St Paul's insurer settled the claim. In the interim, as the Court is aware, Stewarts Law filed a third party debt order application ("**TPDO Application**") in respect of the settlement monies . On 9 July 2024, the TPDO Application was dismissed by consent, on terms that provided for (inter alia) significant payments to the funder and ATE providers in respect of Messrs Thomas and Taylor's negligence claim, a firm of solicitors, as well as payments in respect of Messrs Thomas and Taylor's outstanding costs obligations. The relevant consent order ("**TPDO Consent Order**") is at **pages 157-159**. While I am not aware of the full background to the St Paul's Claim, I note that St Paul's appears to have accepted that it breached the duties it owed to Messrs Thomas and Taylor relatively soon after the negligence action was commenced. Mr Crossley is currently a consultant at another firm, Taylor Rose. I understand that while at Taylor Rose, Mr Crossley acted for Ms Dawna Stickler in matters related to these proceedings.

application first, makes a cross-application in response to this Application, or otherwise seeks any relief in response to Harbour's Application.

21 Accordingly, regardless of whether Mr Thomas has satisfied the costs orders referred to above, it remains Harbour's position that Mr Thomas must satisfy the remaining provisions of the Debarring/Stay Directions before he is able actively to do anything else. The Debarring/Stay Directions were made in light of Mr Thomas's repeated efforts to obstruct the Settlement Parties' efforts to enforce their rights pursuant to the Directed Trial, with support and funding provided by Dr Smith and his associates, and ultimately in those parties' interests.

22 In light of all of the above, Harbour seeks, by this Application, to achieve a (further) confirmation of finality in terms of the status of the Directed Trial Judgment and related orders and the Harbour IA, such that the Smith Parties are precluded, to the greatest extent possible, from continuing to interfere with the judicial findings of this Court with the result that the realisation process can continue unimpeded. Harbour is aware that to the extent that it is required to go beyond questions of whether Mr Thomas or Dr Cochrane are shut out from re-opening argument, this Application may engage the interests of other parties to these proceedings. Given the lack of clarity provided by Marriott Harrison in respect of Mr Thomas's intended course of action, other parties may argue that, should Mr Thomas succeed, this could potentially re-engage those other parties' interests in the assets which were the subject of the Directed Trial.

23 As such, if Mr Thomas complies with all the provisions of the Debarring/Stay Directions and this Application is subsequently opposed by Mr Thomas, these type of extremely complex follow-on issues (as well as alternative arguments potentially available to Harbour to sustain its rights) mean that the overriding objective is likely to be best served by case managing issues of principle to be resolved at a first stage, and only if: (a) arguments based on the PACCAR Decision are open to Mr Thomas (and Dr Cochrane); and (b) are successful, to then convene a second stage which can take account of these broader questions. Harbour intends to make more detailed case management proposals in this regard once the initial round of evidence has been exchanged in response to this Application.

24 I should note that Harbour presents this application to this Court, because this Court has substantial familiarity with the underlying history and plainly has an interest in seeing its

existing findings and conclusions respected. In addition, the agreements that are the subject of the relevant disputes are governed by English law and contain jurisdiction clauses in favour of the English Courts. It appears, from the Thomas Letter Before Action, that Mr Thomas also envisages bringing his challenge before this Court. However, I note for completeness that the Court's view may be that although the English Courts are competent and best placed to hear these issues, some of the arguments being contemplated by Mr Thomas can only be (or are most appropriately) pursued by way of application for permission to appeal the outcome of the Directed Trial to the Court of Appeal, albeit long out of time, rather than to the first instance Court.

25 Indeed, I note in this regard that on 28 September 2023, Mr Thomas wrote to Harbour (on an open basis) enclosing a draft appellant's notice. Mr Thomas stated in the accompanying letter (marked "***Urgent and Immediate***") that his intention was to "*appeal against the Directed Trial Judgement of Foxton J. (in particular various terms of the 11 June Consequentials Order, the 14 December 2022 Trust and Receivership Orders, and the 31 March 2023 Directions (Debarring/Stay application order)*" (**pages 160-172**). Mr Thomas acknowledged that the proposed appeal was out of time, and sought Harbour's consent to its terms.

26 My firm responded on 29 September 2023, noting that Mr Thomas's letter was not accompanied by grounds of appeal, skeleton argument, any evidence in support or draft orders (**pages 173-174**). In fact, it set out no grounds at all for the proposed appeal. Our email stated that we would consider the substance of the application when such materials were provided. Mr Thomas provided no such further materials.

27 I note that Mr Thomas, nine months after his intimated appeal to the Court of Appeal, appears to have decided to take a different approach, instead proposing to apply to this Court.

28 At this point, as noted above, the precise form of relief sought by Mr Thomas is not entirely clear. The Thomas Letter Before Action concludes that Harbour is "*not entitled to any sums from the Proceeds pursuant to the Harbour IA and all of the assets held pursuant to the Harbour Trust are to be released to the funded parties in their appropriate proportions*." and that "*Appropriate consequential steps will follow in respect of the assets currently held pursuant to the Harbour Trust, which we would also seek to agree with you without the need for litigation*.". When my firm pressed for further details of Mr Thomas's intended relief, Marriott Harrison responded that:

"*1. It is perfectly clear that if our client succeeds in demonstrating that the Harbour IA (or any specific DBA part of it) is unenforceable:*

(i) Harbour will not be entitled to any part of the assets listed in paragraph 4 of the Consequentials Order (and we note that you do not argue to the contrary); and

(ii) their beneficial owners would be the Orb Claimants (in their appropriate proportions) as the claimants in the claim of which these assets are the proceeds."

29 It is therefore not entirely clear what the appropriate procedural route for such relief sought by Mr Thomas might be, and it is obviously an incomplete analysis, because if Mr Thomas' rights under the Harbour IA (which were themselves established at the Directed Trial) fall away, he does not articulate how he would nevertheless establish his entitlement to any relevant assets. Despite this, and whilst it will be a matter primarily for submissions, I would respectfully suggest that at least some of the relief sought by way of this Application can properly be sought from the first instance Court – by way of example, this Court can rule on the request for relief concerning Dr Cochrane and the LCL Settlement Agreement (which we expand upon at paragraph 84-97 below), and this Court can also, for example, confirm the present validity of its existing findings so far as it is concerned – without trespassing on any matters which might fall within the appellate jurisdiction. Further, the time for pursuing any appeal of the Directed Trial outcome has long since passed, and indeed the PACCAR Decision is no longer recent (having been handed down over a year ago), such that it is very difficult to see on what basis any prospective appellant could seek permission to appeal out of time from the Court of Appeal in any event.

30 It is also not clear what Mr Taylor's position is on Mr Thomas's intended relief, or whether he is even aware of this matter. Harbour will serve a copy of this Application on Mr Taylor and invite him to confirm his position in advance of any hearing.

31 Harbour's position in respect of the relief sought by Mr Thomas is necessarily reserved, pending compliance with the Debarring/Stay Directions and clarification of the precise approach taken by him in this litigation, and the basis for that approach. However, Harbour does invite this Court to make such orders as are within its jurisdiction to confirm the final nature of the findings and orders it has made, so as to deal as fully as possible with the recent challenges which have been intimated.

B. Executive Summary of the basis of the relief sought by Harbour

32 In accordance with its obligations under the Harbour IA, Harbour provided nearly £5.2 million of funding to the Orb Claimants, in order for them to pursue claims against Mr Andrew Ruhan and others in proceedings numbered CL-2012-000625 (the "**Orb Litigation**"). I will address further below the mechanism by which Harbour's entitlement to a return on its investment is calculated. However, it is also relevant to note here that Harbour's entitlements were secured by:

32.1 a debenture giving Harbour fixed and floating charges over the whole, or substantially the whole, of Orb's property; and

32.2 a guarantee from Dr Cochrane which was in turn secured by a security interest agreement over the shares in Orb.

33 As this Court knows, the Harbour IA is governed by the law of England and Wales (as are the other transaction documents).

34 Harbour's position, in summary, is that there is no basis for disturbing the outcome of the Directed Trial, to include the Consequentials Order. It is too late for any such attempt to be made now to this Court, and it would be an abuse of process for the Dr Cochrane, or Messrs Thomas and Taylor (or any other party) to argue otherwise. Moreover, (a) so far as Dr Cochrane is concerned, she has signed a Deed by which she has expressly agreed not to pursue such points; and (b) so far as both Dr Cochrane and Mr Thomas are concerned, they signed the 2014 Harbour Deed by which they agreed that the recoveries under the IOM Settlement were to be treated as "Proceeds received as a result of Success in the Proceedings" for the purposes of Cl 9.1 of the Harbour IA and were to be applied in accordance with the terms of that clause.

35 Further, to the extent that Mr Thomas or others seek to rely on the PACCAR Decision, and to the extent this Court is prepared to entertain such arguments at all, its effect was not to make new law regarding whether or not litigation funding agreements, such as the Harbour IA, were Damages Based Agreements (a "**DBA**" or collectively "**DBAs**"), subject to the terms of the DBA Regulations 2013 ("the **DBA Regulations**"). The argument that the Harbour IA is a DBA has been available to the Orb Claimants since the agreement was first entered into and the possibility that the funding arrangements such as the Harbour IA were in fact subject to the DBA Regulations has been publicly debated in legal, academic and political circles since at least 2014.

36 I will set out further below the extensive opportunities that the Orb Claimants have had prior to and during the Directed Trial to seek to run the arguments that Dr Cochrane now advances in the Jersey Recall Applications, and that Mr Thomas has threatened in the Thomas Letter Before Action. Harbour's position is that the arguments advanced by both Dr Cochrane and Mr Thomas (as well as any argument that she or others may advance in opposition to Harbour's present application), constitute an abuse of process. In the alternative, if that is not the case, they are time barred.

37 Further, and to the extent necessary, Harbour also contends that in any event, the PACCAR Decision, even on its merits, does not render the Harbour IA unenforceable, or that if it does so to some extent, that it is only unenforceable in part. Again, Harbour's arguments will be further developed in its submissions, but a summary of the key points advanced, and the evidence upon which they are based, is set out below.

38 The remainder of this witness statement is accordingly divided into the following sections:

38.1 The outcome of the Directed Trial as regards Harbour and the Orb Claimants (Section C);

38.2 The Smith Parties' actions since the Directed Trial (Section D);

38.3 The Actions of Dr Cochrane specifically (Section E);

38.4 The PACCAR decision and its relevance to the Harbour IA (Section F);

38.5 The LCL Settlement Agreement and the 2014 Harbour Deed (Section G);

38.6 The abusive nature of the Smith Parties' attempt to seek to invalidate the Harbour IA (Section H);

38.7 Severability of the Harbour IA (Section I);

38.8 Harbour's detrimental reliance on the Harbour IA (Section J);

38.9 Limitation (Section K);

38.10 Dr Cochrane's standing (Section L); and

38.11 Conclusions (Section M).

C. The outcome of the Directed Trial as regards Harbour and the Orb Claimants

39 Given the Court's familiarity with the Directed Trial, I will not rehearse the extensive background here. By way of summary only, I set out below the salient facts insofar as this Application is concerned.

40 The Directed Trial in these proceedings commenced on 19 January 2021. Shortly thereafter and just before Dr Smith was due to give evidence, on 27 January 2021, the Smith Parties (including Dr Smith and Dr Cochrane, but not including Messrs Thomas and Taylor) entered into a settlement agreement (the "**LCL Settlement Agreement**") (**pages 175-337**) with Harbour, the Serious Fraud Office ("**SFO**"), Stewarts Law LLP ("**Stewarts**"), the liquidators of a group of BVI companies (the "**Joint Liquidators**"), the Viscount of the Royal Court of Jersey in her capacity as the administrator of the *en désastres* of Dr Cochrane and Orb (the "**Viscount**"), and the Receivers of the realisable property of Dr Smith (the "**Enforcement Receivers**", together the "**Settlement Parties**"). The Smith Parties (known in the LCL Settlement Agreement as the LCL Parties) provided undertakings to the Court to assist the Settlement Parties (recorded in an order made on 4 February 2021 (the "**LCL Discontinuance Order**")) (**pages 338-348**) and discontinued their claims, taking no further part in the Directed Trial.

41 On 16 May 2021, the Directed Trial Judgment was handed down. All of the claims advanced by Harbour and the other Settlement Parties succeeded in all material respects.

42 In respect of Orb and Dr Cochrane, the Judge made the following findings:

42.1 The shares of Orb were found to be the realisable property of Dr Smith, further to a Confiscation Order obtained by the SFO on 13 November 2007 in the sum of £40,856,911[8] (the "**Confiscation Order**").

42.2 More generally, the judge found that Dr Cochrane held the shares in the Non-Arena Companies (including Orb), for Dr Smith, as his nominee.

42.3 Separately, the Judge found that 50% of Bodega (the company which owns Steephill, the property in Jersey in which Dr Cochrane resides) was held by its legal owner (Dr Cochrane) on the terms of the Harbour Trust in respect of which the Judge subsequently, on 14 December 2022, appointed receivers on the application

[8] I understand that the current balance of the Confiscation Order, including interest, is around £82 million.

of Harbour and others and removed the Orb Claimants as trustees (in a further significant judgment in relation to this matter handed down on 30 November 2022). The remaining 50% is vested in the Viscount as administrator of Dr Cochrane's *désastre*.

43 The practical outcome of the Directed Trial was reflected in the Consequentials Order. The Judge ordered the following in respect of Harbour's and the Orb Claimants' entitlement:

"4. The interests in the following assets are held by their legal owners on the terms of the Harbour Trust and are to be applied and apportioned between the beneficiaries, namely Harbour, Orb arl, and Messrs Thomas and Taylor, in accordance with those terms (save as set out below):

a. The shares in the Arena Companies (as set out in Schedule 2 to this order);

b. Such future distributions as may be paid or payable to the shareholders of the Arena Companies;

c. The traceable proceeds of the IOM Settlement Cash, but in particular:

i. An equitable interest of 100% in Flat 24 Hamilton House;

ii. An equitable interest in 50% of the shares in Bodega;

iii. An equitable interest of 100% in Flat 2 Hamilton House;

iv. An equitable interest of 15% in Flat 22 Hamilton House;

v. An equitable interest of 20.26% in the headlease / leasehold of Hamilton House and Flats 1, 10, and 14 Hamilton House (for Flats 10 and 14 Hamilton House, taking effect by way of a first ranking charge arising by way of subrogation to discharged security);

vi. An equitable interest of 16.62% in Flats 11, 21 and 23 Hamilton House;

vii. An equitable interest of 10% in Flat 17 Hamilton House

d. The traceable proceeds of the £23,921,641.59 paid to Candey LLP which derived from the $43.5m Qatar Settlement Payment, but in particular:

i. An equitable interest of 90% in Flat 12 Hamilton House (reflecting the balance of the purchase price);

ii. An equitable interest of 88.05% in Montagu Square (reflecting the balance of the purchase price);

subject to such claims as remain available to Mr Pelz following the findings in the Trial Judgment as set out below at paragraph [23] (for the avoidance of doubt, this qualification applies only to the assets listed at items 2.d.i and ii above).

5. Any share of the proceeds under the Harbour Trust which is attributable to Orb and Messrs Thomas and Taylor shall be adjusted as follows:

a. The entitlement of Orb and Messrs Thomas and Taylor (after payment out of the prior items in the waterfall under the Harbour Trust) shall first be determined without any adjustments, based on the following percentages: 62.5% to Orb, 18.75% to Mr Thomas and 18.75% to Mr Taylor;

b. Thereafter:

i. Mr Thomas is required to give credit in the sum of £1,010,097.75 and his entitlement shall be reduced accordingly;

ii. Mr Taylor is required to give credit in the sum of £1,546,998 and his entitlement shall be reduced accordingly.

c. For the avoidance of doubt, no payment shall be made in respect of the adjusted shares until after the amounts secured by the Stewarts lien set out in paragraph [8] have been fully satisfied."

44 In respect of the Viscount's entitlement, the Judge ordered the following:

"14. The Jersey Properties, namely:

a. 1 Moedwill Cottage (Les Vaux Cottage), Les Grand Vaux, St Saviour, Jersey JE2 7NA;

b. 2 Moedwill Cottage (Les Vaux Cottage), Les Grand Vaux, St Saviour, Jersey JE2 7NA;

c. Montrose, Les Grand Vaux, St Saviour, Jersey JE2 7NA; and

d. Antoinette Gardens, 49 Langtry Gardens, St Saviour's Hill, St Saviour, Jersey, JE2 7AG,

are vested in the Viscount of the Royal Court of Jersey, in her capacity as the administrator of the en désastre (bankruptcy) proceedings of Dr Cochrane, free from adverse proprietary rights, save in respect of the unchallenged life interest in Antoinette Gardens, which is unaffected by this order.

The equitable interest in the 50% of the shares in Bodega vest in the Viscount of the Royal Court of Jersey in her capacity as administrator of the en désastre of Dr Cochrane, free from adverse proprietary rights."

45 As to the SFO's position, the Consequentials Order provided for the following regarding assets that were the realisable property of Dr Smith and therefore subject to the Confiscation Order:

"16. With the exception of the shares in Bodega, Dr Gerald Martin Smith holds 100% of the equitable interest in the shares of each of the Non Arena Companies (as set out in Schedule 2 to this order).

17. To the extent that the whole equitable interest in Flat 1 Hamilton House is not exhausted by the equitable interests of the beneficiaries under the Harbour Trust and the companies under the Joint Liquidators' control respectively, the balance of the equitable interest is attributable to Dr Gerald Martin Smith.

18. All of the shares in Litigation Capital Limited are held in the name of Conduit Asset Management Limited for Anthony Smith, who in turn holds them as a nominee for Dr Gerald Martin Smith, who thereby holds a 100% equitable interest in the said shares.

19. Save as otherwise provided for by the declarations in this order any and all residuary equitable interests in the Relevant Property and IUAs are held either by the Viscount of the Royal Court of Jersey, in her capacity as the administrator of the en désastre (bankruptcy) proceedings of Dr Cochrane, or by Dr Gerald Martin Smith."

46 The most immediately relevant aspect of the Directed Trial findings in respect of the SFO is that Orb (a Non-Arena Company) is the realisable property of Dr Smith and therefore subject to the SFO's Confiscation Order, per paragraph 16 of the Consequentials Order. While I understand that Dr Cochrane remains the nominal legal shareholder of Orb, the Consequentials Order is unequivocal: she has no right to Orb or its assets.

47 Dr Cochrane sought, by an application of 10 January 2024 of which I provide further details below, to remove Orb from the list of Non-Arena companies in the Consequentials Order, and her application was dismissed and certified as being "*totally without merit*". As such, Dr Cochrane has identified no basis for disturbing paragraph 16 of the Consequentials Order.

48 It is particularly notable that Dr Cochrane's Jersey Recall Applications, and in particular the exercise she proposes in order to assess her personal financial position are premised in large part on an account of Orb's assets, which she asserted (wrongly) were to be treated as her own. In her third affidavit of 11 March 2024, Dr Cochrane also initially claimed to "own 100% of the shares of Orb" (**pages 349 – 365**), and omitted to inform the Jersey Court of the full effect of the Directed Trial's finding that Orb's shares constituted the realisable property of Dr Smith. At the hearing of 26 June 2024, the Jersey Court indicated its disapproval of Dr Cochrane's failure to explain the findings as to Orb in the Directed Trial Judgment given that she was subject to a duty of full and frank disclosure when seeking permission to serve the Recall Application out of the jurisdiction, and required Dr Cochrane to explain her omission. As I note further below, Dr Cochrane has since amended her position in relation to the shares of Orb.

D. The Smith Parties' actions since the Directed Trial

49 As indicated above, the Smith Parties have by various means sought to frustrate the outcome of the Directed Trial Judgment and related orders. Given the many separate instances, these, with the exception of Dr Cochrane's activities in Jersey given the recent nature of the Jersey Recall Applications, are only summarised in this witness statement. Appendix 1 to this statement contains a more detailed record of the activities in question[9].

50 The disruptive actions, unlawful conduct and court proceedings issued or necessitated include:

50.1 Resistance on the part of Dr Cochrane of the steps taken by the Enforcement Receivers regarding the control of Casa Coloniches (a Non-Arena Company);

[9] Appendix 1 cross-refers to official reports provided by the Enforcement Receivers, in accordance with the terms of the Variation Order dated 7 December 2017 (which I refer to by the prefix "MR") and the Receivership Order dated 14 December 2022. They are restricted to a circulation list which includes Harbour, the Viscount and Mr Thomas, but are otherwise confidential. The Enforcement Receivers have confirmed that these documents may, in redacted form, be referred to for the purposes of this application. Redactions have been applied in respect of commercially sensitive information.

50.2 Failure by Dr Smith and others to provide vacant possession of Flats 11, 12, 19, 20 and 21 Hamilton House, in contravention of their court-ordered obligations;

50.3 The failed Part 8 Claim commenced by Messrs Thomas and Taylor by which, among other things, they sought to appoint Mr Ticehurst as a trustee for an improper purpose, resulting in their being removed as trustees;

50.4 The commencement and/or defence of five sets of interlinked proceedings in the Republic of the Marshall Islands by associates of Dr Smith including Mr Thomas, which include opposing the recognition of the Enforcement Receivers' appointment over shares of the Non-Arena Companies;

50.5 Conduct of Mr Thomas in relation to the purported transfer by LCL of its shares in SMA and GACH which led to the Enforcement Receivers commencing contempt proceedings against him;

50.6 The actions of Dr Smith which led to his being convicted of contempt of court in July 2022;

50.7 Mr Thomas' application for permission to appeal the receivership order made by Foxton J on 14 December 2022 and seeking a stay of the receivership arising thereunder (which was dismissed by the Court of Appeal) (**pages 366-378**);

50.8 Attempts made by the Smith Parties, via companies called Minardi and BKV, to prevent the transfer of the shares of SMA to newly appointed trustees of the Harbour Trust;

50.9 An application by Messrs Thomas and Taylor for an order that claims to certain assets be assigned to them (**pages 379-381**). This led to the Debarring/Stay Directions (**pages 382-384**);

50.10 Proceedings involving Mr Sodzawiczny before the Isle of Man courts, which culminated in Mr Thomas and a Mr Miah (who had been involved in the activities referred to at paragraph 50.8 above) being found to be in contempt of court as a result of their failure to remove a company director whose actions were in breach of an injunction protecting Mr Sodzawiczny's interests in property in Spain;

50.11 Prolonged obstruction of the Enforcement Receivers by Dr Cochrane and other Dr Smith associates[10] in respect of C'an Agata and Son Montserrat (the **"Spanish Properties**");

50.12 Dr Smith and Dr Cochrane purporting to commence an LCIA Arbitration resulting in Mr Sodzawiczny needing to seek and obtaining an anti-arbitration injunction;

50.13 The Slip Rule Application;

50.14 Mr Thomas's threatened claim against Harbour in respect of his purported rights under the Harbour IA to require Harbour to indemnify him for his own outstanding costs obligations (**pages 388 – 389**)[11];

50.15 Dr Smith being convicted of fraud on 29 July 2024 in relation to fraudulently obtaining COVID-19 Bounce Back Loans, and subsequently on 20 September 2024 sentenced to 18 months imprisonment[12]. A portion of the funds he fraudulently obtained were used to pay costs orders owed to the SFO pursuant to an order made by Foxton J on 29 June 2020;

50.16 Actions of Dr Smith in breach of the Restraint Order and in breach of the undertakings given in relation to the LCL Settlement Agreement. This has led to the SFO commencing further contempt of court proceedings against him which are due to be heard in October 2024;

50.17 Further to the actions of Dr Cochrane in relation to the Spanish Properties which I refer to above, she subsequently sought to argue in these proceedings that the LCL Settlement Agreement and LCL Discontinuance Order had been "*superseded*"[13]. This matter culminated in a ruling from Foxton J on 18 April 2024 that it had not, which I describe in further detail below;

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[10] Mr Thomas wrote to Harbour and the Enforcement Receivers and well as the Viscount and others on 28 September 2023, claiming that the ERs needed the Orb Claimants' consent to sell Son Monserrat, and that its proposed sale would be unlawful (**pages 385-387**). Mr Thomas's position was entirely incorrect, as confirmed by Foxton J's 18 April 2024 ruling which I refer to below.

[11] On 31 May 2024, we replied to Mr Thomas to indicate that Harbour did not accept the liability alleged in his letter (**page 389A**).

[12] https://www.cityoflondon.police.uk/news/city-of-london/news/2024/september/man-jailed-for-fraudulently-receiving-a-50000-covid-bounce-back-loan-to-help-pay-back-historic-72-million-fraud-court-order/ (**pages 390-391**).

[13] Witness Statement of Dr Cochrane dated 24 April 2024 (**pages 392-401**)

50.18 Dr Smith's application of 8 July 2024 to discharge the SFO's Restraint Order of 2005 and set aside the Confiscation Order of 2007[14] (**pages 402-438**), and related subsequent receivership orders made in these proceedings (the "**Discharge Application**"); and

50.19 Dr Smith's subsequent letter of 12 July 2024 (**pages 439-441**) in which he again asserted rights over the Hamilton House properties I refer to above, and sought to undermine the outcome of the Directed Trial.

51 It is clear from this correspondence and my prior knowledge of these proceedings that the actions of Dr Cochrane and Mr Thomas are being orchestrated by Dr Smith in order to force the Settlement Parties, including Harbour to expend further time and costs and to erode the value of the assets under the management of the various office holders, and, via threats of interminable legal action by Dr Smith and/or his proxies, to pressurise the Settlement Parties into foregoing the fruits of their success at the Directed Trial.

52 The actions of the Smith Parties (described in more detail in Appendix 1) to seek to deprive Harbour of its entitlement pursuant to the Harbour IA, as well as their resistance to and obstruction of the efforts of the court-appointed office holders whose job is to manage and realise the assets which were the subject of the Directed Trial, have been almost continuous since the Directed Trial Judgment was handed down on 18 May 2021. I would respectfully suggest that the challenges which they have mounted in reliance upon the PACCAR Decision should be considered in that context; namely, that arguments over enforceability of the Harbour IA are merely the latest means by which these parties seek to undermine decisions of this court with which Dr Smith and others do not agree.

E. The actions of Dr Cochrane specifically

53 This section of my witness statement describes certain relevant actions of Dr Cochrane in this jurisdiction and elsewhere both before and after the Directed Trial Judgment. Conduct of Dr Cochrane not covered below is either addressed in Appendix 1 or has been deemed unnecessary to include at this stage.

Correspondence between Dr Cochrane and Harbour since April 2023

[14] I note that by his covering letter of the same date, Dr Smith stated that "*As this matter will impact the Orb Claimants, Dr Cochrane, the Attorney General of Jersey and Harbour it has been copied to them*".

54 In a letter dated 11 April 2023 (**pages 439-448**) Dr Cochrane alleged breaches by Harbour of the Harbour IA, a conspiracy against the Orb Claimants by Harbour and the Settlement Parties, and that (directly contrary to the findings of the Directed Trial) she was personally entitled to the assets of Orb. Specifically, her letter stated:

> "*by failing to honour [Harbour's] agreements terms [they] prevented us from obtaining additional litigation funding…this was [Harbour's] first repudiatory breach".*
>
> "*the [2019 Settlement Agreement] sets outs out the mechanics of [Harbour's] conspiracy against the Orb Claimants"*
>
> *"The Orb claimants won [the Directed Trial]. The so called settling parties have not. And yet you have over the last 2 years, as "Lead" conspired to prevent the Harbour Trust from coming into functional being in fundamental breach of your own Harbour IA terms".*
>
> *"The monies recovered by the Orb Claimants belong to them pursuant to the terms of the Harbour IA trust arrangements. I, as the 100% owner of Orb, want it to receive what it is entitled to."*

55 My firm responded to these accusations on 11 May 2023 (**pages 452-454**):

55.1 confirming that Harbour emphatically denied any impropriety or breach of any obligations, or that it has caused Dr Cochrane any loss;

55.2 Reiterating the position on Orb's ownership, referring to the Directed Trial judgment whereby it was held that, notwithstanding Dr Cochrane being the registered shareholder, the shares held in Orb were held as nominee for Dr Smith and therefore, recoverable by the SFO; and

55.3 Indicating to Dr Cochrane that her correspondence appeared to be a "*coordinated attempt by [her], Mr Thomas and Dr Smith to further frustrate the outcome of the Directed Trial*".

56 It is clear to me that from at least April 2023, Dr Cochrane's intention was to gain control of the assets of the Harbour Trust, as well as the assets of Orb. This is the position she maintains now, albeit premised on the alleged unenforceability of the Harbour IA, rather than the previous allegations of (presumably repudiatory) breaches of the Harbour IA by

Harbour. However, as the Court will note, this chain of communications was commenced by Dr Cochrane before the PACCAR Decision was handed down.

57 Following the PACCAR Decision, Dr Cochrane re-commenced correspondence with Harbour, now seeking its agreement to an application to set aside or annul her *désastre*, and that of Orb, on the ground that they were obtained by Harbour in circumstances where the Harbour IA was an unlawful and/or unenforceable agreement.

58 On numerous occasions during this period, Harbour set out its position to Dr Cochrane in correspondence. By way of example, in a letter of 10 August 2023 (**pages 452-453**), my firm responded to Dr Cochrane as follows:

> *"5. As to paragraph 7 of your letter, Harbour's position is as follows:*
>
> *a) The orders made in and in relation to the SFO Proceedings numbered CL-2017- 000323 including the Directed Trial Consequentials Order and the 14 December 2022 Trust and Receivership Order remain valid, binding and enforceable and Harbour will naturally abide by their terms.*
>
> *b) No party sought to challenge the enforceability of the Investment Agreement at the Directed Trial despite having had the opportunity to do so. Any attempt to do so now would constitute an abuse of the court's process.*
>
> *c) Your suggestion that the Investment Agreement "was unlawful from its signature and is unenforceable" is legally misconceived, for various reasons, and is in any case irrelevant given that the underlying issues have already been adjudicated."*

59 On 14 August 2023, Dr Cochrane accused both Harbour and the Viscount of an "*unlawful means conspiracy to manipulate [her] circumstances to keep [her] in a state of "desastre" for [their] improper economic purposes. Manipulation that has been ongoing for almost 7 years*" (**pages 457-458**). The letter, as well as a letter dated 16 August 2023 (**pages 459-460**), sought to obtain their consent to support Dr Cochrane's application to "set aside/ annul" the *désastre* orders.

60 On 21 August 2023, Dr Cochrane again accused Harbour of "*an evolving conspiracy that repetitively breached the Harbour IA terms*", alleging that Harbour "*victimised*" the funded parties (**pages 461- 463**).

61 In a letter dated 25 August 2023, Dr Cochrane asserted that she intended to seek *"…compensatory and or restitutionary damages. Be that through the Courts of Jersey, the Privy Counsel*

[sic], *the English High Court or the courts of the Cayman Islands or the USA*". In the same letter, Dr Cochrane again alleged that Harbour has "*deliberately and with malice and forethought* [sic], *unlawfully damaged and impacted my family's and my life and the Orb Claimants rights*" (**pages 464-465**).

62 On 23 October 2023, Dr Cochrane made another request for Harbour to agree to a consent order in support of her set aside application (**pages 466-467**). On the same day, our firm responded, repeating Harbour's position that her assertion as to the supposed "*mistake"* in the drafting of the Consequentials Order was "*baseless and inaccurate"* (**pages 468-469**).

63 Materially similar allegations were made by Dr Cochrane on the next day, 24 October 2023, in relation to the composition of the Non-Arena companies and Orb's ownership in direct conflict with the Directed Trial Judgment and Consequentials Order, as well as against Harbour of "*serial (and most probably repudiatory breaches) of its own agreements terms*" (**pages 470-474**).

The Slip Rule Application

64 Notwithstanding this firm having set out Harbour's position on the matter in correspondence, Dr Cochrane ultimately filed an application on 10 January 2024 to amend the Consequentials Order purportedly under the 'Slip Rule' to remove Orb from the list of Non-Arena Companies, on the basis that it had been included by mistake when the order was drafted (the "**Slip Rule Application**") (**pages 475-487**).

65 On 15 January 2024, my firm filed written submissions in response to the Slip Rule Application (**pages 488-494**), arguing that the application should be dismissed for the following reasons:

65.1 Dr Cochrane did not have standing to bring this application, on the basis that she remains subject to *désastre* in Jersey and is represented by the Viscount;

65.2 The application was without merit; and

65.3 The application was made by and/or with the support of Dr Smith and his associates, with the aim of frustrating court judgments and orders. All of the previous correspondence purportedly sent by Dr Cochrane bears the distinctive hallmarks of Dr Smith's letter-writing style. Further, Harbour's submissions referred to a letter of 2 January 2024 which purports to have been sent by Dr

Cochrane and Mr Thomas to Susan Dunn of Harbour, Mr Jackson of Quantuma (one of the Joint Liquidators) as well as the managing partner of Stewarts Law, Mr Dench, containing allegations of conspiracy by Harbour, the Joint Liquidators and Stewarts against the Orb Claimants. The metadata on this letter showed that it was drafted by Dr Smith (who is listed as the 'author'), rather than by Dr Cochrane.

66 On 17 January 2024, Dr Cochrane responded to Harbour's submissions by asserting that:

"…the Directed Trial did not determine that my ownership of Orb arl was as a nominee for Dr Gerald Smith as paragraph 1 of the Consequentials Order makes clear" (paragraph 4) (**pages 495-500**).

67 On the same day, Dr Cochrane wrote to the Viscount's Jersey lawyers, Ogier (**pages 501-503**). In particular, she wrote that:

> *"I understand from that advice that at the convening hearing the Royal Court will be asked to make substantive decisions as to whether certain claimants who have filed claims in my désastre process and the désastre process of Orb a.r.l (Orb) are properly to be treated as creditors. It would be unreasonable to ask the Royal Court to undertake the process of reviewing all the claims with respect to Orb if it is a Non-Arena company."*

68 Shortly thereafter, on 22 January 2024, Foxton J dismissed the Slip Rule Application on the papers, on the basis that Dr Cochrane had no standing, and certified the application itself as being "*totally without merit*" ("the **Slip Rule Application Ruling**") (**pages 504-505**). In his ruling, Foxton J highlighted (inter alia) the following relevant passages of the Directed Trial Judgment (with emphasis added):

"606. Subject to (a) my finding as to the Retained 50% in Bodega (at [503(iv)] above) and (b) any issues which arise as to the effect of the Ozturk No 2 Trust which do not form part of the Directed Trial, I am satisfied that Dr Cochrane held the shares in the Non-Arena Companies as Dr Smith's nominee. I would note that neither Dr Cochrane nor Dr Smith now seek to challenge this finding, and I am satisfied that it is established on the evidence. In summary:

> *i) Dr Smith has a track record of seeking to disguise his interest in assets behind Dr Cochrane. The investigations brought by the SFO in connection with the Izodia Theft identified a ski chalet held through a corporate vehicle of which Dr Cochrane was a director and the transfer of his luxury car collection into Dr Cochrane's name shortly after the Izodia Theft came to light.*

ii) Although notionally assetless, Dr Smith has been able to live "high on the hog" (in his own phrase) off assets notionally owned by Dr Cochrane, spending those assets in accordance with Dr Smith's idiosyncratic tastes (including a commissioned water clock and artwork chosen by Dr Smith) or for his personal benefit (for example on private jet travel, much of which involved Dr Smith travelling alone). While I accept that much of the money spent by Dr Smith belonged to others, the freedom with which he dissipated assets notionally in Dr Cochrane's ownership is relevant when considering whether such interest as Dr Cochrane had in those assets was held in her own right, or as Dr Smith's nominee.

iii) Dr Cochrane has on a number of occasions proclaimed that she is a "busy GP with two young daughters and no real business experience", with minimal knowledge of Dr Smith's business activities. Dr Smith has himself accepted that Dr Cochrane lacked "any independent experience of the world of business, the world of property deals". The vast network of companies which she apparently owns, and the complex web of dealings in which those companies have engaged, strongly support the suggestion that her involvement is nothing more than as a cipher, and that Dr Smith – with his extensive track-record of complex, contrived and dishonest business dealings – is "calling the shots".

iv) Dr Cochrane has no obvious sources of independent wealth from which she might have acquired these assets independently of Dr Smith. In 2005, according to her own evidence, she was close to destitution, and in 2014 and 2016, she gave accounts of her assets and wealth which identified no substantial assets beyond those transferred under the IOM Settlement.

v) The confiscation order made against Dr Smith gave him every incentive to hide his ownership of assets behind a nominee owner who he could trust to follow his directions. It is clear that Dr Smith has acted at all times since the Confiscation Order was made with a view to making it appear as if he has no assets – for example his Deed of Separation with Dr Cochrane of 11 March 2014 sought to give Dr Smith all the benefits of certain properties, while transferring no property for the SFO to attach.

69 The Slip Rule Application Ruling constituted an unambiguous rejection of Dr Cochrane's contention that she was entitled to treat Orb's assets as her own on the basis that Orb was not a Non-Arena Company. By extension, her contention that Orb's assets should be

treated as her own for the purposes of determining her balance sheet solvency is unsustainable. Notwithstanding this definitive ruling (and the Directed Trial Judgment and the LCL Settlement Agreement), this assertion as to Dr Cochrane's ownership of Orb was advanced in Dr Cochrane's Third Affidavit of 11 March 2024 in support of her Amended Representation (**pages 348-364**) (as described in more detail at paragraph 33 of Appendix 2 below), in which at paragraph 28 she states that she "*holds 100% of the shares of Orb a.r.l.*" (omitting any mention of the findings of the Directed Trial in relation to Orb) and then, at paragraph 35, claims that Orb's assets are "*relevant in calculating [her] balance sheet solvency*". I respectfully suggest that, in so doing, she was seeking actively to mislead the Jersey Court.

70 Perhaps in response to the concerns raised by the Jersey Court over her characterisation of the ownership of Orb, Dr Cochrane's position in Jersey has more recently developed, such that she now concedes that "*it is correct that paragraph 16 of the Order of Foxton J dated 11 June 2021… states that Dr Smith holds 100% of the equitable interest of the shares in the Non-Arena Companies (listed in Schedule 2 of that Order)*". However, in order to maintain her position in respect of Orb's recall application, Dr Cochrane now argues that "*the Directed Trial did not determine the ownership of the assets owned by the Non-Arena Companies*", which, for the first time, she now asserts "*are held on resulting trust of [sic] the benefit of the Orb Claimants*". (**page 1061**) Dr Cochrane has not yet elucidated how her arguments regarding Orb are to her own benefit, given that she holds no interest in Orb, and it is not a fully accurate statement in any event, given that the IUAs (which the Directed Trial did determine ownership of) were owned by various Non-Arena Companies.

71 A summary of the background to Dr Cochrane's Jersey Recall Applications is set out in Appendix 2 to this statement, which has been prepared with the assistance of Harbour's Jersey lawyers.

F. The PACCAR Decision and its relevance to the Harbour IA

72 This Court will be aware of the PACCAR Decision. By way of very brief summary, the Supreme Court found that certain litigation funding agreements fell within the definition of DBAs, for the purposes of the section 58AA of the Courts and Legal Services Act 1990 ("**CLSA 1990**").

73 However, in order to establish if the Harbour IA is in fact a DBA, a thorough analysis is required of the relevant regulatory framework, and of the Harbour IA itself.

74 For an agreement to qualify as a damages based agreement, such that it is subject to the DBA Regulations, it must satisfy three requirements (see Section 58AA (3) CLSA 1990):

74.1 First, it must be an agreement between a person providing "*advocacy services, litigation services or claims management services*" and the recipient of those services;

74.2 Second, it must provide for the recipient "*to make a payment to the service provider if the recipient obtains a specified financial benefit in connection with the matter in relation to which the services are provided*"; and

74.3 Third, the amount of that payment must be "*determined by reference to the amount of the financial benefit obtained by the recipient*".

75 My understanding is that the PACCAR Decision revolved principally around the first of these grounds, and established that litigation funders were providers of "*claims management services*". Harbour cannot, and does not, dispute this finding or the reasoned conclusions of the Supreme Court before this Court (although it reserves its position in the event that any other point ultimately had to be determined by the Supreme Court).[15] As such, for these purposes Harbour proceeds on the basis that it provides claims management services, and thus the Harbour IA satisfies the first requirement of a DBA according to the CLSA 1990.

76 In relation to the second requirement, I understand this to apply to any contingent funding, non-recourse agreement whereby the funder will only receive a return if the funded parties succeed and proceeds are received. This is the basis upon which Harbour and other funders structure their funding agreements, and Harbour will not seek to contend otherwise in respect of the Harbour IA.

77 For the purposes of this statement, I will focus on the third CLSA requirement, namely that a DBA contains provision for a funder's return which are "*determined by reference to the amount of the financial benefit obtained by the recipient*". I understand this to mean, in simple terms, where a funding agreement provides for a funder's return to be calculated by

[15] I note, however, that considerable efforts have been made by the legislature to introduce legislation in order to correct this position, which appears not to have been intended by the drafters of the amendment to the CLSA 1990. Unfortunately given the timing of the General Election, it has not yet been possible for this legislation to be passed. While Harbour, alongside others in the funding industry, remain hopeful that such legislation will be introduced, in the intervening period the PACCAR Decision has allowed parties such as Dr Cochrane and others to seek to undermine funding agreements such as the Harbour IA notwithstanding the fact that the funded parties have taken the benefit of the funding.

reference to a percentage of the proceeds of the funded action, and it also satisfies the first two criteria set out above, it will meet the definition of a DBA.

78 The Harbour IA, at Schedule 2, contains a mechanism for calculating Harbour's return in the event that the Orb Claimants succeeded in the funded proceedings, which I extract below ("**Schedule 2**"):

Schedule 2 - HF2's beneficial interest in Trust property

HF2's entitlement to Proceeds as a Trust Beneficiary shall, unless modified otherwise in accordance with this Agreement, be as set out in the table below and shall be paid in cash in pounds sterling:

Time from date of this Agreement to date of receipt by HF2 of the Proceeds (subject to the provisions of clause 14)	**Proceeds on Trust payable to HF2**
Up to 6 months	20% of the Proceeds up to and including £40,000,000 (but in any case, after repayment of the HF2 Investment, an amount no less than 2 times the HF2 Investment)
6 – 12 months	30% of the Proceeds up to and including £40,000,000 (but in any case, after repayment of the HF2 Investment, an amount no less than 3 times the HF2 Investment)
Over 12 months	35% of the Proceeds up to and including £40,000,000 (but in any case, after repayment of the HF2 Investment, an amount no less than 4 times the HF2 Investment)
Any Time Period	10% of the Proceeds in excess of £40,000,000 up to and including £80,000,000
Any Time Period	5% of the Proceeds in excess of £80,000,000

The Claimants entitlement to Proceeds as Trust Beneficiaries shall be such proportions as equates to the amount of those Proceeds that they are entitled to receive in such capacity under this Agreement.

At the date of this Agreement, the parties have agreed that the anticipated value of the Causes of Action is at least £100,000,000. On that basis, it is currently anticipated that, after any payments to HF2, the Claimants will receive at least 50% of the Proceeds including where the multiple set out in this Schedule 2 is the applicable basis for calculating HF2's share of the Proceeds.

79 This tiered structure was agreed in order to account for both the time period of the receipt of any Proceeds, as well as the amount of such proceeds. As I understand it, this again conforms with standard industry practice. The first two rows were agreed to cover the eventuality of an early settlement of the funded proceedings, in order to allow for greater

recovery by the Orb Claimants in the event that the proceedings were brief. Harbour's return is therefore based on recovery both on a percentage basis, and by reference to a multiple of its investment.

80 If a funding agreement meets the criteria set out in the CLSA 1990 it is a DBA which must also comply with the requirements of the DBA Regulations, in particular Section 3 of those regulations:

> *3. The requirements prescribed for the purposes of section 58AA(4)(c) of the Act are that the terms and conditions of a damages-based agreement must specify—*
>
> > *(a) the claim or proceedings or parts of them to which the agreement relates;*
> >
> > *(b) the circumstances in which the representative's payment, expenses and costs, or part of them, are payable; and*
> >
> > *(c) the reason for setting the amount of the payment at the level agreed, which, in an employment matter, shall include having regard to, where appropriate, whether the claim or proceedings is one of several similar claims or proceedings.*

81 It is my understanding that it has never been standard practice in the funding industry, as reflected in the approach taken in the Harbour IA, to include reasons in funding agreements for the funder's return. No such reasons are set out in the Harbour IA. As such, again, Harbour does not contend that the Harbour IA meets the requirements of the DBA Regulations. I note that the Minister of State responsible for piloting the DBA Regulations through Parliament, Lord McNally, followed up questions on the draft regulations in Grand Committee with a formal written response to Lord Beecham on 5 March 2013 (**pages 506-510**), shortly before they were promulgated on 1 April 2013. He stated that: "*The DBA Regulations update the 2010 regulations, and take account of recommendations made by the Civil Justice Council (CJC).*"

82 The CJC's position had been set out in a letter dated 24 October 2012 to the Ministry of Justice (**pages 511-514**) in the context of the statutory consultation required under LASPO, which was also extended to non-statutory stakeholders. Among the CJC's recommendations had been a proposed amendment to the information required to be given to a client entering a DBA, which referred to the availability of other methods of financing the claim or financing the proceedings. The CJC suggested the addition of third

party litigation funding into the list, reflecting its view that this was a type of alternative to a DBA, not a DBA itself, and that the Government was not consulting on the basis that litigation funding agreements would be subject to the regulations.

83 The CJC's suggestion was not taken up. However, in Lord McNally's letter, under the heading "Third party litigation funding" he expressly stated on behalf of the Government:

The matter was debated at some length during the passage of the LASPO Act through Parliament. Some colleagues were concerned about the future growth of third party litigation funding arrangements and, in particular, a move into personal injury claims. While there was a call for the introduction of statutory regulation, the Government does not believe this is the right course of action at this stage: rather this is an issue that we are keeping under review and we will not hesitate to act should we need to do so in the future.

G. The LCL Settlement Agreement and the 2014 Harbour Deed

84 As outlined above, on 27 January 2021, shortly after the Directed Trial commenced, Dr Smith, Dr Cochrane and other Smith Parties entered into the LCL Settlement Agreement.

85 The relevant terms of this agreement are:

85.1 Paragraph 3

"The LCL Parties hereby release, discharge and waive (and agree to treat as released, discharged and waived in all respects and for all purposes) all and any actions, claims, rights, demands and set-offs, whether capable of being litigated or enforced in this jurisdiction or any other, whether presently known or unknown to the Parties or to the law, and whether arising in law or equity, under statute or otherwise, that they have, had, may have or hereafter can or shall or may subsequently acquire, against the Settlement Parties or any other person, where such action, claim, right, demand or set-off etc relates to or arises out of or in connection with:

3.1. The Relevant Property;

3.2. The Identified Underlying Assets and the £2 million paid into Stewarts' client account in September 2016;

3.3. The Settlement Assets, Jersey Settlement Assets, Arena Property, Additional Settlement Assets, Arena Surplus and Net Proceeds of Realisation as defined in the Settlement Agreement;

3.4. Any property transferred under the IOM Settlement and / or Geneva Settlement and/or the substitute or traceable proceeds thereof; and

3.5. (For the avoidance of doubt) The LCL Parties' claims to the assets listed in Schedule 1;

For the avoidance of doubt, and consistent with the general nature of the release, discharge and waiver intended to be provided by this Clause 3, the claims released by this paragraph shall include but not be limited to any proprietary, equitable or other claims of any nature whatsoever, including (without limitation) any asserted equitable interests, mere equities, security interests, or asserted claims or entitlements to tenancies, licences or other rights to possession of any real property comprised within the said assets (or directly or indirectly held by companies whose shares are included within the said assets) and where the asset in question relates to shares in a company, any claims held against the company in question and its direct or indirect subsidiaries, in addition to the shares themselves.

*(together the "**Paragraph 3 Property**")"*

85.2 Paragraph 6:

"Further to the above paragraph, and for the avoidance of doubt, the LCL Parties will not seek to challenge the Settlement Parties' cases at the Directed Trial, including their cases to the effect that the Paragraph 3 Property is the realisable property of Gerald Martin Smith, subject to any equitable/proprietary interests therein which may be established and which take priority pursuant to the provisions of the Criminal Justice Act 1988, and / or their cases that the Paragraph 3 Property falls within Dr Cochrane's en désastre estate, or Orb ARL's en désastre estate, subject to any such prior equitable/proprietary interests as are capable of binding such estates."

85.3 Paragraph 9

9. The LCL Parties and each of them undertake to the Settlement Parties and will undertake to the Court (in an order bearing a penal notice):

9.1. To use their reasonable endeavours to assist the Settlement Parties and each of them to realise the Paragraph 3 Property for the benefit of whichever person is ultimately found by the Court, or is agreed to be, entitled to that Paragraph 3 Property.

9.2. Not to impede, obstruct or hinder in any way, whether directly or indirectly or by way of assistance rendered to any third party, any attempts made by the Settlement Parties or any of them to safeguard and/or realise the Paragraph 3 Property.

9.3. To comply, as soon as reasonably practicable, with reasonable requests made of them by the ERs, JLs and/or Viscount (including, for the avoidance of doubt, by meeting with the ERs, JLs and/or Viscount, providing them with information or documentation, and executing such documents as they may require) in connection with safeguarding and/or realising the Paragraph 3 Property.

9.4. To take the specific steps or refrain from taking the specific steps (as the case may be) as set out in Schedule 3, save that a reference to one or more of the LCL Parties individually in relation to a specific obligation contained therein shall not be considered to be an obligation owed by the remaining LCL Parties."

86 It has become apparent to Harbour, and to me, that the Smith Parties, in particular Dr Smith and Dr Cochrane, have never intended to honour the terms of the LCL Settlement Agreement. Indeed, shortly after the conclusion of the Directed Trial, on 9 August 2021, my firm received a letter from Mr Spragg of Keystone Law, solicitors to Litigation Capital Limited ("**LCL**")[16], arguing that Harbour did not succeed at the Directed Trial and therefore the LCL Settlement Agreement had "*no continuing force or effect*" (**page 515**). We responded on 12 August 2021, refuting this assertion. Mr Spragg responded on 16 August 2021, noting (without explanation) that:

- "*The judgement awarded all the assets to the Orb Claimants,*
- *The LCL parties' – SPs parties' agreement was conditional and between themselves. It did not include the Orb Claimants,*
- *LCL did not release the Orb Claimants*" (**pages 516-517**).

87 The background to LCL's involvement in these proceedings is well known to the Court and I will not rehearse it in detail here. In short, LCL is a vehicle of the Smith Parties, and at various times Dr Cochrane, Mr Taylor and Mr Anthony Smith (Dr Smith's brother)

[16] On 24 November 2021, we received an email from an 'Admin LCL' proton mail account attaching a document headed 'Notice of Change' which stated that Keystone Law no longer acted for LCL and that LCL would be acting in person.

have been its directors. In the circumstances, therefore, Mr Spragg's correspondence was sent in the interests (and most likely at the direction) of Dr Smith, Dr Cochrane and Messrs Thomas and Taylor, who, as early as two months after the Consequentials Order was made, were already putting into motion plans to prevent the Settlement Parties from enforcing the rights they had established at the Directed Trial. While no party has formally sought to challenge the validity of the LCL Settlement Agreement, several of the Smith Parties have acted in clear breach of its terms. I summarise several such acts below, and refer to further details which are set out in Appendix 1:

87.1 Mr Thomas appears to have colluded with LCL in relation to its efforts in the Republic of the Marshall Islands to frustrate the efforts of the Enforcement Receivers, in contravention of LCLs' obligations under the LCL Settlement Agreement and the LCL Discontinuance Order. In doing so, Mr Thomas incited a clear breach of the LCL Discontinuance Order by LCL. The Enforcement Receivers commenced contempt proceedings against Mr Thomas, which were ultimately discontinued when Mr Thomas corrected the position.

87.2 Dr Smith directly committed numerous breaches of the LCL Settlement Agreement by impeding the Enforcement Receivers' attempts to manage and realise assets to which Harbour is entitled pursuant to the Directed Trial Judgment, namely the Hamilton House properties;

87.3 Dr Cochrane breached her obligations under the LCL Settlement Agreement by impeding the efforts of the Enforcement Receivers to manage and realise properties in Spain, which ultimately led to the ruling of 18 April 2024 to which I refer below.

88 In the case of Dr Cochrane, as I outline above, the release of claims under the LCL Settlement is directly relevant to the Jersey Recall Applications. This is because Dr Cochrane has asserted proprietary rights over Orb (which also disregards the outcome of the Directed Trial), as well as listing within her estate various properties to which she has waived any rights by way of the LCL Settlement Agreement.

89 Although this will be a matter for development in submissions, Harbour's position is that the release and waiver given by Dr Cochrane and the other Smith Parties under the LCL Settlement Agreement is broad and (as set out above) extends to, among other things: "*all*

and any actions, claims, rights, demands and set-offs, whether capable of being litigated or enforced in this jurisdiction or any other, whether presently known or unknown to the Parties or to the law, and whether arising in law or equity, under statute or otherwise, that they have, had, may have or hereafter can or shall or may subsequently acquire…"

90 The LCL Settlement Agreement also contains no-contest clauses. I would respectfully suggest that, taken as a whole, the LCL Settlement Agreement precludes Dr Cochrane from seeking to ventilate the arguments that she does in relation to the effect of PACCAR on the Directed Trial Judgment and the Harbour IA in the Jersey Proceedings – she has agreed to a full settlement and is no longer entitled to seek to go behind Harbour's entitlements.

91 As I explain above, while LCL (and thus, undoubtedly, Dr Smith) questioned the validity and enforceability of the LCL Settlement Agreement, Dr Cochrane has not formally advanced this position, as far as Harbour is aware. Instead, in her Jersey Recall Applications she has sought simply to ignore it. As the Court is aware, however, the issue of the validity of the LCL Settlement Agreement (and more specifically the LCL Discontinuance Order) came before the Court earlier this year and has been determined.

92 While Harbour was not directly involved, I am aware of a ruling in these proceedings given on 18 April 2024 (the "**LCL Undertakings Ruling**") (**pages 518-519**). I understand the context of this ruling is complex, and relates to efforts made by the Enforcement Receivers to carry out their duties to realise certain assets in Spain, which Dr Cochrane has incorrectly asserted belong to the Orb Claimants. As set out above and further explained in Appendix 1, Dr Cochrane has impeded the efforts of the Enforcement Receivers, in direct contravention of the undertakings she gave in the LCL Discontinuance Order, which reflect Dr Cochrane's obligations pursuant to the LCL Settlement Agreement, and which are accompanied by a penal notice.

93 My understanding is that the LCL Undertakings Ruling's effect was to confirm the binding nature of the undertakings contained within the LCL Discontinuance Order. As such, I respectfully suggest that Dr Cochrane's obligations under the LCL Settlement Agreement remain valid and binding and that the Court has already finally determined this question.

94 I also note that the LCL Undertakings Ruling contained the following finding at paragraph 12:

"*Dr Cochrane has no standing to act in any form of trustee capacity on behalf of the Orb Claimants, still less to take decisions intended to give Dr Smith (who is not an Orb Claimant) the use of any assets.*"

95 I consider it likely that Dr Cochrane's Jersey Recall Applications are being conducted with the assistance, and likely at the direction of Dr Smith, who seeks to regain control of the property which is within Dr Cochrane and Orb's *désastres*.

96 On the basis of the foregoing, I respectfully ask the Court to grant the relief sought by Harbour in reliance upon the LCL Settlement Agreement, as set out at paragraph 5.1 above.

97 A second issue arising from an agreement affects both Dr Cochrane and Mr Thomas, to the extent that they might otherwise be able to attack the Harbour IA on the basis of the PACCAR Decision. The 2014 Harbour Deed was signed from October 2014 onwards, and postdated the receipt of the assets under the IOM Settlement. Each of Dr Cochrane and Mr Thomas (amongst others) agreed that the recoveries under the IOM Settlement were to be treated as "Proceeds received as a result of Success in the Proceedings" for the purposes of Cl 9.1 of the Harbour IA and were to be applied in accordance with the terms of that clause. Accordingly, each of Dr Cochrane and Mr Thomas are estopped by deed from contesting that position. In addition, the 2014 Harbour Deed is on any view not a DBA – it no longer relates to a future contingency, but regulates the effect of an event that had by that stage already happened.

H. The abusive nature of the Smith Parties' attempt to seek to invalidate the Harbour IA

98 Harbour's position is that the Orb Claimants could have argued that the Harbour IA was a DBA and sought to undermine Harbour's entitlement under the agreement at any time after it was agreed (although possibly not immediately). The DBA Regulations entered into force on 1 April 2013, and the Harbour IA was executed on 10 July 2013. As set out above, it is accepted that at that point, not even the Government believed that the DBA Regulations were going to apply to litigation funding agreements.

99 The litigation which gave rise to the PACCAR Decision (the "**Trucks Dispute**") arose in the Competition Appeals Tribunal (the "**CAT**"). It is not necessary for me to explain the background to those proceedings, save that the hearing in front of the CAT at which the issue of whether litigation funding agreements were Damages Based Agreements took

place from 4 to 6 June 2019 (the "**Trucks Judgment (Funding)**[17]"). The Trucks Judgment (Funding) was handed down on 28 October 2019, and subsequently the same arguments regarding the status of litigation funding agreements were ventilated before the Court of Appeal in relation to an application by the defendants in the Trucks Dispute for permission to appeal or alternatively for permission to bring proceedings for judicial review, a decision which was handed down on 5 March 2021 (*Paccar Inc. v RHA and UKTC* [2021] EWCA Civ 299 (the "**PACCAR Court of Appeal Decision**")).[18]

100 Both of these decisions made it clear that arguments about the status of litigation funding agreements at DBAs were 'live' and had been published in high profile judgments since late 2019. Both the Trucks Judgment (Funding) and the PACCAR Court of Appeal Decision also refer to an article published in the Cambridge Law Journal in 2014, by Professor Rachel Mulheron, titled "*England's unique approach to the self-regulation of third party funding: a critical analysis of recent developments*" (the "**Mulheron Analysis**")[19] (**pages 520-553**). The Mulheron Analysis, in my view, contains a thorough breakdown of the primary arguments which would, several years later, be advanced by the defendant parties in the lead up to the Trucks Judgment (Funding), and later by those same parties in their application to the Supreme Court.

101 In particular, Prof. Mulheron expends several pages on a detailed analysis of question of whether litigation funders, according to the rules of statutory interpretation, provide "*claims management services*", as defined in section 58AA of the CLSA 1990. While she concedes that the drafting of the relevant provisions may give rise to a degree of uncertainty, she concludes that "*the author considers that any application which sought to render a LFA unenforceable because it did not meet the requirements of the DBA Regulations 2013 would be bound to fail.*" Professor Mulheron also noted that the possibility that funding agreements were caught by the DBA Regulations 2013 had been "*ventured in some quarters since the implementation of the*

[17] https://www.bailii.org/uk/cases/CAT/2019/26.html
[18] https://www.bailii.org/ew/cases/EWCA/2021/299.html, at paragraph 80(2) "*The Tribunal next pointed out that the argument now advanced by DAF "is not altogether novel": see [37]. In particular, the issue was raised by Professor Rachel Mulheron, who is "one of the leading academics in the field of civil procedure", in an influential article in the Cambridge Law Journal in 2014: see England's unique approach to the self regulation of third party funding: a critical analysis of recent developments [2014] CLJ 570 at 592-595. Although Professor Mulheron considered the argument to be incorrect, she suggested that for the sake of clarity the legislation should be amended.*"
[19] [2014] C.L.J. 570, 590-96.

DBA Regulations 2013".[20] The author also notes that the debate "*has been the subject of comment at several conferences since the Jackson reforms took effect.*"[21]

102 While I understand that Professor Mulheron reached the conclusion that litigation funding agreements were very unlikely to qualify as damages based agreements, this very clearly shows that the arguments raised by the parties to the PACCAR Decision were not novel, and could have been run on behalf of the Orb Claimants, Dr Cochrane, or any other party to these proceedings.

103 I also note that in an open letter to the Lord Chancellor of 16 April 2024 (**pages 554-555**), to which Mr Thomas and Dr Smith appended their signatures and which sought to persuade the Government not to introduce the retrospective aspects of the Litigation Funding (Enforceability) Bill, the authors concede that "*The law has always been that litigation funders provide claims management services and therefore their LFAs are DBAs (provided Section 58AA(3) of the CLSA 1990 is engaged) and are subject to regulation. The Supreme Court in PACCAR simply confirmed this position. That the point had not been judicially considered before is irrelevant: Professor Rachel Mulheron (whose views the litigation funders will be well aware) first raised the point almost a decade ago.*"

104 Despite Professor Mulheron's conclusions, she and those working with her clearly remained concerned that greater clarity was required in this area, and undertook to engage with the Civil Justice Council on a consultation called the Damages Based Agreements Reform Project, the conclusions of which were published in August 2015 (the "**CJC DBA Report**").[22] The aim of this consultation was to make recommendations to the government regarding revisions to the DBA Regulations 2013, with a view to the enactment of the DBA Regulations 2015.

105 In the event, the DBA Regulations 2015 were never adopted. However, noting that while "*it was extremely unlikely that Third Party Funders were inadvertently covered by the 2013 DBA Regulations… the intent of the Ministry of Justice to set any remote residual uncertainty about the point at nought was noted*". The authors recommended specifically excluding litigation funders in the revised report.

[20] Mulheron Analysis, page 3, paragraph 1
[21] Ibid, footnote 140
[22] https://www.judiciary.uk/wp-content/uploads/2015/09/dba-reform-project-cjc-aug-2015.pdf

106 I note that until mid-2016, the Orb Claimants were represented by Stewarts Law, a firm with a very detailed understanding of litigation funding, and who were no doubt aware of the principles I outline above. It is also evident to me, however, that the Orb Claimants would have had no commercial interest seeking to undermine the Harbour IA while they were represented by Stewarts. Harbour complied with the Harbour IA fully and provided the Orb claimants with around £5.2m of litigation funding.

107 However, despite the deterioration of the relationship between the Orb Claimants and Harbour, which ultimately resulted in Harbour successfully establishing its rights under the Harbour IA at the Directed Trial, neither the Orb Claimants nor any other party sought to take up the argument that the Harbour IA was unenforceable on the basis that it was a DBA that did not comply with the DBA Regulations 2013 at any point before or during the Directed Trial. Their opportunities to do so were extremely extensive, given the lengthy nature of these proceedings. I set out at Annex 1 a timetable of the relevant procedural steps in these proceedings. This clearly shows that the Orb Claimants have had numerous opportunities to advance an argument as to the enforceability of the Harbour IA, from mid-2017 (when the first "assets and claims position papers" were produced by the parties, including the Orb Claimants) until July 2021 when the opportunity to appeal the Consequentials Order expired.

108 In particular, the Orb Claimants had multiple opportunities during the lead up to the Directed Trial to advance claims in respect of the validity of the Harbour IA, including:

108.1 Five Case Management Conference (CMC) hearings. The purpose of three of those CMCs was to establish the scope of assets and issues to be determined at the Directed Trial.

108.2 Pursuant to court orders, at least three requirements for parties to file statements outlining their position, including by way of a statement of case or position paper, and consequential amendments to the same. Applications to amend parties' pleadings were being made as late as 31 December 2020 following the PTR, at which time LCL (one of the Smith Parties) applied to amend its statement of case.

108.3 Witness statements of fact, both trial witness statements and those in respect of interlocutory applications such as, for example, the guillotine hearing that culminated in the assets being identified as the subject matter of the Directed Trial.

108.4 The Directed Trial itself, which spanned 7 weeks, represented a significant opportunity for the Orb Claimants to advance their position. It should be noted that during the trial period, extensive submissions on a wide range of issues were put forward by numerous parties to the litigation, in some instances for the first time. No stone was left unturned, and all matters raised were exhaustively deliberated.

109 I note also that Harbour's Statement of Case in these proceedings of 29 November 2017 stated at paragraph 7 that "*Harbour intends to rely upon the Harbour Funding Agreement in these proceedings for its full terms and true effect*". It went on at paragraph 15 to state that "*Harbour entered into the Harbour Funding Agreement in good faith, in the ordinary course of business and on ordinary terms (including terms as to its remuneration and success fee)…*".

110 In response, Messrs Thomas and Taylor in their Responsive Statement of Case of 28 July 2019, at paragraph 24, stated that "*These Respondents accept as accurate in all material respects the summary of the Harbour Funding Agreement given in paragraphs 5 to 16 of Harbour's Statement of Case dated 29 November 2017…*"

111 It is notable that the SFO's responsive statement of case of 12 June 2018 stated at paragraph 13 that "*Harbour is required to prove paragraphs 15 and 16* [of its Statement of Case]. *No admissions are made as to the validity and enforceability of the Harbour Investment Agreement*".

112 Harbour's Amended Responsive Statement of Case of 10 April 2019, stated at paragraphs 7 and 8:

"*7. Harbour relies on the Harbour Funding Agreement as the foundation for its claim under the Harbour Trust: see paras 5-27 of its SOC. The Viscount supports Harbour's case in relation to the Harbour Funding Agreement at paras 55-65 of her SOC….*

8. As for the contentions advanced by certain other Interested Parties in relation to the Harbour Funding Agreement:

a. It is noted that no Interested Party challenges the validity of the Harbour Funding Agreement…"

113 It is clear that the validity and enforceability of the Harbour IA was relied upon by Harbour from the outset of these proceedings, and that no party chose to actively challenge Harbour's position. It is entirely unsurprising, therefore, that the Directed Trial did not need expressly to confirm that status.

114 Accordingly, the Smith Parties have had ample opportunities to argue that the Harbour IA was subject to the DBA regulations and failed to do so. I would respectfully suggest that these matters are res judicata, or give rise to cause of action or issue estoppel, or that it would be abusive, for reasons that will be expanded upon in submissions, for them to be allowed to do so now.

I. The Severability of the Harbour IA

115 Given the PACCAR Decision, if the above points do not determine the matter in Harbour's favour, there appears to be a risk that the Harbour IA would be found by a court to be a non-compliant DBA. I note, however, that the Harbour IA also includes a clause headed "Severability", which provides that:

"*If any term or provision in this Agreement shall in whole or in part be held to any extent to be illegal or unenforceable under any enactment or rule of law, that term or provision or part shall to that extent be deemed not to form part of this Agreement and the enforceability of the remainder of this Agreement shall not be affected*".

116 It is my understanding that the percentage-based recovery provisions in Schedule 2 are capable of being severed, such that the agreement remains enforceable. I do not seek to make submissions in this witness statement as to the legal position in respect of severability. However I will, for the Court's convenience, set out below my understanding of how this would operate in practice.

117 Harbour's entitlement in respect of any proceeds up to £40 million is calculated on an alternative basis, depending on when such proceeds are received. In respect of this agreement, the initial period in respect of proceeds received either 6 or 12 months after the agreement was signed, expired in 10 July 2013, over 10 years ago.

118 The final two rows are intended to determine Harbour's recoveries if the proceeds exceed £40 million, and are calculated on a percentage basis only. It is also worth noting, although not a necessary factor in this exercise, that Harbour does not expect the proceeds to exceed £40 million, indeed they are likely to be significantly less, not least because the costs of the relevant office holders charged with realising the assets have been significantly inflated by the actions of the Smith Parties since the Directed Trial.

119 As long ago as 2 July 2021, not long after the Directed Trial Judgment, my firm wrote to Messrs Thomas and Taylor setting out the likely proceeds, including estimated values of the relevant assets (which are now significantly out of date, and which are likely to be significantly reduced as at today's date) (**pages 556-563**). We also made it clear that Harbour expected its minimum return to be calculated on the basis of the multiples included in Schedule 2. It should be noted that the Orb Claimants (Messrs Thomas and Taylor in particular) have on several occasions asserted that they expect the proceeds to be considerably more than £40 million. In any event, I respectfully suggest that such dispute is not material at this stage.

120 It is Harbour's belief that the sections of Schedule 2 which contain a percentage based recovery can be severed from the Harbour IA, to the extent that they are "illegal or unenforceable", in accordance with the severability provisions of the agreement. This is a straightforward exercise in contractual interpretation which does not require reference to the general common law principles concerning severance, or to satisfy the general common law test. In particular, in the contractual interpretation context the court is not limited to deletions, it does not matter whether there is surplus language left over and there is no need to consider whether the overall balance of the contract remains the same.

121 However, Harbour also intends to argue in the alternative that the general common law test can be satisfied in any event. I set out below another version of Schedule 2 which demonstrates where such modifications are necessary (the "**Modified Schedule 2**"). I note also that in pre-action correspondence, having received the draft of this Application, Marriot Harrison has indicated that Mr Thomas disagrees with Harbour application of the principles of severability in respect of the proposed Modified Schedule 2. These objections would only appear to have application to the common law approach not the exercise in contractual interpretation referred to above. Harbour reserves its position in this regard, including as to the further modification of Schedule 2 and any arguments about how the surviving wording may be interpreted, pending receipt of Mr Thomas's responsive evidence.

Schedule 2 - HF2's beneficial interest in Trust property

HF2's entitlement to Proceeds as a Trust Beneficiary shall, unless modified otherwise in accordance with this Agreement, be as set out in the table below and shall be paid in cash in pounds sterling:

Time from date of this Agreement to date of receipt by HF2 of the Proceeds (subject to the provisions of clause 14)	Proceeds on Trust payable to HF2
Up to 6 months	~~20% of the Proceeds up to and including £40,000,000 (but in any case,~~ after repayment of the HF2 Investment, an amount no less than 2 times the HF2 Investment~~)~~
6 – 12 months	~~30% of the Proceeds up to and including £40,000,000 (but in any case,~~ after repayment of the HF2 Investment, an amount no less than 3 times the HF2 Investment~~)~~
Over 12 months	~~35% of the Proceeds up to and including £40,000,000 (but in any case,~~ after repayment of the HF2 Investment, an amount no less than 4 times the HF2 Investment~~)~~
~~Any Time Period~~	~~10% of the Proceeds in excess of £40,000,000 up to and including £80,000,000~~
~~Any Time Period~~	~~5% of the Proceeds in excess of £80,000,000~~

The Claimants entitlement to Proceeds as Trust Beneficiaries shall be such proportions as equates to the amount of those Proceeds that they are entitled to receive in such capacity under this Agreement.

At the date of this Agreement, the parties have agreed that the anticipated value of the Causes of Action is at least £100,000,000. On that basis, it is currently anticipated that, after any payments to HF2, the Claimants will receive at least 50% of the Proceeds including where the multiple set out in this Schedule 2 is the applicable basis for calculating HF2's share of the Proceeds.

122 It is my understanding that, for severance to be possible at common law, three requirements must be satisfied:

122.1 First, it must be possible to remove the offending language without adding to or modifying other language (known as the "**Blue Pencil Test**")[23];

122.2 Second, the resulting contract must be supported by adequate consideration; and

[23] Harbour reserves its position, should the matter go on appeal to the Supreme Court, as to whether the requirements of the Blue Pencil Test itself remain appropriate.

122.3 Third, the resulting contract must not be of a different nature to the original agreement, such that it is not the sort of contract that the parties entered into at all.

123 As to the Blue Pencil Test, I would respectfully suggest to the Court that the Modified Schedule 2 provisions are workable, and do not require any re-writing or amendment in order to be understood. In fact, they read as plain English, as if the severed provisions had never been included. The nature of the agreement has not changed.

124 The only other passage in the Harbour IA which refers to Harbour's entitlement to a percentage of proceeds is contained within Clause 10.2(e):

"*10.2 Where, pursuant to clause 4.2(i), the Claimants receive a recommendation from the Legal Representatives to accept an offer of Settlement made on behalf of one or more Defendants (the "Recommended Offer") but the Claimants elect to reject the Recommended Offer, if the Proceeds eventually recovered from such Defendant or Defendants are less than the amount of the Recommended Offer, the Claimants shall hold such Proceeds on bare Trust absolutely for the benefit of HF2 and the Claimants and to the extent of their interests as Trust Beneficiaries The Claimants shall additionally keep such Proceeds separate from the Claimants' own funds and shall apply the Proceeds received as a result of Success in the Proceedings in the following order upon receipt of such Proceeds:*

(a) deduct all stamp duties, bank charges and currency exchange costs payable by the Claimants relating to or arising out of any such Success in the Proceedings;

(b) pay to HF2 the HF2 Investment;

(c) pay any other sums due in respect of Claimants' Legal Costs;

(d) pay to the Legal Representatives, Barristers or other third parties with whom the Claimants have concluded a Legal Costs Agreement any success fee or costs uplift payable under any such Legal Costs Agreement;

(e) pay to HF2 any amount due to it in its capacity as Trust Beneficiary pursuant to Schedule 2 save that the percentage of Proceeds payable to HF2 shall be calculated by reference to the amount of the Recommended Offer and not by reference to the amount of the Proceeds; and

(f) pay to the Claimants any remaining amount which the Claimants shall receive in their capacity as Trust Beneficiaries."

125 All that is required in this section of the agreement is the deletion of the second half of Clause 10.2(e), from the words "*save that*" to the end of the clause and in any event Clause 10.2(e) has no relevance to the current situation. Again, the balance of the clause remains entirely coherent, without any further amendments necessary.

126 I note that the Thomas Letter Before Action also refers to the provisions of Clause 14 of the Harbour IA. I understand the implication of the letter to be that, according to Mr Thomas, Clause 14.4(a)(ii) of the Harbour IA also contains provisions that cause Harbour's return to be "*determined by reference to the amount of the financial benefit obtained by the recipient*", in accordance with the third of the DBA requirements of the CLSA 1990. However, I do not believe this to be the case (and again it has no relevance to the current situation).

127 Clause 14.4 reads as follows:

"*14.4 In the event that the Claimants continue with the Proceedings after the Termination Date and the Claimants subsequently Succeed in such Proceedings, the Claimants agree on a joint and several basis that:*

(a) they will hold all Proceeds on bare Trust absolutely for the Claimants and HF2 and to the extent of their interests as Trust Beneficiaries, such Proceeds will be kept separate from the Claimants' own funds and the Claimants shall as trustee of the Trust forthwith pay to HF2 an amount from the Proceeds corresponding to:

(i) the HF2 Investment up to the Termination Date; and

(ii) a sum calculated by applying 10% per annum on the amounts referred to in subclause 14.4(a)(i), calculated from the date of each payment out (or assumption of liability for Adverse Costs) by HF2 to the date of refund to HF2 by the Claimants.

(b) The provisions of clauses 8 and 9 and payment to HF2 under the Trust, will apply as if this Agreement had continued in force, SAVE THAT the amount of Proceeds payable to HF2 under Schedule 2 shall be fixed by reference to the Termination Date and not the date of receipt of monies by HF2 following Success in the Proceedings; and

(c) the Claimants shall not be obliged to make payments to HF2 under the terms of this Trust that are more than the Proceeds it recovers.

For the avoidance of doubt, this clause 14.4 shall survive any termination of this Agreement."

128 Although the Thomas Letter Before Action does not clearly set out the basis of Mr Thomas's assertion in relation to this provision, I assume that Mr Thomas's case is that a reference in 14.4(a)(ii) to a sum of 10% per annum due to Harbour renders this clause a DBA provision in that by its nature a percentage is determined by to a separate figure. However, the figure which determines the amount of the percentage due in this instance is Harbour's investment, rather than the amount of any proceeds. This is effectively a provision for Harbour to recover interest on its investment in the instance that the Harbour IA is terminated before proceeds are received by the Orb Claimants. Therefore by definition, if this clause were to be invoked, the Orb Claimants would have not yet received any financial benefit for Harbour's return to be calculated by reference to. I do not understand the third criterion of the CLSA 1990 to be intended to refer to this scenario, therefore there is no need to consider the severance of this provision.

129 Finally, I also understand Mr Thomas to intend to argue that the provisions of part of Clause 9 of the Harbour IA would render the agreement a DBA, specifically Clause 9.3. Mr Thomas's position has not been made completely clear in correspondence, and as such Harbour reserves its position and will respond more fully in due course if necessary.

130 As to the second requirement of the severability test, which is that the resulting contract should still be supported by adequate consideration, I would respectfully suggest that this would be satisfied. Harbour would still be providing consideration by way of its promise to provide funding to the Orb Claimants (and the provision of funding), and the Orb Claimants would be providing consideration by way of their promise to hold on trust the Proceeds on Success, and to pay to Harbour, out of those proceeds, (1) the amount of the investment and (2) a return, calculated now as a multiple of Harbour's investment.

131 As to the third requirement (that the nature of the agreement should not be altered such that it becomes quite different to that originally agreed), as I outline above, the Harbour IA only requires amendment in very limited respects. The essence of the agreement remains unchanged, namely that Harbour agreed to fund the Orb Claimants in exchange

for a return should Proceeds be recovered. The potential change in Harbour's entitlement is a matter of degree, and not a change in the inherent commercial nature of the agreement.

132 In the alternative, Harbour's case will be that at a bare minimum, its contractual right to repayment of the investment (plus interest at 10% per annum as stipulated in clause 17.1 of the Harbour IA)[24] remains unimpaired. This is specified in Cl 9.1(b), and is unaffected by any finding that the return elements of the Harbour IA are unenforceable.

133 I note that the severance approach is not the only available analysis of how to deal with statutory unenforceability. It will be a matter of submission as to whether it is the correct framework within which to assess the issue, as opposed, by way of example only, to an interpretation of the Harbour IA which locates the DBA within a confined portion of the larger whole and which does not have effects outside of that portion.

134 Finally, Mr Thomas has suggested that even if Harbour's case on severance succeeds, the resulting agreement must somehow conform to the requirements of the CLSA 1990. Mr Thomas has not explained this principle and as such it would be premature for Harbour's position to be fully developed here. That said, Harbour would consider the starting point to be that if the Harbour IA is not a DBA following one of the approaches as set out above, it is not required to meet any criteria set out in S.58AA of the CLSA 1990.

J. Harbour's detrimental reliance on the Harbour IA

135 Harbour has detrimentally relied upon its understanding that the Harbour IA was an enforceable agreement which conferred upon it particular proprietary rights. In these proceedings, as I note above, Harbour funded the Orb Claimants in the amount of approximately £5.2 million, and has since spent several times that amount enforcing its rights under the Harbour IA.

136 In total, Harbour has expended approximately £16.7 million (including amounts advanced by Harbour to the Viscount) as of the date of this evidence, and expects to expend considerably more on dealing with further actions which have been initiated by the Smith Parties. Additionally, the continuing efforts of the Smith Parties and other related individuals to resist the work of court-appointed office holders will further inflate the costs

[24] Harbour's position is that contractual interest also accrues pursuant to clause 17.1 in respect of its entire entitlement, including returns on its investment provided for in Schedule 2 of the Harbour IA, should the court find in its favour on this application.

associated with managing and realising the assets which were the subject of the Directed Trial and depress ultimate recoveries.

137 The other Settlement Parties submitted their relevant costs to the Court at the time of the costs consequentials hearing following the Directed Trial. These represent only a partial picture of the total costs that those parties have expended, as they reflected only their legal costs incurred during the Directed Trial, i.e. to 2021. These totals have undoubtedly increased significantly in the subsequent years (including a total of around £1.16 million expended by the Settlement Parties in the context of the Part 8 Claim).

137.1 Stewarts Law: £2.3 million

137.2 The Viscount: £2.5 million

137.3 The SFO: £1.8 million

137.4 The Joint Liquidators: £3.4 million

137.5 The Enforcement Receivers: £3.8 million

K. Limitation

138 Harbour will also submit that, as determined in the Directed Trial, Harbour's right to recovery under the Harbour IA was engaged (at the latest) on 29 April 2016, at the time of execution of a settlement between Dr Smith, Dr Cochrane and Mr Andrew Ruhan (the "**Geneva Settlement**") (the Confidential Deed, which is one of the Geneva Settlement documents is at **pages 564-568**), which brought to an end the Orb Litigation (which was itself dismissed by way of consent order on 5 May 2016).

139 As such, the time period for the Orb Claimants to contend that the Harbour IA was unenforceable began at the date of the Geneva Settlement, and ended in April 2022, well after the conclusion of the Directed Trial, and during the period in which the Orb Claimants' challenges to the Directed Trial Judgment were well underway.

140 Harbour's limitation submissions will be developed in due course, but I also note here that, as I set out above, the potential arguments regarding the applicability of the DBA Regulations 2013 to the Harbour IA were publicly available since around the time of the Mulheron Analysis in 2014. As such, the Orb Claimants could have discovered the basis

for their potential cause of action at any time from that point in 2014 onwards, and certainly by April 2016.

141 For the purposes of this evidence, I have sought to apply a conventional 6-year limitation period. Harbour's position in this regard is reserved pending the full articulation by Mr Thomas of the relief he seeks, which depends on how he frames his case as to the basis for any right of recovery – obviously different limitation periods may apply depending on how this is put. This reservation also extends to Harbour's right to argue that Mr Thomas is barred by laches from obtaining the relief he seeks, in the circumstances of this case, whether or not a limitation period applies to the relief he seeks.

142 Finally, in pre-action correspondence, Marriott Harrison has indicated that Mr Thomas intends to argue that should his action be time barred, the same should apply to this application by Harbour. Harbour's position will be developed in submission in due course, but I note that this appears to be a misconceived interpretation of the relief sought by Harbour in this application. Primarily, Harbour seeks declarations that Mr Thomas, Dr Cochrane or any other party's actions to undermine the Harbour IA are abusive or incorrect, and only if Harbour does not succeed on those grounds, that those parties' applications are time-barred in terms of advancing the substantive arguments.

L. Dr Cochrane's standing and the Debarring/Stay Directions

143 As she was declared *en désastre* in November 2016, Dr Cochrane's personal interests in these proceedings have been represented by the Viscount. I note, however, that Dr Cochrane executed the LCL Settlement Deed in her personal capacity.

144 In the circumstances, without prejudice to its rights more generally, Harbour is prepared to take a pragmatic position and would not object to Dr Cochrane being permitted to address the Court on the matters dealt with in this application.

145 Given the Thomas Letter Before Action, it seems that Mr Thomas is likely to seek to oppose Harbour's application and seek relief that is relevant to the other Orb Claimants as well as himself. In this regard, Harbour's position is that Mr Thomas remains bound by and must comply, in full, with the terms of the Debarring/Stay Directions before any application or request for relief he makes can proceed.

M. Conclusions

146 I respectfully submit that Harbour's present application should be granted on one or more of the bases I set out above.

147 Subject to the Court's approach in relation to, and determination of, the above matters, further issues may need to be addressed or raised, or directions given, in respect of which Harbour's position is fully reserved. These include, for example: (a) whether the Guarantee entered into between Harbour and Dr Cochrane renders Dr Cochrane liable for any unenforceable obligations under the Harbour IA in any event, and whether Harbour can hold Dr Cochrane, Mr Thomas and Mr Taylor liable for breach of the representations and warranties at Cl 3.1(g) of the Harbour IA under which they promised that the obligations assumed were "legal, valid, binding and enforceable obligations" in the amount of any reduction to Harbour's entitlement; (b) whether Harbour can nevertheless uphold its rights on alternative bases, such as proprietary estoppel, constructive or resulting trusts, unjust enrichment or equitable allowance, or the survival of the Harbour Trust even in the event that the Harbour IA is found to be unenforceable in whole or in part; and (c) the impact of any of these determinations on the position of other parties to the proceedings. I mention these only for completeness, to make it clear that the points I have mentioned above (and which Harbour considers should be sufficient to dispose of the various complaints and attacks which have been intimated) may not be the only arguments available to Harbour to protect its position, although I hope that it will not prove necessary for the parties to take up further court time in relation to this matter.

STATEMENT OF TRUTH

I believe that the facts stated in this witness statement are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Signed……  ……

Name: Adam Karim Zoubir

Date ……31 October 2024……..

ANNEX 1

Opportunities for parties to have raised arguments based upon the DBA Regulations 2013 during these proceedings

No	Date	Event/ Relevant Order
1.	6 March 2017 24 April 2017	CMC hearing before Popplewell J **Assets and Claims Position Papers:** Pursuant to Popplewell J's order dated 6 March 2017, the parties were required to lodge position papers setting out their case.
2.	26 June 2017	CMC hearing The SFO and Enforcement Receivers apply for a determination of the extent to which the Shares and the Jersey Properties (as defined therein) are realisable property of Dr Smith.
3.	28 June 2017	Order by Popplewell J Pursuant to paragraph 8, parties were required to serve a statement of case which, amongst other things, *"provides particulars of the claim(s) or issue(s) which it contends can conveniently be disposed of together with or within the SFO Application"*.
4.	6 and 7 December 2017	Directions Hearing
5.	7 December 2017	Popplewell J Order Each party was required to file a brief document identifying any other Interested Party's claim that was accepted, and to the extent not, the reasons why not (if this was not already set out in that party's assets and claims position paper). This presented another opportunity to advance this position.
6.	24 April 2018	Popplewell J Order Pursuant to paragraph 9(c) of the Order, any Participating Party (including Dr Cochrane) was given the opportunity to file a responsive statement to any other Participating Party's case.
7.	25, 26 and 27 February 2019	CMC Hearing
8.	29 March 2019	Moulder J order The parties were required to give disclosure relevant to the issues in the case
9.	24 February 2020	CMC hearing before Foxton J This CMC took place following the Settlement Agreement being entered into by the Settlement Parties. Again, this represented another opportunity for the Orb Claimants to put forward their position, either in the hearing or in correspondence.

10.	18 May 2020	Guillotine hearing before Foxton J determining the scope of underlying assets.
11.	27 and 28 July 2020	CMC hearing before Foxton J
12.	11 December 2020	Pre-trial review before Foxton J
13.	8 January 2021	The parties to the Directed Trial submitted skeleton arguments
14.	19 January 2021 to 9 March 2021	The Directed Trial before Foxton J
15.	10-11 June 2021	Consequentials Hearing
16.	Appeal period	The Consequentials Order of Foxton J dated 11 June 2021 Paragraph 34 of this order permitted applications for permission to appeal to be made to the Court of Appeal by 2 July 2021. No applications were made by the Orb Claimants.

Appendix 1

Chronology of events relating to the activities of Dr Smith-associated parties following the Directed Trial Judgment

Date	Event	Relevant Smith Party	Description
Ongoing (from October 2021)	Non-Cooperation by Dr Cochrane in respect of Shares in Casa Coloniches B.V. ("**Casa Coloniches**")	Dr Cochrane	Dr Cochrane has been consistently non-cooperative regarding the transfer of the share of Casa Coloniches, a Non Arena Company over whose shares the the Enforcement Receivers are appointed. Her actions include initially refusing to sign transfer documents for the shares, initially refusing to appoint the Enforcement Receivers as directors and sign other documents and indicating an intention to oppose the Attorney General of Jersey's representation to vary the saisie judiciaire made by the Royal Court of Jersey on 24 November 2016 to permit the transfer of shares in Casa Coloniches to the Enforcement Receivers which has caused, and continues to cause, significant delay and cost.[25]
Ongoing (from February 2021)	Obstruction by associates of Smith in bringing claims against companies controlled by the Enforcement Receivers and opposing the recognition of the Enforcement Receivers and Directed Trial Judgment in proceedings in the Republic of the Marshall Islands	Smith parties and Thomas	In February 2021, Simon Cooper and Simon McNally commenced claims against SMA and GACH (both Non-Arena Companies) in the Republic of the Marshall Islands which the Enforcement Receivers on behalf of SMA and GACH opposed. In April 2021, the Enforcement Receivers applied for recognition of their appointment. In June 2021, LCL sought to consent to a claim brought by Cooper and McNally that includer a transfer of the shares of the Non Arena Companies (determined in the Directed Trial to be held for Dr Smith and payable to Confiscation Order) to SMA and GACH, which the Smith parties (including Mr Thomas) claimed were not controlled by the Enforcement Receivers but by Thomas or entities connected with them. In November 2021, Minardi Investments Limited (then acting by Smith associates) brought a further claim against SMA (acting by the Enforcement Receivers). The opposition to recognition of the Enforcement Receivers and the outcome of the Directed Trial continues, resulting in significant delay and costs[26].

[25] Paragraph 5.7.2 of MR26 (**pages 569-623, page 599**)
[26] Paragraphs 5.2.7 and 5.2.8 of MR26 (**page 585-586**).

March 2022 ongoing	Obstruction of vacant possession of Flats 11, 12, 19, 20 and 21 Hamilton House[27]	Certain of the LCL Parties	Dr Smith, Robert Morris, Imogen Smith and Iona Smith, all parties to the LCL Settlement Agreement, were required to give vacant possession of these flats, pursuant to its terms. Despite notice being given to them by the Enforcement Receivers, vacant possession was actively resisted, including by way of court applications, causing significant cost and delay. As noted above, despite vacant possession having ultimately been obtained by the Enforcement Receivers, Dr Smith has again claimed rights over these properties, as a result of the PACCAR decision.
11 May 2022	Part 8 Claim commenced by Messrs Thomas and Taylor by which they sought to appoint Mr Ticehurst as trustee of the Harbour Trust for an improper purpose "the **Part 8 Claim**")	Thomas	As part of their efforts to frustrate the Directed Trial, Messrs Thomas and Taylor (with the support and funding of Smith and his associates) sought to enforce certain rights as trustees of the trust arising out of the Harbour Investment Agreement by way of a Part 8 claim. Despite a previous indication from Foxton J that Messrs Thomas and Taylor were not suitable trustees, given their prior unlawful receipt of trust funds, they acted in direct contravention of the Judge's indications by both seeking to act as trustees, and by improperly appointing a further trustee (Mr Ticehurst). After a further trial which took place in late 2022, again in front of Foxton J, Messrs Thomas and Taylor were found to have been acting in concert with Smith and against the interests of the principal beneficiaries of the Harbour Trust, and were removed as trustees. All of Messrs Thomas and Taylors' arguments failed, the Settlement Parties were forced to incur significant additional costs of over £1m, and the additional litigation caused a significant delay in the ongoing enforcement efforts of the Office Holders.
20 June 2022	Contempt Application against Mr Thomas		The Enforcement Receivers filed a contempt application against Mr Thomas[28] on the following grounds: • Inciting LCL to purport to transfer its shares in SMA and GACH to the "joint trustees of the Orb Claimants Trust"; • Purporting to accept board appointments for SMA and GACH; and • Purporting to act as a director of SMA and GACH by agreeing to stay the RMI proceedings.

[27] Please see footnote 7 of 4.3.1.2 of the 6th Receivership Order Report dated 12 July 2024 (**pages 624-663, page 635**)
[28] Paragraph 4.2.12 of MR25 (**pages 664 – 716, page 679**)

			Ultimately, Mr Thomas carried out the actions required by the Enforcement Receivers, and the contempt application was compromised with costs ordered in favour of the Enforcement Receivers.
29 July 2022	29 July 2022 Dr Smith contempt of court conviction	Dr Smith	Dr Smith was convicted of contempt of court in July 2022 in respect of breaches of a restraint order obtained by the SFO, which restricted his access to certain bank accounts. Dr Smith was found guilty of three counts of contempt and given an eight-month prison sentence, suspended for 18 months.[29]
2022	SMA Application	Smith parties	Attempts made by the Smith Parties, via companies called Minardi and BKV, to prevent the transfer of the shares of SMA to newly appointed trustees of the Harbour Trust;. Foxton J rejected those efforts in a Judgment dated 28 February 2023 ([2023] EWHC 428 (Comm)) (the "**SMA Judgment**") which found amongst other things that: *"19. I have no doubt that the approach taken by those behind Minardi and those behind BKV (to extent that they are different), was co-ordinated, and represented a calculated attempt to delay the hearing and the orders which the Harcus Parker Parties seek. Those individuals should be in no doubt as to the importance which the court attaches to ensuring that its processes are not misused and its orders are complied with, and the full range of the court's powers to serve these ends…* *103. As will be apparent from the foregoing, there is a real risk in this case that individuals who are bound by, but unhappy with, the outcome of the Directed Trial have been and are continuing to instigate proceedings and applications in these proceedings and elsewhere to challenge the outcome of the Directed Trial or by way of a collateral attack on its conclusions. The scale of these activities and the legal costs and court time they are consuming, mean that considerable vigilance will be required on the court's part to ensure that its judgments are respected and its processes are not abused.* *104. If activities of this kind continue, there will need to be careful consideration of a number of matters, including:* *i) whether there are any individuals who may have breached court orders and undertakings and, if so, whether the court's committal jurisdiction should be engaged;*

[29] Paragraph 3.4.3 of MR26 (**page 581**). The court's decision is summarised in this link: Convicted fraudster found to be in contempt of court - Serious Fraud Office (sfo.gov.uk)

			ii) whether officers of the court should be given control of any companies which have changed hands in questionable circumstances, and which are being used in this process; *iii) whether further injunctions could or should be granted against individuals where there is a sufficiently arguable case that they are engaged in activities intended to challenge a judgment which is binding upon them;* *iv) the consequences of undischarged costs orders in the litigation to date; and* *v) who has been funding these various applications and whether any orders against the funding parties or those controlling them would be appropriate.*
31 January 2023	Assignment Application resulting in the Debarring/ Stay Order	Thomas	Despite Foxton J's clear direction regarding further collusion and frustration, Messrs Thomas and Taylor sought to bring a further application against Harbour and the other Settlement Parties in early 2023. This application sought an order for the assignment of claims to certain assets identified in the Consequentials Order, currently under the control of office holders. Foxton J issued directions on 31 March 2023 to the effect that Thomas and Taylor were not permitted to bring any further actions against the Settlement Parties without attending a preliminary hearing related to whether their outstanding costs orders should first be satisfied, and that they would be obliged to disclose the involvement of and/or funding provided by Smith and related parties, i.e. the Debarring/Stay Directions.
29 March 2023	Contempt Application made by Mr Sozawiczny against Mr Thomas (Isle of Man Court)	Thomas	Mr Thomas has been found guilty of contempt of the Isle of Man High Court because, alongside a fellow director and associate of Dr Smith (a Mr Miah) of an Isle of Man company, he failed to take steps (within his control which had been pointed out to him by the applicant) to remove a director of a subsidiary company that was in egregious and flagrant breach of an Isle of Man injunction protecting the applicant's interest in property in Spain. Pursuant to a judgment dated 29 November 2023, Mr Thomas was held to have committed a contempt of court.
August 2023 - ongoing	Obstruction by Dr Cochrane and other Smith associates in respect of C'an Agata and Son Montserrat (the **"Spanish Properties"**)	Dr Cochrane Dr Smith Thomas Stickler	Two subsidiaries of Buena Vida Living 2 B.V (**"BVL2"**), Conor and Agata, both hold registered title to the Spanish Properties. The Enforcement Receivers commenced eviction proceedings against Dr Cochrane and Mr Jansen (Dr Smith's associate who purportedly occupied the property pursuant to an agreement

			with Dr Cochrane). This application succeeded in the Spanish Court in June 2023 and Dr Cochrane was ordered to pay 108,000 euros to Agata (the "Spanish Judgment"), but her eviction was automatically suspended whilst she appealed the Spanish Judgment. In the end, the Spanish Court acceded to the Receivers (as directors of Agata) submission that Dr Cochrane's appeal should be struck out which it was earlier this year. According to the Enforcement Receivers, Mr Thomas asserts that the shares of Agata and Conor (or their proceeds) are (in some way) the property of the "Orb Claimants" held for the Harbour Trust. A summary of the extensive correspondence from Dr Cochrane who threatens litigation in respect of the Spanish Properties[30], is as follows: On 11 August 2023, Dr Cochrane wrote to Bernardo Oliver, an architect who is engaged by the Receivers (as directors of Conor) in connection with the sale of Son Monserrat, noting Mr Oliver's conversation earlier that day with Dr Smith and asserting: a. that the property and Conor are "hers" following their lawful transfer to her pursuant to the terms of the Isle of Man Settlement (with 62.5% owned by her and 37.5% owned by Messrs Thomas and Taylor); b. that Will Besga of Mallorca Law SL ("Mallorca Law") and the Enforcement Receivers had conspired to forge a shareholder resolution to remove Gail Cochrane and Ms Stickler as joint directors of Conor and Agata without their consent, with such forgery having been reported to the Mallorcan authorities and Miguel Games of Pinto Ruiz & Del Valle having been instructed to bring proceedings against Mr Besga for fraud; c. that Mr Besga and the Enforcement Receivers' actions in this regard were part of the wider "strategy of unlawful interference in the outcome of the Directed Trial that Harbour Funding Limited… is unlawfully engaged in to purloin for itself and others the IOMS proceeds"; and d. that Mr Oliver should provide a written undertaking not to assist any party to purchase Son Monserrat without Dr Cochrane's express written consent. On 15 August 2023, Dr Smith wrote to the Receivers to assert that he had been "*asked to assist the Orb Claimants to finish the redevelopment of Son Monserrat and to refurbish C'an Agata*", to confirm that he had moved into C'an Agata (without the Receivers' consent as directors of Agata) and to request that the Receivers "*cease orchestrating interference"* with Agata and Conor.

[30] Paragraphs 4.6.10 to 4.6.10.26 of MR24 (**pages 717 – 768, pages 737 - 742**).

			On 17 August 2023, Gail Cochrane wrote to the Viscount (copied to the Receivers) in response to a letter to Ogier (the Viscount's Jersey lawyers) claiming that: a. Conor, Agata and the Spanish Properties "*are the property of the Orb Claimants*"; b. "*the purported role that Mr Milsom and Standish [Standisch] hold was obtained by fraud because they were purportedly appointed as directors of the Companies by Will Besga (a Mollorca attorney) on the basis of a purported shareholder resolution he forged (see attached letter of 11 April 2023). A criminal action in Spain which is currently subject to litigation and censure before the courts of Palma*" (sic); c. Bernardo Oliver was "*my appointed architect*"; and d. the Receivers have "*no lawful role*" and that "*attempting to sell assets of the Orb Claimants, is tantamount to theft*". On 17 August 2023, Mr Thomas (in his capacity as 'a beneficiary' of the Harbour Trust) wrote to David Standish: a. querying whether the Spanish Properties are the subject of court orders and/or whether the assets have ever been subject to the English proceedings; and b. suggesting that 33% of the properties were "his". On 21 August 2023 (at 11.30am), Dr Smith wrote to the Receivers and repeated many of the unsubstantiated allegations made in Gail Cochrane's letters of 11 and 17 August 2023 and threatening to commence proceedings in Spain against the Receivers and Mr Besga if the Receivers did not resign as directors of Agata and Conor. The Enforcement Receivers provided robust responses to these letters on 21 August 2023. On 23 August 2023 (at 10.47am), Dr Cochrane wrote to the Enforcement Receivers alleging that their appointments as directors of Agata and Conor had occurred as a result of a forged shareholder resolution, suggesting that the Receivers' correspondence with her was "bullying, threatening and demeaning" and asserting that the PACCAR decision confirmed that the shares in Agata and Conor are the property of the Orb Claimants. On 30 August 2023, Gail Cochrane lodged an appeal against the Possession of C'an Agata Judgment. On 12 September 2023, Dr Smith wrote to the Enforcement Receivers asserting that the Directed Trial has "*long since determined*" that the Orb Claimants own the shares of Agata and Conor.

			On 19 September 2023, Ms Stickler emailed the Enforcement Receivers' lawyers asserting that she is the "*only lawful director of Agata and Conor*" and repeating various of the above-noted assertions made by Dr Smith and Dr Cochrane regarding the Enforcement Receivers' appointments as directors of Agata and Conor. She ignored the request to transfer the share in BVL2. On 28 September 2023, Mr Thomas wrote to the Receivers noting his intent to seek leave to appeal and set aside elements of the Consequentials Order, asserting that the Spanish Properties belong to the Orb Claimants and seeking the Receivers' confirmation that no sale of Son Monserrat will proceed until Mr Thomas' appeal has been determined and the Receivers "*have clarified with the court by application in the usual way, whether… they are… empowered to sell Son Monserrat…*" In addition, Dr Cochrane and Dr Smith are claimed to have threatened the Receivers' agents in person, accused the Receivers' lawyer of forging a document, reported that lawyer and the Receivers to the criminal authorities in Mallorca, instructed the Receivers' lawyers, agents and architect to cease acting and threatened legal proceedings against them in an attempt to prevent a sale. In the face of this behaviour, which was obstructive and in clear breach of court order, the Receivers ultimately concluded a sale of the property last year. As outlined above, after Dr Cochrane had refused to withdraw her appeal of the Spanish Judgment and written submissions were exchanged with the Court, on 18 April 2024, Foxton J issued a ruling that Dr Cochrane was bound by undertakings she provided in the LCL Discontinuance Order, which prevented her from resisting the Enforcement Receivers' efforts to realise the Spanish Properties.
2 December 2023	Mr Sodzawiczny and the Anti-Arbitration Injunction	Dr Cochrane Dr Smith	Application made by Mr Sodzawiczny for an anti-arbitration injunction to prevent Dr Smith and Dr Cochrane from pursuing an LCIA Arbitration they purported to commence on 6 December 2023. In his judgment dated 7 February 2024[31], Foxton J held the following:

[31] Sodzawiczny v Smith (Re Arbitration Claim) [2024] EWHC 231 (Comm) (07 February 2024) (bailii.org)

			"*there is a real risk in this case that individuals who are bound by, but unhappy with, the outcome of the Directed Trial have been and are continuing to instigate proceedings and applications in these proceedings and elsewhere to challenge the outcome of the Directed Trial or by way of a collateral attack on its conclusions…* *…I am satisfied that Dr Cochrane is acting wholly at Dr Smith's direction and for his purposes in lending her name to the Smith RFA".*
10 January 2024	Slip Rule Application	Dr Cochrane	As described in further detail in the body of this witness statement, Dr Cochrane in filing this application sought to have two companies added to the list of 27 non-arena companies, and sought to have LCL and Orb removed from the list.
8 July 2024	Smith Restraint/Receivership/Confiscation Order application	Dr Smith	Dr Smith served an application in these proceedings, challenging the SFO's Restraint, Receivership and Confiscation Orders.[32]
11 July 2024	Thomas Letter Before Action	Thomas	The letter before action, received on 11 July 2024, issued on behalf of Mr Thomas, intimates a challenge the validity of the Harbour IA based upon the PACCAR Decision.
19 July 2024	Dr Smith's fraud conviction	Dr Smith	As recently as July 2024, Dr Smith was convicted of fraudulently obtaining a COVID-19 bounce back loan to the value of £50,000 for his personal use, by means of a fraudulent application. A portion of the funds he fraudulently obtained were used to pay costs orders owed to the SFO pursuant to an order made by Foxton J on 29 June 2020.[33]
20 September 2024	Dr Smith's fraud sentencing	Dr Smith	Dr Smith sentenced to 18 months' imprisonment for Covid loan fraud
Pending	Further contempt application against Dr Smith	Dr Smith	The SFO has filed a further application for GS' committal to prison for contempt of court for further breaches of the Restraint Order and failing to comply with undertakings he gave in respect of Flats 11, 12 and 21 Hamilton House which were recorded in the LCL Discontinuance Order of February 2021. This application is supported by a 40 page witness statement from Mr Standish, as receiver appointed under the 2022 Receivership Order. It is understood that Dr Smith's solicitors, Berkeley Square Solicitors, refused to accept service of the application and on 27 March 2024, the SFO subsequently applied for such service to be deemed good service. I understand a final hearing has been listed for 29 and 30 October 2024.

[32] (**pages 399-435**)

[33] https://www.cps.gov.uk/cps/news/businessman-found-guilty-government-backed-covid-19-bounce-back-loan-fraud#:%7E:text=Businessman%20found%20guilty%20of%20Government%20backed%20COVID%2019%20bounce%20back%20loan%20fraud,-19%20July%202024&text=An%20entrepreneur%20was%20convicted%20today,be%20sentenced%20on%2020%20September and (**pages 769-770**).

Appendix 2

Background to Dr Cochrane's Jersey Recall Applications

The Jersey Recall Applications

I. Administration application

1 In the context of the Orb Claimants' failure to honour the terms of the Harbour IA, as addressed in the Directed Trial Judgment, Harbour issued formal demands in Jersey against Orb by letters dated 17 and 26 August 2016 (**pages 771-779**), and pursuant to these demands, Orb was informed that failing settlement, an application would be made for the appointment of an administrator.

2 Following the formal demand upon Orb referred to above, Harbour applied to the Royal Court of Jersey (the "**Royal Court**") for a letter of request to the English High Court seeking an administration order in respect of Orb. The Royal Court's judgment on that application was dated 28 September 2016, Representation of Harbour v Orb [2016] JRC 171 ("**the Administration Judgment**") (**pages 780-795**).

3 In paragraph 40 of the Administration Judgment, the Royal Court noted as follows:-

"In her written responses to the formal demands made by Harbour, Dr Cochrane denies any debt being due by ORB to Harbour, although that denial is not repeated in her affidavit of 7th September, 2016, filed in response to Harbour's application. Indeed, and perhaps significantly, she says nothing in that affidavit about Harbour's claim or whether or not it is accepted by ORB. Furthermore, in his skeleton argument, Advocate Nicholls, representing ORB, makes no reference at all to Harbour's claim and whether or not it is accepted by ORB. His submissions are limited entirely to the lack of any evidence of ORB having assets within England and Wales, a requisite, he says, for any letter of request to be issued. Advocate Nicholls did not appear at the hearing on the 14th September, 2016, and therefore the Court was unable to press him on the point, but if ORB had a genuine defence to Harbour's claim, it would be surprising in the extreme for that defence not to be mentioned, and indeed, given some prominence."

4 The Royal Court concluded that Harbour was a creditor of Orb with a liquidated claim and that Orb was cash flow insolvent. It nevertheless decided in its discretion not to issue a letter of request on the ground that, given Orb's incorporation in Jersey and other matters, a *désastre* would be the preferable way of proceeding,

II. *Désastre* application

5 Following the Administration Judgment, Harbour made a formal demand on Dr Cochrane under the terms of her personal guarantee of the obligations of Orb that I describe above.

6 It then applied for declarations of *désastre* in respect of both Orb and Dr Cochrane. The matter was heard inter partes on 24 November 2016. The Royal Court granted the applications on 24 November 2016 for the reasons set out in a judgment dated 12 January 2017, Harbour v Orb [2017] JRC 007 ("**the *Désastre* Judgment**") (**pages 796-809**).

7 The Royal Court reminded itself (at paragraph 13 of the *Désastre* Judgment) that, in order for the Court to declare a *désastre*, a creditor must show that it has a liquidated claim (i.e. a certain debt which is not the subject of a genuine dispute or an arguable defence) which exceeds the minimum threshold of £3,000 and the creditor must also show that the debtor is insolvent (defined as meaning 'an inability to pay its debts as they fall due' i.e. on a cash flow basis) but has realisable assets. The Court said that its judgment should be read as a continuation of the Administration judgment.

8 As to whether Harbour was a creditor with a liquidated claim against Orb, at paragraphs 19 - 21 of the *Désastre* Judgment, the Royal Court held:

"19. Advocate Drummond, for Harbour, took the Court through a careful analysis, set out in his skeleton argument, of how Harbour's liquidated claim arose under the Funding Agreement, the Isle of Man Agreement, and the 2014 Agreement, the latter presenting an insurmountable hurdle for ORB and Dr Cochrane in that by that Agreement, to which they were a party, they had agreed that the assets recovered by Dr Cochrane under the Isle of Man Agreement (at least £10m) would be treated as proceeds of the English proceedings Harbour had been funding, giving rise to an immediate liability on the part of ORB to repay the sums advanced, namely £5,189,010.48, just short of the aggregate amount Harbour was committed to fund under the funding agreement."

9 The Court held that Harbour was indisputably owed this sum by Orb and there was no reasonably arguable defence to that claim. It further held that Dr Cochrane had no reasonably arguable defence to the claim against her in this sum pursuant to her guarantee.

10 Having found that Orb had realisable assets, the Royal Court considered the position of Dr Cochrane at paragraph 32 of its judgment in the following terms:

"In or around April 2016, Dr Cochrane signed a loan note in favour of Phoenix Group Foundation ("Phoenix") in the sum of £73.75m in which she represents that she is the ultimate owner of a number of

assets set out in Schedule 1 thereto. She also said in her affidavit of 7th September 2016, "I am also privileged to be a very wealthy woman, with holdings in dozens of companies worldwide, including [ORB]."

11 The Royal Court was satisfied that Dr Cochrane and Orb had realisable assets despite the appearance of a strategy to divert assets away from Orb.

12 The Court then considered a submission that Orb had a counterclaim against Harbour in relation to the Harbour IA which it was entitled to set off against any debt owed to Harbour. In this connection the Royal Court said as follows:

"44. If this was a genuine claim for £73M, then it was inconceivable to us that no reference had been made to it in the previous proceedings before this Court, in which Dr Cochrane did file an affidavit (which made no reference to it) or at any time at all in the dealings between Orb and Dr Cochrane on the one part and Harbour on the other. It was inconceivable to us that, if the claim was genuine, Orb and Dr Cochrane were unable to give particulars of it sufficient to enable us to assess whether it was reasonably arguable. Furthermore, there was no explanation as to how such a substantial claim came to be filed before the High Court without legal advice a mere two days before the hearing.

45. These arguments had been put forward by Orb and Dr Cochrane at the last moment without any evidence being filed in support on their behalf. In our view, given the background of this matter, we would have expected at least an affidavit from Dr Cochrane to assist us in the exercise of our discretion, an affidavit upon which she would, of course, have been susceptible to cross-examination. She gave us no such assistance."

13 The Court concluded that to refuse or adjourn the applications for declarations of *désastre* would be unjust to Harbour and the other creditors.

14 Having regard for various other considerations, the Court held that the requirements for granting a declaration of *désastre* were met in respect of both Orb and Dr Cochrane and accordingly, on 24 November 2016, the Royal Court declared Orb and Dr Cochrane *en désastre* (**pages 810-817**).

a. Events following the declaration *en désastre*

15 On 30 December 2016, Harbour filed a proof of debt in each of Orb and Dr Cochrane's respective *désastres* (**pages 818-847**). Those proofs of debt have not yet been adjudicated by the Viscount.

16 The Viscount applied to the Royal Court to issue two letters of request to the English Court. Despite what Dr Cochrane had said in her affidavit for the bankruptcy hearing (**pages 848-853**), the Royal Court noted in its judgment of 16 February 2017 (**pages 854-858**) (giving reasons for issuing those letters of request) that (paragraph 9):

"… Dr Cochrane has now asserted to the Viscount that she has very few assets. According to her recently completed personal questionnaire and statement of income and expenditure required under Article 18 of the Law, Dr Cochrane has advised that her only assets consist of six pieces of jewellery, two shares in a company known as Bodega Limited ("Bodega") and an unknown value in a partnership, which the Viscount believes is a share in the medical practice from which she works. Other items of value currently in her possession, which include a substantial art and wine collection, a rib, several high-value motor vehicles and other chattels are said to be owned by Bodega, of which the 99.9% shareholder is said to be Litigation Capital Funding, a New York based entity believed to be owned by Mr Anthony Smith, the brother of Dr Gerald Smith. Dr Smith is the former husband of Dr Cochrane and has twice been convicted of offences of fraud and served a prison sentence. Dr Smith has advised the Viscount that Orb does not have nor has it ever had any assets."

17 The judgment further noted that (paragraph 13):

"Following the declarations en désastre, creditors had submitted claims, together with supporting documents, against Dr Cochrane in the sum of £765,532,125 and against Orb in the sum of £562,889,913. The Viscount believes there is potentially some degree of duplication in the claims as some creditors have claimed against Dr Cochrane as guarantor of the obligations of Orb. Nevertheless, given the background described in the September judgment and the judgment of Popplewell J and the other matters referred to above, the Viscount regards it as inconceivable that both Dr Cochrane and Orb have been able to acquire such colossal levels of debt without owning any of the assets listed by Harbour in its application for désastre. The Viscount also notes that Dr Cochrane and Orb are subject to ongoing and vigorously fought legal proceedings in England. Five such sets of proceedings are listed in her affidavit."

b. Application for a retrospective extension of time to appeal

18 On 31 December 2019, Dr Cochrane applied for an extension of time in which to appeal against the declaration of *désastre* in her case (**pages 859-863**). This application first came before Birt JA as a single judge on 14 January 2020, who directed that the matter be brought to the full court (**page 864**). Dr Cochrane's application was subsequently listed for hearing during the week commencing 27 July 2020.

19 On 16 July 2020, Dr Cochrane applied for an adjournment, substantially on the basis that she had a short while earlier dismissed Advocate Blakeley and was planning to instruct a new firm of advocates (**pages 865-867**). That application for an adjournment was refused by the Court of Appeal in a short judgment dated 20 July 2020 (Cochrane v Harbour Fund II LLP and the Viscount [2020] JCA 140A) (**pages 868-872**). The new firm was not in fact instructed and accordingly Dr Cochrane appeared as a litigant in person at the hearing.

20 On Friday 24 July 2020 – the matter being listed for hearing on Tuesday 28 July 2020 – Dr Cochrane sent to the Court an affidavit dated 23 July 2020 (**pages 873-880**) together with various exhibits. By a letter dated 27 July 2020 (**pages 881-883**), she purported to file two further documents. Her application to adduce those documents was rejected (**pages 884-920**).

21 The Court of Appeal also noted that (paragraph 100):

"As to creditors, the Viscount states that the current value of claims in Dr Cochrane's désastre is approximately £304,293,400, albeit that she has not yet adjudicated upon the claims because she considers it unfair to put potential creditors to the cost of proving their claims in circumstances where the current English litigation is likely to result in the effective adjudication of many of these claims and where, pending the outcome of those proceedings, the present assets are insufficient to lead to any distribution."

22 The application for an extension of time was dismissed, the Jersey Court of Appeal finding:

"104. … Given the extremely lengthy delay (nearly three years), and our conclusion that the reasons given for that delay do not provide justification, we would only consider extending the time for appealing if the merits of the proposed appeal were overwhelming (to use Beloff JA's expression). That is certainly not the case. As we have described earlier, we conclude that there are minimal prospects of Dr Cochrane being successful in showing that Harbour does not have a liquidated contractual claim in debt, or that she did not have realisable assets at the time of the désastre application. Even in relation to whether Harbour has a proprietary claim to the assets which are the subject of the current English litigation, any case mounted on appeal would be at best arguable; it is certainly not overwhelming.

105. The above factors are sufficient to lead to a rejection of this application. But when one adds in the factor that prejudice would be caused to Harbour and other parties if the application were to be allowed, the case for refusing to extend the time for appealing is unanswerable."

23 In a separate costs judgment, the Jersey Court of Appeal awarded costs against Dr Cochrane on the indemnity basis (**pages 921-924**). In respect of her application for an extension of time, it stated:

"7. In our judgment, the Applicant's conduct in pursuing the Application was unreasonable and takes the case out of the norm. We so conclude for the following reasons:

(i) The delay was extreme (nearly 3 years when the time for appealing is 28 days) in circumstances where this Court found that there was no justification for this period of delay. As the Court said at paragraph 104 of its judgment, this alone was sufficient to lead to dismissal of the Application unless the merits of any appeal were overwhelming.

(ii) The period of delay and the inaction by the Applicant has also to be judged against the fact that, to the Applicant's knowledge, administration of the désastre was continuing throughout this period.

(iii) Not only was there extreme delay without justification but this Court found that the prospects of success of any appeal were minimal and that its pursuit would cause prejudice not only to Harbour but also to other parties to the current English litigation, who had all proceeded and incurred time and expense on the basis that the Applicant was en désastre and that the Viscount was accordingly entitled to act on her behalf.

24 *Putting these matters together, we consider that pursuit of the Application was unreasonable and that it would not be a fair result for Harbour only to be able to recover the costs which it has incurred on the standard basis."*

25 *As to the other applications, the Court of Appeal said (at paragraph 11) "In our judgment, the conduct of the Applicant both in relation to the adjournment application and the last minute applications for fresh evidence was unreasonable and justifies an award of indemnity costs."*

c. Extension of Dr Cochrane's bankruptcy

26 On 14 January 2021, the Royal Court granted an application by the Viscount to extend Dr Cochrane's bankruptcy for three years (to 24 November 2023), for the reasons set out in a judgment dated 29 January 2021 (**pages 925-930**). The Royal Court noted that:

"3. The Viscount has taken control or possession of certain realisable assets of Dr Cochrane valued at approximately £75,000 and believes that Dr Cochrane also owns further realisable assets, including an interest in certain Jersey properties and movable property located therein, and shares in various other

companies. However, the ownership of such further assets of Dr Cochrane is currently the subject of proceedings in the High Court of England and Wales (CL-2017-000323) ("the English Proceedings"). The English proceedings are highly complex, involving 47 parties and numerous personal and proprietary claims. They are summarised in the judgment of the Court in Viscount v Smith [2020] JRC 043. …

7. The claims filed by potential creditors in Dr Cochrane's désastre total £305,261,798.37. Due to the ongoing English Proceedings, the Viscount has not yet conducted an inspection of the creditors' claims, nor has she formally adjudicated or admitted any of them. The Viscount considers that there is no utility in adjudicating any of the creditors' claims until the present uncertainty is resolved as to whether, and to what extent, there may be any assets available for distribution in the désastre. In her view, it is also unfair to put the creditors to the cost of proving their claims in circumstances where the English Proceedings are likely to result in the effective adjudication of many of their claims, and there are presently no assets available for distribution."

d. Further application for a (retrospective) application for an extension of time to appeal

27 On 16 August 2023, Dr Cochrane sent an application to the Jersey Court of Appeal seeking an extension of time to appeal against the declarations *en désastre* of both Dr Cochrane and Orb on the basis that the PACCAR Decision rendered the Harbour IA unlawful and unenforceable (**pages 931-933**). On 18 August 2023, Harbour confirmed that it intended to oppose this very late, retrospective application for an extension of time (**page 934**).

28 As far as we are aware, no directions have been given by the Court of Appeal for the resolution of this application, if indeed it is still being pursued by Dr Cochrane.

e. Further application for an extension of the bankruptcy

29 On 3 October 2023, the Viscount issued an application for the further extension of Dr Cochrane's bankruptcy for a further three years (to 24 November 2027) (**pages 935-964**), resulting in an order of the Jersey Court dated 6 October 2023, convening a substantive hearing (**pages 965-969**).

30 However, on 27 October 2023, the Viscount and Dr Cochrane agreed to the terms of a consent order that the hearing of that extension application be adjourned until after the determination of any recall application issued by Dr Cochrane (**pages 970-971**).

31 I understand from Harbour's Jersey lawyer, Advocate Edward Drummond, that irrespective of the outcome of the Viscount's application to extend the bankruptcy of Dr Cochrane, Orb will remain in bankruptcy; the provisions of Articles 39 to 42 of the Bankruptcy (*Désastre*) (Jersey) Law 1990 only apply to individuals and do not apply to companies.

f. Recall Application

32 On 21 November 2023, Dr Cochrane issued a representation seeking the recall of the declarations *en désastre* made in respect of her estate and the estate of Orb pursuant to Article 7 of the *Désastre* (Bankruptcy) (Jersey) Law 1990 on the basis that they are both currently balance sheet solvent, with very small (or zero) claims against them, but with assets valued in the tens of millions of pounds. I understand from Harbour's Jersey lawyers, Bedell Cristin, that a recall petition such as this is adjudicated on the basis of the petitioner's balance sheet solvency as at the date of the application. Harbour's position is that Dr Cochrane has misrepresented both the nature of the assets which the Court should take into account (most of which belong to Orb, or were subject to the LCL Settlement I refer to above) as well the value of those assets, which she has grossly inflated. Additionally, Harbour contends that Dr Cochrane has also misrepresented the liability position insofar as the claims of Harbour and other creditors are concerned.

33 On 1 December 2023, the representation was adjourned to a convening hearing on 6 February 2024. On that date, for the reasons given in a judgment of the Royal Court dated 23 February 2024 (**pages 972-976**), the Viscount was convened to the application. Dr Cochrane was given leave to file an Amended Representation (which she did, dated 7 February 2024 (**pages 977-991**) and she also filed a further affidavit in support (her Third Affidavit sworn on 11 March 2024), which was served on creditors (**pages 348 – 364**).

34 On 18 June 2024, Harbour applied for a stay of the Amended Representation until 28 days after final resolution of Harbour's intended application to the English High Court for a declaration as to the status of the Direct Trial Judgment including as to the impact if any of the PACCAR Decision and related ancillary matters ("**Harbour's Recall Stay Application**"). On 18 June 2024, I swore an affidavit in support of Harbour's Recall Stay Application (**pages 992-1008**).

35 A directions hearing in respect of Harbour's Recall Stay Application took place on 25 June 2024 (**pages 1009-1010**). The Court set out a timetable for the filling of further evidence

and submissions from Harbour, Dr Cochrane and the Viscount. Accordingly, on 2 August 2024 Harbour filed its further evidence (**pages 1011-1018**), and the Viscount subsequently filed evidence in respect of Dr Cochrane's assertions regarding her asset and debt position on 8 and 23 August 2024 (pages **1019-1055**). Dr Cochrane filed responsive evidence on 10 September 2024 (**pages 1056-1062**).