CIVIL PROCEDURE NEWS

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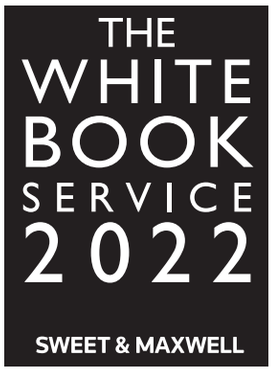

In Brief

Cases

■ **CRO v REC** [2023] EWHC 189 (Comm), 3 February 2023, unrep. (Foxton J)

Freezing injunction – legal expenses exception

CPR r.25.1(1)(f), PD25A, Annex A. Foxton J considered the wording of the standard form freezing injunction, which is set out in Annex A of PD25A, and that set out in Annex 11 of the Commercial Court Guide. Both were noted as containing the following wording of the legal expenses exception:

> *"This order does not prohibit the Respondent from spending £ a week towards its, her or his ordinary living expenses and also £ [or a reasonable sum] on legal advice and representation. [But before spending any money the Respondent must tell the Applicant's legal representatives where the money is to come from.]"*

The specific issue, noted at [2], was "*whether, when the reasonable sum wording is used, together with the proviso in square brackets at the end ('the Source Proviso'), the effect of the order is to require the respondent to identify not only the source from which the funds used to meet legal expenses originate, but also the amounts so spent*." **Held**, it was clear that the wording of that proviso did not require respondents to disclose the amount they spend on legal expenses. It does not do so because it does not expressly state that requirement (at [6]). Secondly, if the source proviso were to require respondents to disclose the amount they spend on legal expenses it would need to say so clearly and expressly. That was required by requirements of fairness (at [5]–[6]). Finally, Foxton J disagreed with Neuberger J's approach to the legal expenses exception in ***Cantor Index Ltd v Lister*** (2002). On Foxton J's analysis:

> *"[16] It will be apparent that . . . in Neuberger J's analysis . . . the reference to 'legal expenses' in the standard form was not limited to legal expenses in the litigation commenced by the claimant or in relation to that dispute. I am (respectfully) unable to agree that this is the usual effect of this provision. The principal purpose of the legal expenses proviso is almost invariably characterised as a means of ensuring that the respondent can meet the expenses of the proceedings in which the claimant seeks judgment (including ancillary proceedings), rather than providing a means of accessing legal advice or conducting litigation generally. Thus, in Tidewater Marine International Inc v Phoenixtide Nigeria Limited [2015] EWHC 2748 (Comm), [36], Males J observed:*
>
> > *'A further principle is that a defendant is entitled to defend itself and, if necessary, to spend the frozen funds, which are after all its own money, on legal advice and representation in order to do so. This is recognised by the standard wording of the usual freezing order, although the defendant's right to spend its own money on legal advice and representation is limited to expenditure of "a reasonable sum".'*
>
> *To similar effect, Sir Thomas Bingham MR in Sundt Wrigley Co Ltd v Wrigley (unreported, 23 June 1995) stated that 'in the Mareva case, since the money is the defendant's subject to his demonstrating that he has no other assets with which to fund the litigation, the ordinary rule is that he should have [to] resort to the frozen funds in order to finance his defence.' Gee, Commercial Injunctions, [21-039] is less definitive, observing of the legal expenses exception:*
>
> > *'What this covers is a matter of interpretation taking into account all the terms of the order including other exceptions and the surrounding circumstances when the order was made. This includes legal advice and representation for the purpose of defending the proceedings in which the order has been made. If advice is needed from abroad for the purpose of conducting the English proceedings, this is covered by the gateway'.*
>
> *However, his primary focus is on the legal expenses of the dispute with the applicant."*

Sundt Wrigley & Co Ltd v Wrigley (unreported, 23 June 1995), unrep., CA, ***Cantor Index Ltd v Lister*** [2002] C.P. Rep. 25, ChD, ***Tidewater Marine International Inc v Phoenixtide Nigeria Ltd*** [2015] EWHC 2748 (Comm), unrep., Comm., ref'd to. (See ***Civil Procedure 2022*** Vol.1, para.44.2.6.)

■ **Olympic Council of Asia v Novans Jets LLP** [2023] EWHC 276 (Comm), 10 February 2023, unrep. (Foxton J)

Contempt of court – power to commit directors and corporate officers

CPR r.81.1(2). Judgment was obtained by the claimant in proceedings that arose from an aircraft lease to purchase agreement. Judgment was obtained for approximately US $7 million, plus costs. Directions were also given regarding the determination of a profit share. No penal notice was, however, added to that order. Subsequently, a worldwide freezing injunction was granted against the first defendant. It contained a penal notice. The second defendant was, at

a later date, also made subject to the worldwide freezing injunction. A later order, again with a penal notice, was then issued against all three defendants. The question then arose whether the breach of any of the orders made could form the basis of an application for committal against the third defendant, a director of the first defendant. The specific issue before the court was whether there was a power to commit directors or other officers of corporate bodies for breaches of orders that were made against that corporate body. **Held**, such a power was implicit in CPR r.81.1(2). Under CPR Pt 81 as it was prior to 1 October 2020, the then r.81.4 made provision for that to be done. That provision could be traced back to s.33 of the Common Law Procedure Act 1860 (at [26]–[30]). CPR r.81.4 (pre-October 2020) was not, however, replicated in its replacement, the current CPR Pt 81 (at [22]–[23]). The current CPR r.81.1(2) provides that CPR Pt 81 was not intended to alter the substantive law of contempt. That that was the case had been explained in a number of cases post-2020, e.g., ***BMF4 Plc v Rizwan Hussain*** (2022) and ***Deutsche Bank AG v Sebastian Holdings Inc*** (2022). The provision that was contained in the pre-October 2020, CPR r.81.4 formed part of the substantive law of contempt, it was thus implicit in the current CPR r.81.2 (at [33]–[35]). As the judge explained:

"[31] Turning to the October 2020 Version:

i) As noted above, r.81.1(2) and (3) provide that the October 2020 Version does not alter the scope and extent of the jurisdiction of court determining contempt proceedings, and has effect subject to and to the extent that it is consistent with the substantive law of contempt. There is some scope for argument as to whether the rule that was CPR 81.2(3) was part of 'the substantive law of contempt', or a procedural provision addressing how an order is to be enforced. In my assessment, the better view is that it is a legal principle which was substantive in content, but one which took effect via procedural statutes and rules.

ii) CPR 81.2 defines 'penal notice' as follows:

'A prominent notice on the front of an order warning that if the person against whom the order is made (and in the case of a corporate body, a director or officer of that body) disobeys the court's order, the person (or director or officer) may be held in contempt of court and punished by a fine, imprisonment, confiscation of assets or other punishment under the law'.

This pre-supposes that the previous principle relating to the position of the directors or officers of bodies corporate remains part of the law of contempt. However, it could be argued that the provision only provides that directors or officers 'may be held liable', leaving open whether the test to be applied in determining whether there is such a liability is that arising under the 'special provision' which preceded the October 2020 Version, or the more exacting 'wilful interference' basis for contempt which applies to non-parties at common law. The Consultation Paper (at p.9) stated that 'this definition is an amalgam covering as succinctly as possible all bases (prominence, corporate bodies and types of punishment)'.

iii) The effect of CPR 81.4(2)(e), taken together with CPR 81.2, is that there is a requirement that an order made against a body corporate includes a penal notice in these terms, if an application for committal is to be made.

iv) Rule 81x.20, which remains in force alongside the October 2020 Version, prescribes the contents of a writ of sequestration to enforce a judgment, order or undertaking. Rule 81.x.20(1) provides that 'if a person required by a judgment or order to do an act or does not do it within the time fixed by the judgment or order ... the judgment or order may be enforced by a writ of sequestration against the property of that person'. Rule 81x.(3) provides:

'If the person referred to in paragraph (1) is a company or other corporation, the writ of sequestration may in addition be issued against the property or any director or other officer of that company'.

v) These provisions have led the editors of White Book 2022, Vol 2, [3C-24.1] to conclude that 'the contempt jurisdiction over directors of a corporate party (recited by the old CPR r.81.4(3)), [is] implicit in the new CPR r.81.2 and the retention of r.81x.20 for the purposes of enforcing writs of sequestration.'

[32] Clearly, the position under the October 2020 Version in relation to committal applications against the directors or officers of a body corporate which has not complied with a court order requiring it to do (or abstain from doing) something is not as clear as it could be. Mr Kimbell KC understandably, and very properly, pointed to the seriousness of the committal jurisdiction, the potentially highly adverse consequences it can have for a director or officer of a company who is the subject of such an application, and the clarity which is generally required of statutes or delegated legislation which are alleged to have made particular individuals susceptible to criminal punishment: Bennion, Bailey and Norbury on Statutory Interpretation (8th), section 26.4 ('the principle against doubtful penalisation').

[33] Nonetheless, I am satisfied that the intention in the October 2020 Version to preserve the existing law as to the circumstances in which a director or officer may be subject to a committal application in relation to the breach of an order made against a company is sufficiently clear:

i) Specific provision is made in CPR 81.2 for committal applications against, or the imposition of a sanction for contempt on, the directors or officers of a body corporate, who are clearly being treated in a different category from other non-parties to a court order.

ii) CPR 81.1(2) and (3) make it clear that the October 2020 Version is not intended to alter the substantive law of contempt.

iii) That reference to substantive law is, in my assessment, in this context to be read as including the principles and case law which determine the circumstances in which an application for committal may be made against a director or officer in respect of a breach of a court order by a body corporate.

[34] In this regard, I note that both parties before Mrs Justice Cockerill in ADM International SARL v Grain House International SA [2023] EWHC 135 (Comm) proceeded on the basis that the October 2020 Version had not altered the law so far as the directors and officers of body corporates who breached court orders was concerned (see [97]–[98]).”

Additionally, it was clear that this aspect of the substantive law of contempt applied to limited liability partnerships (LLPs) (at [37]–[39]). It also applied to de facto as well as de jure directors of LLPs (at [44]). ***Deutsche Bank AG v Sebastian Holdings Inc*** [2020] EWHC 3536 (Comm), unrep., Comm., ***Business Mortgage Finance 4 Plc v Hussain*** [2022] EWHC 449 (Ch), unrep, ChD, ***Business Mortgage Finance 4 Plc v Hussain*** [2022] EWCA Civ 1264; [2023] 1 W.L.R. 396, CA, ***ADM International SARL v Grain House International SA*** [2023] EWHC 135 (Comm), unrep., Comm., ref’d to. (See ***Civil Procedure 2022*** Vol.1, para.81.1.2.)

■ **National Iranian Oil Company v Crescent Petroleum Company International Ltd** [2023] EWHC 300 (Comm), 10 February 2023, unrep. (Butcher J)

Permission to appeal – no power to impose conditions once permission granted

CPR rr.3.1(3), 52.6(2), 52.18(1)(c). The claimant applied for permission to appeal from a summary judgment decision. The application for permission to appeal was opposed by the defendant. The defendant did not, however, apply for any grant of permission to appeal – contingently or otherwise – to be granted subject to conditions (at [3]). At the hearing of the application, the defendant did not suggest that permission should be made granted subject to any condition (at [7]). One of the grounds of appeal was that the judge had not given sufficient reasons on one issue. The judge, before dealing with that ground of appeal, circulated a draft judgment setting out additional reasons for the decision on that issue. Judgment on that point was subsequently handed down. Further submissions were then put in dealing with the application for permission to appeal on that point. The defendant did not raise, in its additional submissions, the question that permission to appeal should be conditional (at [7]). Permission to appeal was granted on four grounds. It was refused on the insufficient reasons ground. In granting permission to appeal, no reference was made to the grant of permission being conditional (at [9]). It did not because, as the judge noted, neither party had raised the question of conditional permission at that time. The defendant, subsequently, applied for the imposition of conditions on the grant of permission to appeal. The claimant resisted the application on the grounds that it was either too late or that there were no compelling grounds to impose conditions. **Held**, the application was dismissed. Once unconditional permission to appeal is granted, it is too late for conditions to be imposed on the grant of permission:

“[17] NIOC’s first contention is that once unconditional permission to appeal has been granted by the court then it is too late for the actual grant of permission to be made subject to conditions. After unconditional permission has been given, then any question of the imposition of a condition is for the appeal court under CPR 52.18(1), and is one of the imposition of a condition upon which the appeal may be brought.

[18] That submission appears to me to be correct. It is supported by the words of the rules and also by what is said in Goldtrail Travel Limited v Onur Air Tasimacilik [2017] UKSC 57. In that case, Rose J gave judgment against Onur Air. Thereafter, on 15th December 2014, Floyd LJ granted on paper permission to Onur Air to appeal. As Lord Wilson, giving the leading judgment said at paragraph 6:

> *‘In January 2015, following the grant on paper of permission to Onur to appeal against the order of Rose J, Goldtrail applied for the imposition of conditions. It was too late for it to apply under Rule 52.3(7)(b) (now Rule 52.6(2)(b)) of the Civil Procedure Rules for the actual permission to be made subject to conditions. It therefore applied under Rule 52.9(1)(c) (now Rule 52.18(1)(c)) for the court to exercise its discretion to “impose ... conditions upon which an appeal may be brought”.’*

[19] Thus, once a first instance court has granted permission unconditionally, the rules do not envisage that it can then apply conditions to whether the appeal should proceed. That is a matter for the appeal court under CPR 52.18(1)(c).”

Moreover, the judge rejected the submission that as the order granting permission to appeal had not been sealed, it was open to the court to reconsider its decision. In principle, it was open to the court to reconsider its decision. However, applying ***AIC Ltd v Federal Airports Authority of Nigeria*** (2022), the principle of finality took precedence: the judg-

ment on the application was one that was to be treated as the equivalent of a judgment given in open court to which the "deadweight" of that principle applied with its full rigour (at [25]). ***Goldtrail Travel Ltd v Onur Air Tasimacilik*** [2017] UKSC 57; [2017] 1 W.L.R. 3014, UKSC, ***AIC Ltd v Federal Airports Authority of Nigeria*** [2022] UKSC 16; [2022] 1 W.L.R. 3223, UKSC, ref'd to. (See ***Civil Procedure 2022*** Vol.1, para.52.18.4.)

Practice Updates

PRACTICE DIRECTION

CPR PRACTICE DIRECTION – 155TH UPDATE. This Practice Direction came into force on 6 March 2023. It made one amendment to Appendix C, Table B(1) and Table C of PD 27B. The amendment omits from those tables the words "DO NOT include details of any offers made by the compensator or the claimant that have not been accepted".

CPR PRACTICE DIRECTION – 154TH UPDATE. This Practice Direction effects various amendments to PD 51R and PD 51ZB. The amendments came into force, variously, on 1 and 8 March 2023.

PRACTICE GUIDANCE

PRE-ACTION PROTOCOL UPDATE. Amendments were made to the RTA, EL/PL and the RTA Small Claims Protocols. The amendments, which replace reference to PD 8B with references to PD 49F, to the former two Protocols took effect from 22 February 2023. The amendments, which mirror those effected by Practice Direction Update 155, to the last of the three Protocols took effect on 6 March 2023.

PRACTICE NOTE TO PD51O. On 21 February 2023, the Chancellor of the High Court, Judge in Charge of the Commercial Court and Judge in Charge of the Technology and Construction Court issued a Practice Note that clarified, for the avoidance of doubt, that Practice Note to PD51O – Paragraph 3.4(2), dated 12 October 2016 was no longer in force.

MISCELLANEOUS UPDATES

JUDICIAL ASSISTANTS IN THE COURT OF APPEAL. Applications are likely to be advertised for positions as Judicial Assistants in the Court of Appeal for the period October 2023 to July 2024. Applications are to be invited from individuals who have at least a 2:1 degree and some practical legal research experience. The application process is expected to commence towards the end of March 2023.

COURT FUNDS OFFICE – INTEREST RATES ON SPECIAL AND BASIC ACCOUNTS. On 24 February 2023, the Lord Chancellor increased the interest rates payable on funds held in the special and basic accounts. This is the second increase in two months (see ***Civil Procedure News*** No. 2 of 2023). The interest rate payable on funds held in the basic account increased from 2.625% to 3.00%. The interest rate payable on funds held in the special account increased from 3.5% to 4.00%. The rates were increased to both cover the Court Funds Office's running costs and to ensure that an increased rate of interest was payable.

In Detail

NON-PARTY COSTS ORDERS

In ***Paper Mache Tiger Ltd v Lee Mathews Workroom PTY Ltd*** [2023] EWHC 338 (Comm), John Kimbell KC, sitting as a deputy judge of the High Court, considered the application of the court's discretion to award costs under s.51 of the Senior Courts Act 1981. He specifically considered the application of the discretion to award costs against a non-party to proceedings: a non-party costs order. The question of its application arose following judgment, arising out of litigation which sought compensation under in respect of an Agency Agreement, in favour of the applicant. Costs of some £280,000 were awarded in its favour. The defendant had ceased trading prior to judgment being handed down and was in liquidation. A non-party costs order was sought against a Ms Mathews. The application had two bases. First, that she was the real party to the claim. In this respect it was submitted that: the defendant was run entirely in the interests of Ms Mathews; she had used her own money to fund, at least in part, the defence; she was in complete control of the defendant and its defence; and, she arranged for its assets to be transferred to a newly incorporated company (of which

she was the sole director/shareholder) to frustrate the applicant's ability to secure its remedy (at [71]–[72]). Secondly, that Ms Mathews' improper conduct regarding her direction of the defendant, which was intended to frustrate the just disposal of the proceedings (at [70] and [73]).

The application was ultimately refused (at [111]). John Kimbell KC rejected the submission that Ms Mathews was the real party to the claim (at [77]). She was, however, at least in part and indirectly funding the litigation (at [79]). This was understandable given the defendant had ceased trading, had limited assets and was working towards liquidation. Funding, as provided, was provided as part of a controlled winding-up. The deputy judge also accepted that Ms Mathews sought no personal benefit from the proceedings. Furthermore, it was accepted that Ms Mathews' intention was to seek to resolve the proceedings for the defendant's benefit, i.e., not for her own benefit (at [81]). The evidence, when looked at in total, was to the effect that the defendant remained the "legally, factually and economically" real party to the proceedings (at [89]). The deputy judge further rejected the submission based on alleged serious misconduct in the conduct of the proceedings (at [91]–[109]). In all the circumstances it would not have been just to impose a non-party costs order. The applicant had taken a rational decision to commence and pursue proceedings against a defendant knowing it had ceased to trade and was likely to enter liquidation. Nothing had been done by the defendant that influenced the applicant's decision to continue with its claim. Ms Mathews had done nothing to abuse the proceedings for her own benefit. Justice thus did not require a non-party costs order to be made (at [110]). In reaching this decision the deputy judge, very helpfully, restated the leading summary of the principles applicable to such applications. He also drew attention to, and adopted, a further and recent summary of points additional to the leading summary that practitioners ought to be mindful of when approaching such applications. The guidance is as follows:

"[8] I was referred to the summary of relevant principles contained in Goknur v Aytacli [2021] EWCA Civ 1037; [2021] 4 WLR 101 (Goknur). In that case at [40], Lord Justice Coulson, with whom the rest of the Court agreed, summarised the legal principles which apply to NPCO applications as follows (with full references to the cases citation where they first appear):

'a) An order against a non-party is exceptional and it will only be made if it is just to do so in all the circumstances of the case (Gardiner v FX Music Limited (2000) WL 33116500 (27 March 2000, unreported), Dymocks Franchise Systems (NSW) Pty Limited v Todd and others [2004] UKPC 39, [2004] WLR 2807, Threlfall v ECD Insight Limited and Anr [2013] EWCA Civ 1444; [2014] 2 Costs LO 129).

b) The touchstone is whether, despite not being a party to the litigation, the director can fairly be described as "the real party to the litigation" (Dymocks, Goodwood Recoveries v Breen [2005] EWCA Civ 414, Threlfall).

c) In the case of an insolvent company involved in litigation which has resulted in a costs liability that the company cannot pay, a director of that company may be made the subject of such an order. Although such instances will necessarily be rare (Taylor v Pace Developments Ltd [1991] BCC 406), s.51 orders may be made to avoid the injustice of an individual director hiding behind a corporate identity, so as to engage in risk-free litigation for his own purposes (North West Holdings Plc (In Liquidation) (Costs) [2001] EWCA Civ 67). Such an order does not impinge on the principle of limited liability (Dymocks, Goodwood, Threlfall).

d) In order to assess whether the director was the real party to the litigation, the court may look to see if the director controlled or funded the company's pursuit or defence of the litigation. But what will probably matter most in such a situation is whether it can be said that the individual director was seeking to benefit personally from the litigation. If the proceedings were pursued for the benefit of the company, then usually the company is the real party (Metalloy Supplies Ltd v MA (UK) Ltd [1997] 1 WLR 1613, Metalloy). But if the company's stance was dictated by the real or perceived benefit to the individual director (whether financial, reputational or otherwise), then it might be said that the director, not the company, was the "real party", and could justly be made the subject of a s.51 order (North West Holdings, Dymocks, Goodwood).

e) In this way, matters such as the control and/or funding of the litigation, and particularly the alleged personal benefit to the director of so doing, are helpful indicia as to whether or not a s.51 order would be just. But they remain merely elements of the guidance given by the authorities, not a checklist that needs to be completed in every case (Systemcare (UK) Limited v Services Design Technology [2011] EWCA Civ 546).

f) If the litigation was pursued or maintained for the benefit of the company, then common sense dictates that a party seeking a non-party costs order against the director will need to show some other reason why it is just to make such an order. That will commonly be some form of impropriety or bad faith on the part of the director in connection with the litigation (Symphony Group plc v Hodgson [1994] QB 179, Gardiner, Goodwood, Threlfall).

g) Such impropriety or bad faith will need to be of a serious nature (Gardiner, Threlfall) and, I would suggest, would ordinarily have to be causatively linked to the applicant unnecessarily incurring costs in the litigation.'

[9] I was also referred to Asprey Capital Limited v Rediresi [2023] EWHC 28 (Comm). In that case, Patricia Robertson KC, sitting as a Deputy High Court Judge made the following ten additional points at [10] – [17], which I gratefully adopt:

a. *The NPCO jurisdiction is a highly fact-specific jurisdiction;*

b. *There is now an abundance of authority on the absence of any need for abundant authority on the principles which should guide a judge as to whether to make a third party order for costs (per Moses LJ in Alan Phillips Associates Ltd v Terence Edward Dowling t/a The Joseph Dowling Partnership & Ors [2007] EWCA Civ 64, at [31].);*

c. *In the particular context where the order is sought to be made against the director or shareholder of an insolvent company, there must be some factor that makes it just to make the order, notwithstanding the principle of limited liability. The decided cases offer examples but are not exhaustive of the factors that might be relevant, or the ways in which these might combine in a given case to tip the balance.*

d. *The only immutable principle is that the discretion must be exercised justly - Deutsche Bank v Sebastian Holdings [2016] EWCA Civ 23 at [62];*

e. *Funding, by itself, may be consistent with the director pursuing the proceedings for the benefit of the company. Equally, however, the absence of funding will not preclude the making of an order if the proceedings were being run for the personal benefit of the director, rather than in the interests of the company. Impropriety in the conduct of the proceedings, where serious, may justify an order even where the element of personal benefit is lacking. However, it does not follow that some lesser degree of impropriety is irrelevant in a case where there are also other factors in favour of making an order. Ultimately, it is not a matter of operating a 'checklist' but an exercise of a broad discretion. Something that would not be sufficient by itself may be the feather that tips the scale when it is viewed cumulatively with other features of the case.*

f. *Whilst the NCPO jurisdiction is a 'summary jurisdiction', it does not follow that it will only be exercised (a) where the Court can deal with the matter shortly and (b) without determining any disputed issues of fact.*

g. *Whereas the trial judge may be able to deal with a s.51 application very swiftly, that may not be as true where the application has to be dealt with by a judge other than the trial judge. It does not follow, however, that the application must proceed as if it were a mini-trial. The Court can in principle limit the length of the hearing, limit (or indeed not permit) cross examination, limit the parties to the 'big 5 points' and, where appropriate, decide the matter on the basis of witness statements alone, so as 'to ensure that the application is dealt with as speedily and inexpensively as is consistent with fairness to both sides': Robertson Research International Limited v ABG Exploration BV and Others at [16] and [40] (13 October 1999, Unreported, Mr Justice Laddie).*

h. *When deciding whether to make an order in circumstances where some of the relevant facts are disputed, the Court does not approach the matter as if it were an application for summary judgment: Greco Air Inc v Tokoph [2009] EWHC 115 (QB) [45] per Burton J. Rather, the Court must balance considerations of proportionality and justice, bearing in mind that this is a form of satellite litigation which should not be allowed to expand beyond reasonable bounds.*

i. *In most cases, justice is adequately served by the Court doing the best it can to resolve disputed matters on the documents, which it does on a balance of probability (Centrehigh Ltd v Amen [2013] EWHC 625 (Ch) at [41]-[42]);*

j. *The absence of a warning that a party intended to seek an NPCO, given whilst the litigation was still in progress, is capable of being a relevant factor pointing against making an order, if an earlier warning might have altered the way the non-party conducted themselves in ways relevant to the exercise of discretion. If, however, the non-party is, objectively, 'the real party' to the litigation, 'the absence of a warning may be of little consequence' Deutsche Bank v Sebastian Holdings [2016] EWCA Civ 23 at [32] and [37]."*

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