

IN THE HIGH COURT OF JUSTICE

7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

BEFORE:

THE HONOURABLE MR JUSTICE NUGEE

BETWEEN:

EARTH ENERGY INVESTMENTS LLP

CLAIMANT

- and -

**MIDDLESBROUGH FOOTBALL AND ATHLETIC
COMPANY (1986) LTD**

DEFENDANT

Legal Representation

Ms Jones QC (of counsel) on behalf of the Claimant
Mr Paul Millinder Litigant-in-person
Mr Ulick Staunton (of counsel) on behalf of the Defendant

Other Parties Present and their status

None known

Proceedings

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Court Clerk: Court rise.

Nugee J: Yes, Ms Jones?

Ms Jones: So, My Lord, what Mr Millinder and I have agreed is that I am going to take the Court through, as it were, the chronology --

Nugee J: Yes.

Ms Jones: Explain how we got here --

Nugee J: Yes.

Ms Jones: And take Your Lordship briefly through the documents and then Mr Millinder is going to make his submissions and an application.

Nugee J: Yes.

Ms Jones: I think that's the, that's the best way that we can go forward.

Nugee J: That, that sounds quite sensible. Thank, thank you.

Ms Jones: So, if I may I'll hand --

Nugee J: Can I just ask you before you do that?

Ms Jones: Yes, yes.

Nugee J: Miss Bernard who is the other litigant-in-person --

Ms Jones: Yes.

Nugee J: Is she making an application today?

Ms Jones: Well, that was being handled by the other *Eclipse* representative.

Nugee J: Yes.

Ms Jones: I, I simply came in to hold the fort --

Nugee J: Mr, Mr Ulick.

Ms Jones: Yes, Your Honour, yes. So --

Nugee J: You don't know the position, don't worry, if you don't --

Ms Jones: I don't know the position.

Nugee J: No.

Ms Jones: Last seen disappearing with Mr, with *the Bernards* so I don't know I'm afraid --

Nugee J: Yes.

Ms Jones: But I will find out and, and make sure Your Lordship is informed.

Nugee J: Yes, thank you.

Ms Jones: And we better be. So, could I hand up a little document which I've created over the course of the morning which is a chronology? There's one, one for the Court and one for the file.

Nugee J: Thank you.

Ms Jones: It, so it's a little chronology which we're going to go through.

Nugee J: That's very, very helpful.

Ms Jones: And then at the end it sets out some of the, what really is being sought at the moment and what the underlying issues are.

Nugee J: Yes.

Ms Jones: And --

Nugee J: And, and can I ask this relief is being sought today, is it? Because there's some point taken by Mr Staunton that, that, that for example the committal is, is not in proper form and so on.

Ms Jones: Well, that is obviously an, an issue.

Nugee J: Yes, but, but, but at the moment your understanding is that, that, that I'm being asked --

Ms Jones: Yes.

Nugee J: To make these orders today?

Ms Jones: Yes.

Nugee J: Yes, thank you. Yes?

Ms Jones: So, I would normally start with the application notice, but I think actually --

Nugee J: No --

Ms Jones: I need to do the chronology first.

Nugee J: I think there's a long history --

Ms Jones: Yes.

Nugee J: Which, which will be quite helpful to go through, thank you --

Ms Jones: Exactly, exactly. So, I'm hoping that Your Lordship has got three bundles.

Nugee J: Well, let see what I've had because it's --

Ms Jones: You should have, I think, two bundles which came from Mr Millinder containing tabs one to 31 or thereabouts, and then possibly a miscellaneous tab at the back. That looks familiar what Your Lordship has --

Nugee J: I've got one to 19 in this bundle, yeah?

Ms Jones: And, yes, and then there should be a second bundle which is --

Nugee J: And there's a sort of loose leaf clip.

Ms Jones: Yeah.

Nugee J: I don't think it goes as far as thirty something, I think it's low 20s on the whole. 26, I can see.

Mr Millinder: There's three.

Ms Jones: Three folders, Mr Millinder sends (inaudible).

Nugee J: I'm not sure I have any, this may be up to --

Mr Millinder: That's it.

Nugee J: Correspondence bundle.

Ms Jones: Yes, OK.

Nugee J: That looks like, yes --

Ms Jones: Yes.

Nugee J: And that goes up to 31, yes, thank you.

Ms Jones: Right, OK. So, that, that's what has come from Mr Millinder.

Nugee J: And then, and then I've got a bundle for hearing which just had two witness statements in it, I think.

Ms Jones: And that I think was prepared by the Defendants.

Nugee J: Yes.

Ms Jones: Yes, we've just got witness statements and the underlying exhibits.

Nugee J: Yes.

Ms Jones: Good. So, I'm going to refer to that one as the Defendant's bundle.

Nugee J: Yeah.

Ms Jones: So, if, in fact, let us start in the Defendant's bundle if we may --

Nugee J: Yes.

Ms Jones: With the story back in 2012.

Nugee J: Yes.

Ms Jones: And the start of the story is that Empowering Wind Limited, a company, if we could go to tab four in, in that bundle --

Nugee J: Yeah.

Ms Jones: In the Defendant's bundle.

Nugee J: I've got an option agreement.

Ms Jones: Yes --

Nugee J: And Empowering Limited, yes?

Ms Jones: Between Middlesbrough and Empowering Wind, and so Empowering Wind is a company which I believe was wholly owned by the current Applicant, Earth Energy Investments.

Nugee J: I think it was a single purpose vehicle --

Ms Jones: Yes.

Nugee J: It was, yes.

Ms Jones: And the purpose of the vehicle was that a wind turbine was to be built at Middlesbrough football club, I believe in the carpark --

Nugee J: Yeah.

Ms Jones: And, essentially, energy would be used by Middlesbrough when it needed it, otherwise the energy would go into the grid and both Middlesbrough and Empowering Wind would benefit financially --

Nugee J: Yes.

Ms Jones: From this general scheme. So, we have at page 1 an option agreement --

Nugee J: Yeah.

Ms Jones: And then, if we look at page 16 on the same tab.

Nugee J: There was a lease granted.

Ms Jones: We have a lease.

Nugee J: Yes.

Ms Jones: The next document referred to is back in Mr Millinder's bundle at tab two.

Nugee J: Yes.

Ms Jones: And this is a connection deed which deals with the connection from the switchboard within a 11 kilowatt substation to the equipment. So in, in effect, the, the, the wind turbine was going to be connected to an existing substation.

Nugee J: Yes.

Ms Jones: And that is going to play a part in a moment.

Nugee J: Yeah.

Ms Jones: If we then go back to the Defendant's bundle, in that same tab we were looking at just now at page 51 we have the energy supply agreement.

Nugee J: Yes.

Ms Jones: Signed the same date as the connection deed and I'm just going to draw Your Lordship's attention to a couple of items. On page 54 --

Nugee J: Yeah.

Ms Jones: You'll see the definition of commissioning date --

Nugee J: Yes.

Ms Jones: The date of the satisfactory completion of such procedures and tests as from time to time constitute usual industry standards of practice to demonstrate the equipment is

capable of commercial operation. Equipment, just further down the page, is defined as the wind turbine and associate equipment.

Nugee J: Yeah.

Ms Jones: And then if we look at page 56.

Nugee J: Yeah.

Ms Jones: You will see a definition of start date about two thirds of the way down the page.

Nugee J: Yes.

Ms Jones: And then over the page on page 57, under Commencement and Term, under Term it provides that:

“The provisions of this agreement, other than clauses [3.1 to 3 and] 3.1 to 3.3 and 4 shall be effective from the date of this agreement. Clauses 3.1 to 3.3 and 4 shall commence on, and be conditional on, the satisfaction in full of the following conditions for precedent.”

And then 2.1.1 is the occurrence of commissioning and the second is the generator entering into a connection agreement in respect of the equipment.

Nugee J: Yes.

Ms Jones: And connection agreement is defined back --

Nugee J: On page 54.

Ms Jones: On page 54, an agreement to be entered into by the generator and the local distributor to provide for the connection.

Nugee J: Is the one at tab two, is that the connection agreement within the meaning of --.

Ms Jones: No, it's, that's the connection deed. I'll, I'll show you the connection agreement in a moment.

Nugee J: Right.

Ms Jones: It's the, it's the thing in tab four which does relate from 2015.

Nugee J: OK.

Ms Jones: That's my understanding. Now, what, what then happened was that there was a difficulty with the planning permission.

Nugee J: Yes.

Ms Jones: In that there was a planning condition seven related to certain things to do with the local airport and it took some time to get rid of that planning condition, and that was finally done in December 2014.

Nugee J: Yeah.

Ms Jones: Now, there was a demand for rent or I, I think possibly a payment under the option deed in the sum of £255,000 and that was disputed on the basis that this planning condition and the refusal of the, of Middlesbrough to remove it and of the airport to act reasonably in relation to it was a force majeure event, so it was disputed that that amount was due.

Nugee J: Yeah.

Ms Jones: And Mr Millinder through either EI or Wind or Empowering Wind offered to put the money into escrow accounts pending arbitration of whether that sum was in fact due.

Nugee J: Yes.

Ms Jones: And then in April 2015, this dispute having arisen, Middlesbrough refused to connect to complete the connection agreement, and the draft agreement which should have been completed is at tab four in Mr Millinder's --

Nugee J: I don't think it says that --

Ms Jones: No.

Nugee J: It's a letter from Penningtons.

Ms Jones: I have in fact seen that agreement, so --

Nugee J: We'll come back to it shall we?

Ms Jones: Yes. I'm not quite sure --

Mr Staunton: I haven't a tab four.

Ms Jones: Sorry?

Mr Staunton: I haven't a tab four.

Ms Jones: You haven't a tab four? That is very odd because I also myself definitely, sorry, I've got it in tab three actually. Is your (inaudible) in tab three?

Nugee J: Connection agreement deed, 17th of --

Ms Jones: No, not, not the deed.

Nugee J: No.

Ms Jones: There should be a, something called Middlesbrough Football and Athletic Club sale of equipment --

Nugee J: Agreement for sale of equipment.

Ms Jones: Yeah, that's the one.

Nugee J: Assets. I see, yes.

Ms Jones: So, I'm instructed that that, that is the relevant connection agreement, and this is the agreement which Middlesbrough declined to --

Nugee J: Enter into.

Ms Jones: Enter into, yeah.

Nugee J: Yeah.

Ms Jones: So, then in, returning to the chronology, in June 2015 Middlesbrough served not only invoices for rent but also invoices for payment under clause 3.4.2 of the energy supply agreement, that being one of the clauses which was not conditional. And then in August 2015, Middlesbrough determined the lease.

Nugee J: For non payment of rent.

Ms Jones: For non payment, yes.

Nugee J: Rent, yes.

Ms Jones: Then, in June 2016 HMRC petitioned to wind up Empowering Wind.

Nugee J: Yeah.

Ms Jones: And Middlesbrough gave notice of intention to appear as a creditor.

Nugee J: Yes.

Ms Jones: There was a CVA, a, it was not accepted that Middlesbrough was a creditor, for the reasons which have already been given. Empowering Wind made arrangements for a

CVA with all the other creditors, but then at the hearing of the winding up petition Middlesbrough appeared as a supporting creditor --

Nugee J: Yes.

Ms Jones: And the winding up order was made. And, and I haven't really been able to find the underlying documents that these things are referred to in the paragraphs --

Nugee J: Yes.

Ms Jones: That I set out there.

Nugee J: Yes.

Ms Jones: Then, in December 2016, Middlesbrough submitted a proof of debt in the sum of £255,000, so that's the same £255,000 which has been an issue since March 2015 and as to which there had been an offer to put that amount into escrow. Apparently, the official receiver declined to permit my Client to inspect the proof of debt, and on the 9th January a statutory demand having been issued by EEI, i.e. the parent company, not Empowering Wind, there was an application to restrain petition of, presentation of a petition to wind up Middlesbrough. And if we could look at tab 23 which I think is probably in that --

Nugee J: Loose leaf one, yes.

Ms Jones: Loose leaf section.

Nugee J: Yeah.

Ms Jones: So, this --

Nugee J: This is Mr Bloom's witness statement, is it?

Ms Jones: I've, I've got a skeleton argument.

Mr Staunton: I've got *it out*. Tab 23.

Nugee J: No.

Ms Jones: Could be, let's try 24.

Nugee J: I've got an exhibit, no, that's Mr Bloom's exhibit which we've already looked at. What am I looking for?

Ms Jones: Right, a, a, a skeleton, a skeleton argument that was before the --

Nugee J: Mr Staunton's skeleton?

Ms Jones: Yes.

Nugee J: I have that at tab 25.

Ms Jones: Right, I'm so sorry.

Nugee J: It's all right.

Mr Staunton: But there's no, that skeleton's the skeleton before this judge.

Nugee J: No, that's, that's today's skeleton.

Mr Staunton: That's today's --

Nugee J: No, it isn't.

Ms Jones: No, I've got 9th January 2017.

Nugee J: I've got:

“This is an application about notice for an injunction to restrain the -
-”

Ms Jones: Yes.

Nugee J:

“Restrain the Respondent.”

Ms Jones: Yes. That’s the one I’ve got too. Do you want to have a look? You know
(inaudible)

Mr Staunton: Tab 24.

Ms Jones: OK. It’s the skeleton I wanted to take Your Lordship to.

Nugee J: The one before Mr Justice Arnold --

Ms Jones: Yes, in, in January.

Nugee J: The 9th January last year --

Ms Jones: Exactly.

Nugee J: Yes.

Ms Jones: So, but you’ll see the Respondent was Earth Energy Investments.

Nugee J: Which was the --

Ms Jones: Which was the parent company.

Nugee J: Entity which had served the statutory demand?

Ms Jones: Yes.

Nugee J: Yes.

Ms Jones: Exactly. That, that's really the point I wanted to get out of this.

Nugee J: Yes.

Ms Jones: And you'll see, if you look at page 2, paragraph five, that it refers there to the statutory demand, and it was based on the termination of the lease for Empowering Wind.

Nugee J: I think I've seen it.

Ms Jones: Yes. I'm not sure that I have in the --

Nugee J: I think it's exhibited.

Ms Jones: Plethora of papers that I've been --

Nugee J: To Mr Bloom's statement. So, when you go back to tab four of the bundle, the, the Defendant's bundle --

Ms Jones: Yes.

Nugee J: Page 171.

Ms Jones: Yes, thank you.

Nugee J: Because I --

Ms Jones: I can see My Lordship is either there or ahead of me.

Nugee J: Well I, I looked for, for that in particular.

Ms Jones: Yes, yes.

Nugee J: Yes. So, that's the statutory demand.

Ms Jones: Yeah, exactly, yes.

Nugee J: Yes, yeah.

Ms Jones: So, that was the 9th January.

Nugee J: Yes, I'm going to be putting 6th January as the statutory demand, tab four, page 171, yes. 9th January --

Ms Jones: It is, it's tab four of the Defendant's bundle.

Nugee J: Yes. Defendant's tab four --

Ms Jones: Yeah.

Nugee J: You're right, I have to say.

Ms Jones: Exactly.

Nugee J: And then, that's Mr Justice Arnold's, is it not? 9th January?

Ms Jones: It is, yes.

Nugee J: Yes. Yes?

Ms Jones: And then, on the 11th January, I hope in tab four of Mr Millinder's bundle --

Nugee J: There's the, the letter --

Ms Jones: There's a letter from Penningtons.

Nugee J: Again, I think I've seen it.

Ms Jones: Yeah, it's hidden in tab four.

Nugee J: It is.

Ms Jones: Yes, good.

Nugee J: Yes, yes, yeah?

Ms Jones: So, this complains that the material information was not put before the Court.

Nugee J: Yeah.

Ms Jones: And the proposal over the page is that given the failure to provide full disclosure, the appropriate orders of costs is that each party bears its own.

Nugee J: Yeah.

Ms Jones: But that's not actually what happened. If we look at Defendant's volume, tab two, this is the order by consent on the 16th January and I, I haven't managed to put that reference in.

Nugee J: No. It's Defendant's tab two?

Ms Jones: And also. Defendant tab two, page 16.

Nugee J: Thank you. Yes.

Ms Jones: So, this is the 16th January, in fact, before Mr Justice Norris this time, and the, over the page the injunction is continued.

Nugee J: Indefinitely, I think.

Ms Jones: I think it is indefinitely --

Nugee J: Yes, because the petition is, is removed.

Ms Jones: Whereas the proposal had been, but it was until the further order or --

Nugee J: Yes, but, but if you look at the end of paragraph one --

Ms Jones: Yes, yes.

Nugee J: The petition's removed from the file.

Ms Jones: Yes.

Nugee J: So, that's the end of that petition.

Ms Jones: Yes, exactly.

Nugee J: Yes.

Ms Jones: And then there's the order that's, the Respondent pay the Applicant £25,000 --

Nugee J: Yes.

Ms Jones: In respect of costs. So, that's the 16th January. On the 27th January Middlesbrough submitted a further proof of debt in the sum of £541,000 odd, and if we could go back to Mr Millinder's bundle and to tab. Yes, I, I think these, again, these things are not, I haven't located them, but they're referred to in tab 16 on page 4.

Nugee J: Yes, I see.

Ms Jones: There, there is a recital of what had happened.

Nugee J: £541,000 and then 4. --

Ms Jones: Yes, and then 4.1 million.

Nugee J: Yes, I don't think I know how those sums are made up.

Ms Jones: No, I'm not sure I do either --

Nugee J: No.

Ms Jones: But at least part of it is under the energy supply agreement --

Nugee J: Yes.

Ms Jones: And is, is in relation to that same clause, 3.2.4.

Nugee J: It's 3.4 point, point, point 2.

Ms Jones: Or 3.4.2. which is not conditional.

Nugee J: Which is eight pence per kilowatt hour.

Ms Jones: Yes, exactly.

Nugee J: Yes, yeah.

Ms Jones: Exactly. So, those two further proofs were submitted and what then happened, and this is, I think, in part the reason for today's application, on the 2nd October there was a writ of control issued out of Bristol District Registry and the Queen's Bench Division, so if we could go to tab nine of Mr Millinder's file, I hope you have there that writ of control.

Nugee J: And I'm right in thinking, aren't I, that a writ of control is what used to be a FIFA? It --

Ms Jones: It's the first time I've ever come across it My Lord, so, I, I honestly --

Nugee J: I, I think Mr Millinder wants to --

Mr Millinder: Yeah. Could I, could I intervene at this stage because, you know, I've lived and breathed this Your Honour for a very considerable amount of time. I can see that there's a lot of information there to take on board. The application for the writ of control was made on the 2nd October. Sorry, no it wasn't, it was made on the 2nd September or thereabouts, or in September.

Nugee J: 7th, 7th September?

Mr Millinder: 7th September.

Nugee J: I think.

Mr Millinder: And that one on the 2nd October is the writ of control.

Ms Jones: Yes, I'm so sorry.

Nugee J: Yes.

Mr Millinder: Now, my contention in this respect is that at that time, clearly, the Defendants and their representative had a copy of that writ of control, but not once did they see, seek to remedy what they later describe as a mistake in the sum of £583,000 --

Ms Jones: Let me explain what the mistake is, let me explain what the mistake is first, OK? Yeah?

Nugee J: Yes.

Mr Millinder: Well.

Nugee J: Mr, I'm finding it very helpful, I have to admit, hearing Ms Jones just show me the documents and then I'll --

Mr Millinder: OK, sure.

Nugee J: I will listen to what you want to say about them in, in due course, but at --

Mr Millinder: OK.

Nugee J: At this stage I just want to have, have the chronology clearly in mind. So, what I've got at your tab ten --

Ms Jones: Nine.

Nugee J: Ten, I think, is, is the application for the High Court writ on the 7th September and then the writ itself on the 2nd October, as you said.

Ms Jones: Yeah.

Nugee J: Yes, and, and this is the one which claims £555,000 --

Ms Jones: Yes.

Nugee J: Which is plainly wrong.

Ms Jones: Yes.

Nugee J: Because it should have been 20 --

Ms Jones: £555,000 --

Nugee J: It should have been £25,000.

Ms Jones: Yes, and its entered, I think, in the sum actually of 600 and --

Nugee J: Well in the way these things always do, they add up --

Ms Jones: Yeah.

Nugee J: By the time you've added --

Ms Jones: Yeah, added the interest on.

Nugee J: Interest and costs they mount up, yes.

Ms Jones: Yes, exactly. So, so that, I, I, as far as I can see it's clear that that is wrong.

Nugee J: I don't think that's now disputed.

Ms Jones: No.

Nugee J: I'm not sure it was ever disputed in, in, in the sense that I don't think anybody ever said it was the right thing to do, but yes. Yes.

Ms Jones: Yes, I mean, it is, Your Lordship's right that the, the application date of the 7th September clearly sets out £555,000, says that the amount of the judgment was for £555,000.

Nugee J: Yes.

Ms Jones: So, it's, it's not, it's not a question of the writ being mistaken, it's the application is wrong --

Nugee J: Yes, the application's wrong.

Ms Jones: It's asked for the wrong amount.

Nugee J: Yes.

Ms Jones: Yes.

Nugee J: I imagine that the issue with the writ is a fairly --

Ms Jones: Accounting process.

Nugee J: Clerical business.

Ms Jones: Exactly. I, I simply wanted to draw the distinction --

Nugee J: Yes.

Ms Jones: Between an error by the Court --

Nugee J: Yes.

Ms Jones: And --

Nugee J: No, no, I have the point.

Ms Jones: Yes, yes, thank you.

Nugee J: The, the, the, what was asked for by someone describing themselves as the Claimant's legal representative was an order for a writ of, a writ of control saying that the total amount in the judgment was £555,000.

Ms Jones: Yes.

Nugee J: Yes. Yes?

Ms Jones: So, the next part of the story, which is relevant to the application currently before the Court, is that on the 15th November of 2017 there was an application notice under rule 14.11 to reject and the proofs of debt which had been put in by Middlesbrough.

Nugee J: That's all enforced, you know, with the insolvency rules.

Ms Jones: Solvency rules, yes.

Nugee J: Yes.

Ms Jones: Yeah. And I'm hoping we're going to find that in tab 12.

Nugee J: I do, application notice.

Ms Jones: Yes.

Nugee J: Yes.

Ms Jones: So, dated the 15th November --

Nugee J: Rule 14.11, yes.

Ms Jones: Yeah. And could I invite Your Lordship to note a few things?

Nugee J: Yes.

Ms Jones: One is that in question eight, what level of judge does your hearing need?

Nugee J: It says High Court judge.

Ms Jones: There was a request for a High Court judge.

Nugee J: Yeah.

Ms Jones: And that was overruled, and it was put in front of a Registrar.

Nugee J: Is this the matter that came before Mr Registrar Jones?

Ms Jones: Yes, it is.

Nugee J: Yes.

Ms Jones: Yes.

Nugee J: Yes.

Ms Jones: And the second thing I want to draw Your Lordship's attention to is on the next page.

Nugee J: Yeah.

Ms Jones: Where there is set out in part the basis of the complaint in relation to the proofs.

Nugee J: Yes.

Ms Jones: And then, if one goes over the page again, there is a further, as it were, section of what is sought, and there, there are further orders sought to disclaim the energy supply agreement as an onerous contract. Three, to assign the right of action in the damages claim resulting from the breach of lease and energy supply agreement against Middlesbrough to Earth Energy Investments, the parent company of Empowering Wind, or to appoint a Mr Chris Harman as Liquidator. So, the purpose, really, of this set of applications is to enable the cause of action which Empowering Wind may have against Middlesbrough --

Nugee J: Yes.

Ms Jones: To be, shall I say, developed in a way which will bear fruit, it being stymied at the moment in a liquidation in which nothing is happening.

Nugee J: Yes.

Ms Jones: And Mr Millinder first of all does not trust Mr Harman, who is the official receiver dealing with it, and wants to appoint a different liquidator but is, as you can see, is prevented from doing so because Middlesbrough are the majority creditor based on the proofs which he wishes to set aside.

Nugee J: I see, yes.

Ms Jones: So, that, that's what's going on here.

Nugee J: Yes.

Ms Jones: Now, on the 21st December there was the hearing before the Registrar --

Nugee J: Yeah.

Ms Jones: And if Your Lordship looks in tab eight of Mr Millinder's bundle you will see a pretty lengthy 25 pages or so of analysis of what happened at that hearing.

Nugee J: Yes.

Ms Jones: And --

Nugee J: I don't have a transcript itself --

Ms Jones: Yes, you do.

Nugee J: Do I?

Ms Jones: Actually, it's at --

Nugee J: The tab?

Ms Jones: Tab 31.

Nugee J: Right --

Ms Jones: Yes.

Nugee J: Well, that's, that's why I haven't come across it --

Ms Jones: Yes.

Nugee J: Yes.

Ms Jones: Now, I, I'm not proposing to go through either tab --

Nugee J: No.

Ms Jones: Eight or tab 31.

Nugee J: No.

Ms Jones: But again, if I can just pick a few things out.

Nugee J: That would be great.

Ms Jones: So, so, Mr Millinder is concerned about what he sees as collusion arising out of a drinks party that took place, I think, the night before --

Mr Millinder: On the 22nd November 2017, yeah, it was.

Ms Jones: Right in, right in late November there was, there was a, as it were, a management marketing drinks party or a whatever party at Mr Staunton's chambers as I understand it, at which various people, including I think Mr Harman and some of the registrars were present, and that has caused Mr Millinder concern.

Nugee J: Where do I find reference to that at? I'm sorry, I haven't picked up, picked that up.

Ms Jones: Let me just see if I can find it in the, it's, it's in tab eight in those.

Nugee J: OK, don't worry. So, that was, that was one, the drinks party.

Ms Jones: That, that, that's, the 22nd November.

Nugee J: Is that the day after the --

Ms Jones: No, it's, it's about a month or so before --

Nugee J: Sorry, a month before, sorry.

Ms Jones: Yes, yeah.

Nugee J: Yes. 21st December is the day in here so.

Ms Jones: Yeah, yeah.

Nugee J: So, 22nd November chambers drinks, which Mr Registrar Jones attended, did he?
Is, is that --

Ms Jones: Was Mrs, was Mr Jones there, was he?

Mr Millinder: Yes, he was.

Ms Jones: Yes, Mr Briggs, wasn't it?

Mr Millinder: No, no, it wasn't, it was actually Chief Registrar Briggs --

Ms Jones: Briggs.

Mr Millinder: Your Honour.

Nugee J: Chief Registrar Briggs.

Ms Jones: Who, who, who is the person who had said no, not a judge, it needs to go to a Registrar.

Nugee J: Yes, I see.

Ms Jones: So, that, that's the connection.

Nugee J: I see, thank you.

Ms Jones: There. Then, secondly, Mr Millinder understood the Registrar to be saying to him you need to put forward a, a positive proposal as to how this cause of action is going to be got out of Empowering Wind in order that I can reject it. In other words --

Nugee J: Right, yes.

Ms Jones: He, he perceives that the Registrar was making it clear that it didn't really matter what he said or did, the Registrar was going to reject his application.

Nugee J: Right. Is there a bit of a transcript you want me to look at for that purpose, or is there a, a bit of a letter?

Mr Millinder: Sorry, the transcript is in there. The Judge doesn't have a copy of the transcript, it's actually on the back of the correspondence from --

Ms Jones: Yes, yes, I've, I've told him where it is --

Mr Millinder: OK, thank you.

Ms Jones: Yes, yes. I, I think that's probably one of the areas where --

Nugee J: You'll limit --

Ms Jones: Mr Millinder is going to be.

Nugee J: Yes, yes.

Ms Jones: Again, there are sections set out in here. And, and Mr Millinder's contention is that the, that there were, in effect, that the proofs were false. I think it's fair to say the, the Registrar's position was what does it matter? But the reason it matters, it eventually transpires, is because Mr Millinder wants to get that cause of action out of the company in liquidation and into a position where it can be, as I said, developed so it can bear fruit.

Nugee J: I see, yes. Thank you.

Ms Jones: I'm just looking to see if I can, yeah. That has then been adjourned to a further hearing on the 26th March 2018.

Nugee J: Adjourned part heard?

Ms Jones: Part heard, yes.

Nugee J: Yes.

Ms Jones: Again, I think part of Mr Millinder's contention is, is that Mr Registrar Jones had not properly read the papers, and that he takes issue with the notion of part heard.

Nugee J: Yeah.

Ms Jones: And the Registrar required, and I haven't seen but I am instructed that this has happened, that the Applicants, Earth Energy, put in a positive proposal as to how this cause of action was to be got out of the insolvent company. So, I haven't seen that proposal because it's been lodged in proceedings in front of Mr Registrar Jones --

Nugee J: I see.

Ms Jones: But I'm told that it has been made.

Nugee J: Yeah.

Ms Jones: So, against that background, the relief sought in the application notice, now I have that application notice, My Lord, at the beginning of the file headed Correspondence Bundle.

Nugee J: Yes, so do I. Issued on the 30th January.

Ms Jones: That's it.

Nugee J: Yes.

Ms Jones: So, there are three elements to the relief. The first is to set aside the order of the 16th January due to significant material non disclosure --

Nugee J: Yes.

Ms Jones: Of the application on the 9th, at the hearing on the 9th. So, so, the order that it sought to be set aside is the 16th, but it's on the grounds that there was material of non disclosure on the 9th.

Nugee J: Yeah.

Ms Jones: The second is to return the Defendant to Court for sentencing in contempt.

Nugee J: Yeah.

Ms Jones: And that's the point in relation to which Mr Staunton has taken the point about service and so on. And to recuse Mr Registrar Jones from the 14.11 proceedings on the grounds of a, a conflict of interest.

Nugee J: That reference 008690 is to the rule 14.11 application, is it?

Ms Jones: That is my understanding, yes.

Nugee J: Yes. Thank you.

Ms Jones: So, those are the three elements of the relief and, as I say, I've tried to set out underneath some of the underlying issues.

Nugee J: Let's have a look at that --

Ms Jones: Not, not, not that these are issues for Your Lordship, as it were.

Nugee J: No, but it --

Ms Jones: But.

Nugee J: Helps to understand the, the --

Ms Jones: What, exactly.

Nugee J: What the background is.

Ms Jones: Yes, so, the first issue is, was Middlesbrough a creditor of Empowering Wind at the time of the winding up petition? And there are a number of things that might be put forward, the force majeure, says agreement, force majeure clause.

Nugee J: Force majeure clause.

Ms Jones: Yes, and apply --

Nugee J: Then, that's in the, in the lease?

Ms Jones: It's in the lease, yes, and it's also in the energy supply agreement. So, so in relation to the energy supply agreement, there are two different points, force majeure and also the failure to complete the connection agreement, because that, that was what really stymied this whole process. That was when the, there was a delay arising out of the --

Nugee J: That was the planning point.

Ms Jones: Planning, but then the planning permission was dealt with.

Nugee J: December 2014.

Ms Jones: And early 2015, they want to go ahead, but what happens is that Middlesbrough refuse to sign this document, so then the whole thing falls down.

Nugee J: I see, yes.

Ms Jones: So, so, the, it's, it's something along the lines of not being able to *rely on your own wrong* in order to found your cause of action. It's that kind of line of authority.

Nugee J: Yes, I see.

Ms Jones: I'm, I'm sure that sat down with the contract a little bit longer than I've had I could come up with a few other thoughts --

Nugee J: Yes.

Ms Jones: But that's the obvious one. And then, were the proofs of debt wrongfully submitted in order to prevent Empowering Wind from bringing the claim against Middlesbrough? In other words, Mr Millinder's contention is that this was all a scheme --

Nugee J: Yes.

Ms Jones: To make sure that he couldn't sue.

Nugee J: Yeah.

Ms Jones: Then, how can Empowering Wind now bring a claim? That's really the, the point which I now understand a formal proposal has been put forward, but if we look at tab eight in Mr Millinder's bundle --

Nugee J: Yes.

Ms Jones: And if we look at paragraph 6.11 which is right at the end, you'll see, as it were, the outline of how Mr Millinder envisages that that can be proceeded on.

Nugee J: Yeah.

Ms Jones: And could I just make this observation, that doubtless Middlesbrough will say yes but we're a creditor, but that's likely to depend on exactly the same point as to whether there is a cause of action by Empowering Wind against Middlesbrough, so that the two things are likely to come up in the same set of proceedings, and also doubtless Middlesbrough would want to counterclaim if it exists, in fact, could claim it will want rely on that set off against any --

Nugee J: Yes.

Ms Jones: Damages claim.

Nugee J: Yes.

Ms Jones: Then, the next issue is, is whether Mr Registrar Jones stated he wanted Mr Millinder to put forward a package so that he could reject it. That is directly relevant to what Your Lordship has to decide today. And then, how did it come about that the writ of control was issued in the sum of £629,000, because again Mr Millinder has strong views about the impropriety of asking for a writ of control being not only wrong but, you know, he's presented --

Nugee J: Yes.

Ms Jones: 20 times over.

Nugee J: Yes.

Ms Jones: Your Honour, I, I think that that is about the limit of the assistance that I can --

Nugee J: No, no, that's immensely helpful --

Ms Jones: Give Your Lordship.

Nugee J: Could, could I just check you, you ran through the underlying issues. The one you've numbered four --

Ms Jones: Yes.

Nugee J: Which is what did Mr Registrar Jones say about the package?

Ms Jones: Yes.

Nugee J: That is relevant to the recusal.

Ms Jones: Is it?

Nugee J: But the others, I think you suggested were not directly relevant to what I have to decide today, is that right?

Ms Jones: But that, I think that's right.

Nugee J: That's right.

Ms Jones: I think Mr Millinder may want to say otherwise --

Nugee J: Yes.

Ms Jones: But I, I just think it's helpful for Your Lordship to understand what's really going on here as well.

Nugee J: No, no, no. It's very helpful. Yes.

Ms Jones: And what, what Mr Millinder is actually trying to achieve, which is what, to address what he sees is a serious injustice done to the companies which --

Nugee J: His, his position, as I understand it, is this was a, a good commercial proposition which would have benefitted everybody and the whole thing didn't work because of the failure of Middlesbrough to sign up to the connection agreement --

Ms Jones: Yes.

Nugee J: So, so that one couldn't generate any electricity.

Ms Jones: Exactly, yes.

Nugee J: And that's why everything has gone wrong.

Ms Jones: Yes.

Nugee J: Yes.

Ms Jones: And, and that it's totally incorrect to claim amounts for the kilowatt hours when it --

Nugee J: You've stopped.

Ms Jones: You've stopped him providing it.

Nugee J: Yes. I see, yes.

Ms Jones: And then there have been all these procedural routes which, as he sees it, have been taken in order to stymie his claim. And when I say:

“As he sees it.”

I don't mean in any way to suggest that that is (inaudible) --

Nugee J: No, well it is unfortunately often that case --

Ms Jones: Yes.

Nugee J: That, that procedure gets in the way of the substance --

Ms Jones: Yes.

Nugee J: Of the merits, but yes. That's, that is very helpful.

Mr Millinder: Might --

Ms Jones: May, may I, may I ask Your Lordship's indulgence for two minutes --

Nugee J: Of course.

Ms Jones: Which is in trying to get all of these into Court, I've failed to bring in a notebook. May I just pop out to grab a notebook?

Nugee J: Of course.

Ms Jones: Thank you very much. I need to locate the text key as well. Right, *I'll be back soon.*

Nugee J: So, I think I should ask Mr Millinder to address me. Before I do so, I, I'm going to take a slightly unusual course which is to ask Mr Staunton not to address me on any of the issues but just, in terms of the chronology, was there anything that Ms Jones said that you took issue with or, or thought I ought to have supplemented before I hear the, the substance of the application?

Mr Staunton: It's very kind of her to produce this document but I've only just seen it --

Nugee J: Yes.

Mr Staunton: So, I haven't really scrutinised it at all. I certainly don't --

Nugee J: But you've heard her go through. It, it --

Mr Staunton: I don't object yeah. I, I accept everything Ms Jones said.

Nugee J: Yes. There's, there's nothing that you identified as being inaccurate in what she said --

Mr Staunton: No, absolutely not.

Nugee J: As such. And, and in terms of the, the, the history, as it were, which it's useful to see, is there anything specific that you think it would be useful for me to know about before I ask Mr Millinder to address me?

Mr Staunton: Nothing that occurs to me from, from the chronology or from what my learned friend Ms Jones said --

Nugee J: Right.

Mr Staunton: But it seems to me that there's a fundamental problem, which only took me two minutes to identify, in respect of the application to set aside the injunction.

Nugee J: Well, we'll, we'll come to that.

Mr Staunton: Indeed.

Nugee J: I, I'm going to let Mr Millinder address me.

Mr Staunton: Indeed.

Nugee J: I've read your skeleton.

Mr Staunton: Indeed.

Nugee J: And, and I, I have some idea what it is you want to say. So, Mr Millinder --

Mr Staunton: Right.

Nugee J: What I've got, as, as I understand it, before me is, is an application by you on behalf of EEI for three separate things. One, one is to set aside the 16th January an order for non disclosure, one's a contempt application, and the third one is a recusal application. Now, that's what Ms Jones said and that's what I've, I've understood.

Mr Millinder: Yes.

Nugee J: Have I understood that correctly?

Mr Millinder: Not entirely --

Nugee J: Not entirely.

Mr Millinder: Your Lordship. The reason why is, I looked at making a contempt application. I haven't made a contempt application --

Nugee J: Right.

Mr Millinder: And this shouldn't be construed as a contempt application.

Nugee J: Right, so we can put that --

Mr Millinder: What I was asking --

Nugee J: Put that on one side, as it were.

Mr Millinder: Yes, thank you.

Nugee J: Yes, thank you.

Mr Millinder: What I was asking the Court to do is to take into account the very significant material non disclosure at the hearing of the 9th January.

Nugee J: Yes.

Mr Millinder: My contention is that had that information been presented to Mr Justice Arnold on the day, on the balance of probabilities Mr Justice Arnold would have identified very, fairly easily that in fact Middlesbrough football club caused the failure of a perfectly good project by refusing the fundamental connection when it was the entire purpose of the option agreement for me to gain satisfaction of that grid connection agreement dated the 12th December 2012. It was a condition precedent.

Nugee J: Yes.

Mr Millinder: Of that connection offer in 2012 that Middlesbrough football club took ownership of those certain components within its substation, so that the connection for the wind turbine could be established. So, without a connection, as we've already identified, the turbine is defunct, it has no purpose. So, had I have gone along, and luckily I didn't, but had I have gone along and spent my £3 million and built the turbine we wouldn't have a connection. Had I have gone along and, and, or, or followed in this, in the course of what Mr Bloom suggested to me and I'd, I'd submitted a fresh planning application, the contentions would be exactly the same, because undoubtedly, the airport would have objected on the same substantial grounds as they have done with the original application.

And actually, given the complexities of a wind turbine application being 136 metre high structure, it would be completely illogical to submit a new planning application when there is already a planning permission in place. In addition to that, in September, on or around the 23rd September 2013, Miss Maria Froggatt, the planning officer responsible for the case, made the admission that the applicant had done what was required to discharge the planning condition, and that was namely to submit a mitigation system known as the throughput analogue mitigation system, which would provide a system to blank out any intermittent clutter arising from the wind turbine development at the stadium. That was what was required of me to do in accordance with the planning condition. I did that, and it later transpired, September time onwards in 2013, that in fact Middlesbrough Council didn't actually know what precisely I was to do to actually discharge the condition in the first place. I refer to my accompanying statement, sorry could I, could I, could you just pass the, the hearing bundle to me please?

Ms Jones: Well, of course.

Mr Millinder: I, I refer to my accompanying statement in tab, where, where are we?

Ms Jones: Thank you.

Mr Millinder: Thank you, sorry. Seven, tab seven, Your Honour. This is the statement that I made, and, and I created when I made the application to withdraw the condition. In essence, my statement would suggest that in fact the, the condition in question goes to the heart of the planning permission, i.e. the turbine can't operate until a system, which fundamentally still doesn't exist on today's date, was implemented at the airport. So, therefore the turbine couldn't operate until that condition was ultimately removed or disposed of, or indeed discharged unfulfilled. In addition, the issues causing the non withdrawal or, or, or, or fulfilment of the planning condition were matters completely beyond my reasonable control as a developer. I don't have access to Durham and Tees Valley airport air traffic control centre, neither do I have control over installing any such system at the airport, because it is ultimately the airport's operational prerogative to install such equipment, and I've got absolutely no control as to whether such equipment would ever be installed at the airport period. On that basis, I would assert that, in fact, the planning condition is indeed beyond my reasonable control in fulfilling it in the first place. However, I was unable to make an application to challenge the validity of the planning condition because the planning condition

was imposed in 2008. So, therefore, I had little choice, other than to go down the course that I effectively went down which cost me a lot, awful lot of money and involving all kinds of different specialists who advised accordingly, and we've made, we came to the conclusion in September that, in fact, there are financially motivated considerations, bearing in mind that the airport is underperforming, the passenger numbers have dropped significantly over the past years. I construed that it could be a potential for the airport to utilise such planning conditions as a means to leverage funds from developers of wind turbine projects within the vicinity. And in fact, my contention, or my thought process, was to an extent proven, because I later found in, in investigation that, in fact, the airport were putting out these widespread copy and paste style objections without substantiating why any such development would be of detriment to the airport's operation. And that is in contravention of Civil Aviation Authority's CAP 764, which is the policy guidance for aviation stakeholders and wind farms.

Nugee J: Yes.

Mr Millinder: It states that where, where there is a genuine contention, whether it be on the interest, in the interests of their safety or whether it be for other operational reasons, the airport must substantiate why the development would present such risks and what would actually cause those risks to be present in the first place.

Nugee J: Yes. Listen I, I don't --

Mr Millinder: They never did that.

Nugee J: I don't want to stop you saying what you want to say but we only have a limited amount of time --

Mr Millinder: Sure, sure.

Nugee J: And, and, and, and I, if you can, focus on the particular applications you're making today. I understand --

Mr Millinder: Course, so --

Nugee J: There's a lot, there's a lot of, of, of, of history --

Mr Millinder: I'll cut to the chase.

Nugee J: Yes.

Mr Millinder: The long and short of it, and what I was trying to get across in detail was those matters were completely beyond my reasonable control in accordance with force majeure.

Nugee J: The whole of the planning, the whole of the, the delay caused by the planning.

Mr Millinder: Completely --

Nugee J: Condition seven.

Mr Millinder: Beyond my reasonable control.

Nugee J: Right, so you've said that amounted to force majeure for the purposes of the energy supply agreement and for the purposes of the lease.

Mr Millinder: Correct, Your Honour.

Nugee J: Yes.

Mr Millinder: Yeah. So, moving on, moving onto 2016, prior to the hearing of the 19th September, the winding up hearing, I was asked by Mr Registrar Baister to enter into a CVA with the legitimate creditors. I didn't enter into a CVA with Middlesbrough because Middlesbrough's not a creditor. However, I did enter into an agreement with the other legitimate creditors who all accepted my proposal and they were perfectly happy to run with it. Had that proposal have gone across and Mr Staunton, had he not attended on the day to make this misrepresentation that Middlesbrough was a creditor, on the balance of probabilities the company wouldn't have been wound up and we wouldn't be in the position we are today.

Nugee J: I'm sorry, I haven't understood that. What, because the, the misrepresentation you complain of was 9th January 2017. When was the winding up petitioned?

Mr Millinder: So, the, the representation I'm referring to, Your Lordship, is actually the, the representation made prior to 19th September 2016 on the date of the winding up petition. Mr Staunton attended that hearing in support --

Nugee J: At the hearing of the winding up petition?

Mr Millinder: At the hearing of the winding up petition, to support Middlesbrough's claim as a creditor of the company in the sum of £255,000 or thereabouts.

Nugee J: And do you know how the £255,000 was made up?

Mr Millinder: I do.

Nugee J: How was it made up?

Mr Millinder: Circa £181,000 of that pertained to the energy supply agreement.

Nugee J: That's the eight pence --

Mr Millinder: Sorry.

Nugee J: Per kilowatt hour?

Mr Millinder: Yes. The refund payment.

Nugee J: And then the balance is rent, is it?

Mr Millinder: Is rent, yeah.

Nugee J: And your contention is that, that rent under a lease is suspended if there's a force majeure preventing you from earning money, is it, or, or?

Mr Millinder: Well, the, the very purpose of the lease was to build the wind turbine. All of these documents that we completed in the course of the transaction were Middlesbrough's. They shouldn't be viewed as isolated agreements because I entered the lease and I paid the £200,000 in June 2013 on the basis that we were going to build a turbine, and the lease was the instrument that we used so as to secure the land so that the turbine could be built.

Nugee J: Yeah.

Mr Millinder: In a similar respect, the energy supply agreement was to supply energy. However, without a grid connection the energy can't be supplied.

Nugee J: Right, yeah.

Mr Millinder: And the same would apply to the connection deed which I completed on the same day, the 13th, from memory the 13th November 2013, on the same day as the energy supply agreement. I did so on the basis, and of, of the assumption that in fact Middlesbrough football club actually would do what was required of them so that the connection for the wind turbine could be established. They didn't.

Nugee J: Now, this I have not understood. There is, there is an agreement dated 7th November 2013 which calls itself a connection agreement deed which obliges Middlesbrough to ensure that for the remainder of the term of the lease the, Middlesbrough will not --

Mr Millinder: Terminate or tamper.

Nugee J: Terminate or tamper with the connection.

Mr Millinder: Yeah.

Nugee J: Now, your understanding is that that's different from the connection agreement referred to in the energy supply agreement.

Mr Millinder: Yes.

Nugee J: What, what, what does the connection agreement referred to in the energy supply agreement do? What's the --

Mr Millinder: I would, if you, if you may, if I may, Your Lordship, I would just like to explain that in a slightly different context.

Nugee J: OK.

Mr Millinder: The original connection offer dated the 12th December 2012 was requoted. It was requoted in, firstly it was requoted in April 2013 and the requote arrived some time after that, I think it was June, early June or thereabouts, and it was condition precedent, as it was in the original offer, that Middlesbrough football club adopted those certain components within the substation so that the connection could be established. That was my understanding, and very clear understanding, when I accepted the terms of that offer in December 2012. And therefore, I entered the connection deed on the basis that after commissioning, Middlesbrough clearly would have already done what was required of them under the offer and would have already been in ownership of those components, so therefore I ask them not to terminate and tamper with the equipment that they already own, sorry with the connection, within the connection within the equipment that they already own.

Nugee J: OK. But you say that it never actually got an, an electricity --

Mr Millinder: It did. It got the connection. We got the connection in, in 2012. I paid the deposits and then I applied for OFGEM's feed in tariff, preliminary accreditation for the 1.5 megawatt turbine. That was approved in June 2013 before we completed the lease. The electrical design had already been completed. The fundamental connection offer was agreed in 2012.

Nugee J: OK.

Mr Millinder: So, therefore, and my contention is the option period and the very purpose of having that option period in the first place was for me to gain full satisfaction of the grid connection agreement so that the power could be delivered from the turbine to the grid, and from the turbine to the stadium. It was for that explicit reason that I completed the lease on

the 17th, I think it was the 17th June 2013, and paid Middlesbrough the £200,000. Without a connection there was no point in doing it.

Nugee J: OK.

Mr Millinder: I think that that summarises the position as to how we've arrived at the, let's call it a, a, a dispute. And it is a dispute, and it's a dispute in relation to the £255,000 that was disputed from June 2015 onwards, but it was disputed from my end in a different way than it was disputed from the Defendant's. It was disputed from my end because I say well, I've just paid you two hundred thousand quid, I've incurred £700,000 of costs in developing this project that was ready to construct in January. You've just refused the connection, what about my money? What about my revenue from the turbine? What about the five years, sorry, then three years that I've dedicated to this project, intensively dedicated to the project, working very hard to overcome what was a highly contentious and complex issue beyond my reasonable control? If they were going to refuse the, if Middlesbrough were going to refuse the connection, why did they not just tell me in 2012? Because I wouldn't have completed the lease. That was the whole purpose of the option agreement. They wanted to take my money, run me round the houses and kill it on the 11th hour, that is my, my contention.

Nugee J: Right. Yeah. We're still a little way away from the allegation of, of material non disclosure on the 9th January, which is the heart of --

Mr Millinder: We are, yeah. So, Sir --

Nugee J: Of, of, of this application.

Mr Millinder: Now I move onto that side of it.

Nugee J: Yeah.

Mr Millinder: Your Lordship. On the 9th January it was actually, I made a typing mistake in my witness statement, it should have been 5:30pm that I found that the information was withheld, not 4:30pm.

Nugee J: OK.

Mr Millinder: However, at 5:30pm a Mr Julian Gill of Womble Bond Dickinson sent me the file of evidence that was presented at the ex parte hearing.

Nugee J: Yeah.

Mr Millinder: I evaluated all of the information and I immediately noted that the connection offer, the connection deed and the fundamental asset sale agreement was missing, as was the rest of those documents contained in the letter from Penningtons to, to Womble Bond Dickinson dated 11th January 2017. Those are the list of exhibits constituting 172 pages of information that was withheld from ex parte hearing --

Ms Jones: That, that's the letter in there.

Mr Millinder: From the ex parte hearing.

Ms Jones: Tab four or five My Lord.

Nugee J: Yes, I've got, I've got the letter.

Mr Millinder: Now, I know the law. I wouldn't come to Court and mislead the Judge by withholding information. I'm not a barrister, I'm not a solicitor, but I would not mislead a High Court Judge, I wouldn't mislead any judge because it's fundamentally wrong to do so. To withhold 172 pages of information from an ex parte hearing is a very, very serious matter in my opinion. Particularly so when those agreements were fundamental to my case and fundamental to the statutory demand. I now move on to the board minutes of assignment. On the 29th June 2015, shortly after receiving the demand for the £255,000, I met with Alan Millinder and we sat down, and we discussed how can we sort all this out, and we put in place a simple board minute, and that board minute of assignment was included within the correspondence. It was mentioned on the statutory demand, yet the Defendants even withheld that fundamental document and later referred to it in the, in the witness statement. Now --

Nugee J: Do I have a copy of those board minutes?

Ms Jones: I, I think Your Lordship might have it.

Mr Millinder: Yes, yes, is it within here?

Ms Jones: Yes.

Mr Millinder: It should definitely be within here.

Ms Jones: I, I haven't taken Your Lordship to it.

Nugee J: Yes.

Mr Millinder: Yeah, it is in here, it's in here. There's the note of hearing. It's actually tabs 25 to 26, Your Lordship.

Ms Jones: No, it's 27, the board minute.

Mr Millinder: No, I'm referring to the actual, the, the minutes of the hearing, not the board minutes.

Ms Jones: Well, the, the board minute is at, is at tab 27.

Nugee J: 27, thank you.

Mr Millinder: OK, yeah. So, the, the piece I wasn't entirely clear on, Your Lordship, is whether the Court would actually hold that same constituted a valid assignment. Although --

Nugee J: Look, let me, let me just have a look at, at the board minutes. Who, who is Alan Millinder?

Mr Millinder: He's actually a member of my family, my father.

Nugee J: And were the two of you directors or?

Mr Millinder: We were the Directors of Empowering Wind, yes, Your Honour.

Nugee J: Empowering Wind.

(pause)

Nugee J: Yes, I see. That, that's a discussion as to, as to how you move forward on the 29th June once you've received the demand.

Mr Millinder: Yes.

Nugee J: Yes.

Mr Millinder: I wasn't entirely sure whether the Court would hold that that constituted the valid assignment.

Nugee J: Yes.

Mr Millinder: However, what I wanted from the proceedings was a, a directions hearing at the very least so that I could explain the correct factual position to the Court.

Nugee J: Yeah. OK.

Mr Millinder: I now move on, if I may, Your Lordship, I now move on to the note of the hearing of 09.01.17.

Nugee J: Yeah.

Mr Millinder: I refer to the 9th paragraph down made by Mr Staunton. Mr Staunton says:

“There is a definition of force majeure in the lease. [Sorry, there is a definition of force majeure in the lease.] There is no other reference to force majeure in the lease.”

The statement is incorrect. In the agreements and declarations of the lease there is an operative provision of force majeure that works for both parties, but namely the party affected by the force majeure, and in my case it was clearly me.

Nugee J: Yeah.

Mr Millinder: I consider that statement to be rather material in the circumstances, given the fact that there was this large delay and given the fact that I'd mentioned force majeure within the statutory demand and namely, the energy supply agreement, which also has a force majeure provision. I'm not sure why Mr Staunton made this comment.

Nugee J: Yeah.

Mr Millinder: Because indeed, the force majeure provision within the agreements and declarations of the lease does have effect.

Nugee J: Can I be clear that your, your application's based on the material non disclosure at, before Mr Justice Arnold on the 9th January and you've referred to the failure to put in the matters referred to in Penningtons' letter of 11th January, the connection agreement and the like. Now, this is a separate point, which is that Mr, the note of the hearing before Mr Justice Arnold refers to Mr Staunton having said that there's no reference to force majeure in the lease. Is, is that a, is that the part of a non disclosure you rely on or --

Mr Millinder: No.

Nugee J: No, no.

Mr Millinder: Not, not at all.

Nugee J: The non disclosure is, is the, is the material referred to in Penningtons' letter?

Mr Millinder: The material that I refer to.

Nugee J: Yes.

Mr Millinder: Your Honour, yes.

Nugee J: Yes, OK, thank you.

Mr Millinder: So, another point that I did raise, and I don't know if Your Lordship had chance to read the email that I asked to be forwarded to you dated the 3rd February. It's in the very front of the, the hearing bundle.

Nugee J: I think I did read that. Let me just check. Is it the one saying:

“Mr Stuart, I've read your statement.”

Mr Millinder: No.

Nugee J: No.

Mr Millinder: This should be the one saying:

“Mr Staunton, I shall look forward to seeing you on Monday.”

No, sorry, you're right, Your Honour, yes. I apologise, yeah, that's part of the same email, yes, and I've referred to the Schedule 5 agreements and declarations and I now moved on to the tenth paragraph, and I said that it's noted that on that day you, Mr Staunton, blatantly acknowledged that force majeure does have effect as to the energy supply agreement. Mr Staunton made this comment on the 9th January, so therefore, Mr Staunton, on the 9th January was acutely aware that any such sums pertaining to these £4.1 million, £541,00 or £255,000, wouldn't be due because force majeure applied in the operative provision in accordance with that contract.

Nugee J: Yeah.

Mr Millinder: I consider that to be somewhat material because in, more in relation to the other case under 14.11, because indeed it would go some way to proving that, in fact, Mr Staunton himself was aware that force majeure applied in the operative provision as to that energy supply agreement. And in that respect, I would further add, Your Lordship, that

barristers and solicitors owe a duty of care to the Court to maintain honest exposure at all times, and in particular at ex parte hearings where the judiciary are seeking to rely upon information presented ex parte where the other Defendant or the other, the Respondent cannot substantiate or, or, or come up with a counter argument. It is particularly material in this situation, and Mr Staunton has clearly made misleading statements. However, my contention isn't with Mr Staunton. My contention is the fact that the Defendants turned up on the 9th January and withheld those fundamental documents that would have otherwise proven the statutory demand.

Nugee J: Yes. So that's the basis for saying that, that there was material non disclosure on the 9th January. Now, on the 16th there was an order made which on it's face says it was made by consent, and one of the points that I think Mr Staunton takes today is it doesn't matter any more whether the order on the 9th January was something that should have been obtained or not because there was a consent order on the 16th. And I think you want to say that, that --

Mr Millinder: I didn't agree to it.

Nugee J: You didn't really consent to it.

Mr Millinder: That's correct Your Lordship.

Nugee J: Tell me, tell me what the position is.

Mr Millinder: The position is as it is today and as it was on the 9th January. I agreed for the, the consent order, or the basis of it, to continue solely because Middlesbrough, and I did mention this to Mr Justice Arnold who I contacted through the clerk as soon as I found out about this material non disclosure, I explained that I was furious that they'd, they'd withheld this information. However, Mr Bloom had created grounds for a dispute and I understood at that time that the Insolvency Court isn't the appropriate avenue or the appropriate jurisdiction to address such, such dispute, and on that sole basis I agreed for the order to continue, to continue but that each party bear its own costs.

Nugee J: So, how did it come about, as far as you are aware, that the order that was in fact made required EEI to pay £25,000 in costs?

Mr Millinder: How did that come about?

Nugee J: Yes.

Mr Millinder: It came about because Middlesbrough football club, or, or in fact Womble Bond Dickinson solicitors were trying to charge me £47,000, and I know how much these things cost --

Nugee J: Yeah.

Mr Millinder: And it was absolutely ridiculous that they were trying to charge me £47,000 for that ex parte hearing, when quite frankly there was, there was nothing there of any substance anyway, it was all mostly lies, and there was information that was withheld that was clearly material to the case. I said:

“I’m not paying you, it’s as simple as that.”

And Penningtons did --

Ms Jones: I’m, I’m, I’m just going to rise lest that Mr Millinder inadvertently talk about legal advice.

Nugee J: Yes, you --

Ms Jones: Remember we said, not telling, not talking about --

Mr Millinder: No, no. I, I, I do want to explain this position because this is material to the case, and the position is that Penningtons said well, you know, you’ve got to go ahead and, and agree the Consent Order and so on and so forth, but I never did personally agree to the £25,000. I took this issue up with Penningtons and I completed the four month or so professional negligence process with them, and I’ve got evidence of, of that very lengthy process and the claim, the letter of claim that I issued to them for misadvising me in this matter.

Nugee J: Can I ask, did Penningtons sign the Consent Order on your behalf or, or did they

--

Mr Millinder: I don't. I, I honestly don't rightfully know.

Mr Staunton: Right.

Nugee J: Did you, did you appear in Court yourself --

Mr Millinder: No, no, no.

Nugee J: On the 16th?

Mr Millinder: No, not at all.

Nugee J: Who, who appeared, do you know?

Mr Millinder: I don't know, Your Honour.

Nugee J: Did, did, did someone from Penningtons appear?

Mr Millinder: I don't think they did, no.

Nugee J: You, you didn't, you didn't have a barrister?

Mr Millinder: Not, not at all.

Nugee J: No.

Mr Millinder: No, no. I don't think they did appear because there was another document dated the 16th saying that they were, some consent to act document I saw in the correspondence dated the 16th. Well, that would lead me to believe that, in fact, Penningtons didn't even attend the hearing.

Nugee J: Yes. OK. So, if, what you want is to set aside that order of the 16th. The practical effect of that, what do you say, you, you, you want to do if you achieve that? I mean, it does two things. It, it dismisses the petition, removes it from the file and it orders you to pay, not you the, the, EEI to pay £25,000, and I can see if it's set aside the £25,000 order goes, but what happens to the petition in your, what's your contention?

Mr Millinder: Well, the petition.

Nugee J: What are, what are you trying to --

Mr Millinder: I mean, I've got absolutely no intention of issuing any winding up petition whatsoever and it will not be done.

Nugee J: Right.

Mr Millinder: I've got no intention of --

Nugee J: So, the, the purpose of this application is, is to discharge the order of £25,000 costs, is it?

Mr Millinder: Well, it's fundamentally, because they, the Defendants sent a High Court enforcement officer to come and recover £619,000 on the 21st November. I received that unexpected visit. Now, I, another contention that I have with the unexpected visit in, is that in law these High Court enforcement officers are, by law, to have provided a seven day notice letter. No seven day notice letter was given. I had this High Court enforcement agent, big thick set chappie, turn up at my office trying to seize my goods to the value of £619,000, and I didn't know anything about it. I didn't know that there was any such order, and he's refers to Bristol County Court.

Nugee J: Yeah.

Mr Millinder: So, I wanted --

Nugee J: I, I don't think I'm dealing today with whether, where the responsibility lies for the fact that the writ of control had that £600,00 figure in it, am I? That's not for today.

Mr Millinder: No, it's not for today.

Nugee J: No, that's right. Yes.

Mr Millinder: Your Lordship, no, no.

Nugee J: Right. Can you tell me a bit about the recusal application --

Mr Millinder: So --

Nugee J: Because normally, if, if you want to ask a judge to recuse themselves, the application's made to the judge --

Mr Millinder: Certainly, yeah.

Nugee J: Himself. And I think I saw somewhere in your letter or your account of the hearing before Mr Registrar Jones, that he did say if you want to make a recusal application you have to make a formal application.

Mr Millinder: That's correct, Your Lordship, and I did make the application on the 19th January, and on or around the, I think it was the 23rd or 24th January, somewhere around there, I got a confirmation back from Mr Registrar Jones that I, I asked that Mr Registrar Jones recuse himself without a hearing.

Nugee J: Yeah.

Mr Millinder: And Mr Registrar Jones said he's going to list the hearing for the recusal application on the same date as the, as the adjourned hearing date of the 26th March.

Nugee J: 26th March.

Mr Millinder: And that is the primary reason, because I don't want Mr Registrar Jones to hear this case. I want a, a High Court judge to hear this case because a High Court judge

should hear the case because Mr Justice Arnold heard the original case and has substantially more knowledge of the matters in question than Mr Registrar Jones does.

Nugee J: Yes, but the, the application which you've asked Mr Registrar Jones to recuse himself from, if I understood this correctly, this is the application under rule, I can't remember --

Mr Millinder: 14.11.

Nugee J: 14.11, thank you, to set aside the proofs of debt.

Mr Millinder: Yes.

Nugee J: In, in the insolvency, in the winding up.

Mr Millinder: Yes.

Nugee J: And that is the one which you've had a hearing, but you didn't get to the end of it, so, it's, there's going to be another hearing in March?

Mr Millinder: Yes.

Nugee J: That's correct, yes.

Mr Millinder: Yes.

Nugee J: Well, I have to say, well I think, I think the appropriate procedural course, and I know that, that the way in which procedure gets in the way of, of these things can often be frustrating, but the appropriate procedural course is to do what the Registrar said, which is to have that application listed in front of him on the renewed hearing and try and persuade him that it's inappropriate that he hears the case. Now, if he agrees with you then you achieve what you want, and it will have to go off and be adjourned to be heard by someone else. If he disagrees with you and you think that he's wrong about that, then it may be possible to try and appeal that, but I don't think it's appropriate for me today to say whether

Mr Registrar Jones should or should not hear something which he's halfway through hearing.
Do you --

Mr Millinder: I, I completely understand what you're saying, Your Honour. However, my contention --

Mr Staunton: No.

Mr Millinder: Is twofold. And the first is that I allege that there is a conflict of interest. The Registrars are connected with Radcliffe chambers and therefore there is a conflict of interest because the Defendants and, including Mr Harman, the Liquidator, as Official Receiver, as Liquidator, attended that meeting on the 22nd November from 5:30pm onwards at Arundel House and they had a drinks get together. Now --

Nugee J: But I don't think Mr Registrar Jones was, was there himself.

Mr Millinder: He wasn't there himself at that hearing, no. --

Nugee J: The Chief, the Chief Registrar was, Chief Registrar Briggs.

Mr Millinder: The Chief Registrar was, and it was the Chief Registrar that crossed out my request that the case be heard by a High Court judge on the same day as I filed the information concerning what I alleged to be a Section 21 offence, Theft Act offence.

Nugee J: Sorry, I, I, I haven't understood that reference. Section 21 --

Mr Millinder: Sorry, Section 21 of the Theft Act 1968 in respect of the unwarranted demand with menaces.

Nugee J: I see. Blackmail.

Mr Millinder: Blackmail --

Nugee J: Yes.

Mr Millinder: Your Honour.

Nugee J: Yes. Right. Well, I'll hear what Mr Staunton has to say, but, but I think at the moment I'm inclined to think that it should be for the Registrar to decide whether he feels that it's appropriate for him to continue hearing that application or not. But let me, I mean that's fine, I think I will ask Mr Staunton for what he wants to say. Just before I ask you to sit down, have I understood it correctly that those are the two matters I have to decide today, you're asking me to decide today? Secondly, whether I should decide today that Mr Registrar Jones shouldn't hear the rule 14.11 case because of the conflict of interest, and firstly, whether I should set aside, in effect, the order for costs made on the 16th January because of the non disclosure of the material listed in Penningtons' letter of 11th January?

Mr Millinder: Yes, yes, Your Lordship.

Nugee J: Yes. Thank you very much. Yes, Mr Staunton?

Mr Staunton: Now My Lord, I don't want to be over long on the evidence, but can I take you the Defendant's bundle?

Nugee J: Yes.

Mr Staunton: Tab one, Mr Stuart's witness statement.

Nugee J: Yes.

Mr Staunton: Paragraph number five. That's why we went for Mr Justice Arnold, because of the threat following a statutory demand having been served.

Nugee J: Yeah.

Mr Staunton: Paragraph six, the club dispute Earth Energy standing to present the petition.

Nugee J: Yes.

Mr Staunton: Then, carry on to --

Nugee J: You had two points. One, one was, was the assignment effective? And the second was, was the claim itself a, an undisputed debt?

Mr Staunton: Absolutely.

Nugee J: Yes.

Mr Staunton: Have you had, sorry, I'll carry on with this --

Nugee J: I, I have read both Mr Bloom's statement and Mr Stuart's statement --

Mr Staunton: Yeah.

Nugee J: But that doesn't mean I remember everything that's in all of them, but --

Mr Staunton: No, Mr Bloom's statement, of course, was before Mr Justice Arnold --

Nugee J: Yes.

Mr Staunton: And in it, he set out in detail the dispute between Middlesbrough and Empowering Wind.

Nugee J: Yes.

Mr Staunton: One of the main points you mentioned as well is that the statutory demand wasn't served by Empowering Wind which of course has been winding up --

Nugee J: No, no. It was, it was sent by EEI. I have that part, yes.

Mr Staunton: Indeed, and one of the things that Penningtons mention in their letter, tab two, page 12. Sorry, the pagination's very feint and small at the bottom. Paragraph --

Nugee J: Sorry, tab, tab two of your bundle?

Mr Staunton: My bundle, yes.

Nugee J: Yes, page 12, yes?

Mr Staunton: Paragraph number six. So, Penningtons there are mentioning this question of an assignment.

Nugee J: Yeah.

Mr Staunton: And despite that of the response that is at page 14, 15, despite that there was a Consent Order.

Nugee J: Yes.

Mr Staunton: Now, nobody attended that hearing in front of Mr Justice Briggs because the Consent Order had been agreed beforehand --

Nugee J: Mr --

Mr Staunton: And Mr Justice Briggs --

Nugee J: Mr Justice Norris, I think.

Mr Staunton: Pardon me, Mr Justice Norris, indeed. Mr Justice Norris, having seen the Consent Order, excused attendance, so he made the order without anyone attending --

Nugee J: Are you able to tell me on instructions, and I don't think it's in the evidence, as to how the Consent Order got to the Court? Sent by email, signed by both parties, or, or --

Mr Staunton: I don't know, it's not in the evidence said in Court.

Nugee J: No, I don't think it's in the evidence.

Mr Staunton: No. All you have there is Mr Stuart's witness statement, paragraph number seven.

Nugee J: So, as I understand, it was made by consent I think?

Mr Staunton: Yeah.

Nugee J: Yeah.

Mr Staunton: At paragraph eight, there is a response. Paragraph nine, no further correspondence. That's all I can see in the evidence.

Nugee J: Yes.

Mr Staunton: There's no evidence as to how that order got before Mr Justice Norris --

Nugee J: No.

Mr Staunton: But obviously it's signed, so the Court staff must have been satisfied Mr Justice Norris made the order.

Nugee J: Yeah.

Mr Staunton: Now, so there's assertion by Penningtons Manches of material of non disclosure at the ex parte hearing, and despite that there's a Consent Order.

Nugee J: Yes.

Mr Staunton: And therefore, my submission it's impossible for that order to be set aside or varied in any respect.

Nugee J: Yes.

Mr Staunton: Now, one of course remembers that the witness named Mr Bloom was before Mr Justice Arnold. It sets out in full the dispute between the two parties. The --

Nugee J: When you say in full, does it take the particular point, does it refer to the particular point which Mr Millinder is, I think, most exercised about?

Mr Staunton: Well, page, page 3.

Nugee J: Which is the connection agreement point.

Mr Staunton: Yeah. I don't think it does actually.

Nugee J: No, I, I think it's really. What, what it really concentrates on --

Mr Staunton: Yeah.

Nugee J: Is the planning problem.

Mr Staunton: Yeah.

Nugee J: And whether that amounted to force majeure.

Mr Staunton: Indeed.

Nugee J: But what Mr Millinder's told me today and, and is apparent from his material, is his focus on the connection agreement and, and the, and the failure of Middlesbrough, as he sees it, to agree to the relevant agreement, and therefore that was what really stymied the project. Are you in any position to tell me what, what Middlesbrough's position is on that?

Mr Staunton: If it is, in respect of the connection agreement --

Nugee J: In the connection agreement.

Mr Staunton: No. Because all I can say is, this is what Mr Bloom has set out, Middlesbrough's position --

Nugee J: Yes.

Mr Staunton: In his witness statement.

Nugee J: Yes.

Mr Staunton: I can say no more, I can't take you to any evidence.

Nugee J: No, OK.

Mr Staunton: Now --

Nugee J: Your submission is, is your submission that there was a non disclosure, or there was non disclosure but it wasn't material, or, even if there was material non disclosure, it doesn't matter because the opportunity to challenge it was there on the 16th?

Mr Staunton: Absolutely. Well, I think they all follow in sequence, don't they? In the sequence Your Lordship's (inaudible)

Nugee J: Well, yes, they're not, but you, you don't have to adopt all of them. I'm trying --

Mr Staunton: No, no, no, no.

Nugee J: I'm trying, I'm trying to understand what it is you're asking me to, to --

Mr Staunton: Yeah. There was no material non disclosure. Everything was before Mr Justice Arnold in the witness statement of Mr Bloom and the submissions, and even if there was a material non disclosure, Penningtons Manches were onto that before the hearing, before the Consent Order was made --

Nugee J: Yeah.

Mr Staunton: And nevertheless, they consented to the order. Now, it's not for us to be troubled as to whether Pennington Manches had or had not authority from Mr Millinder --

Nugee J: No.

Mr Staunton: To agree the position for costs. We'd no reason to doubt it, and Pennington Manches agreed to the Consent Order.

Nugee J: Were they on the record as acting for the Respondent?

Mr Staunton: I can't say, but I imagine they must have been because I can't see how the Consent Order would otherwise have been made. There's no evidence whether it's on the record. If you turn to page, Defendant's bundle, tab two, page 12.

Nugee J: Defendant's bundle, tab two --

Mr Staunton: Two, page 12.

Nugee J: So.

Mr Staunton: I'm not sure, is that the correct bundle My Lord? I think the Defendant's bundle was in a Radcliffe Chambers file.

Nugee J: Defendant's bundle --

Mr Staunton: Yeah.

Nugee J: I'm so sorry. Yes. Page, page 12, yes.

Mr Staunton: First paragraph.

"We have been instructed to represent Earth Energy Investments."

Nugee J: Yes.

Mr Staunton: Now, I don't, there's nowhere in the evidence with any acknowledgement of services filed.

Nugee J: Yeah.

Mr Staunton: Now, well it's got to --

Nugee J: And at that stage, so that's the 11th January, they were saying each side should bear its own costs.

Mr Staunton: Yeah, and then --

Nugee J: And if that can't be agreed we will attend.

Mr Staunton: Yeah, and then the response at page 14.

Nugee J: And they, your solicitors said --

Mr Staunton: If you look at the final paragraph on page 14:

“We trust you will agree.”

Nugee J: Confirmation that you pay the costs, effectively, and then we'll forward a Consent Order.

Mr Staunton: Or EEI pay the costs, yes.

Nugee J: Yes.

Mr Staunton: And then the final sentence on page 15, and we see there, confirmation for the Consent Order for approval.

Nugee J: Yeah.

Mr Staunton: There's no evidence, well certainly in the evidence there's no further correspondence with Pennington Manches, as Mr Stuart says in his witness statement. There there's no, nothing in the evidence about how that was confirmed or it was a travelling draft order, so I just can't help you be reference to the evidence.

Nugee J: No, OK.

A1. **Mr Staunton:** Now, one of the other grounds upon which Mr Justice Arnold made the order was that this claim is a claim between Empowering Wind and Middlesbrough --

Nugee J: Yes.

A2. **Mr Staunton:** Under the various agreements, and yet the statutory demand comes from EEI.

Nugee J: Yes.

A3. **Mr Staunton:** So, wrong Claimant, and that was dealt with by Mr Justice Arnold. Continue very, very quickly, the page is Defendant's bundle, tab four.

Nugee J: Yeah.

A4. **Mr Staunton:** Page 77, letter from Empowering Wind 22nd September '15 setting out its claim. I won't take you to it in any detail, just showing you that throughout the claim was said to be that of Empowering Wind and suddenly the statutory demand says in fact it's a claim of EEI. Page 79, refusal to make the grid connection, just showing in the heading, and turning onto page 81. The second paragraph, final sentence, finally we that:

"Failing that we've a very clear cut case and my QC be instructed to issue proceedings."

A5. So, it's claim by Empowering Wind. If you turn over the page you've got the response from Mr Bloom. I needn't take you to that in any detail. And then if you turn on please to page 86, the order of the 19th September '16 winding up Empowering Wind.

Nugee J: Yeah.

A6. **Mr Staunton:** And then, if you turn on please to page 88, it's an email from Mr Millinder. It's still Empowering Wind's claim. You'll see there was an attachment, and if you turn onto page 90, that's the attachment and it's still a claim by Empowering Wind. Do you see that, My Lord?

Nugee J: Yes.

Mr Staunton: And then, if you turn on please to page 97, final page, the penultimate paragraph, final sentence:

“It is therefore left no alternative but to recover its loss through the High Court.”

A7. That’s Empowering Winds it. And then, page 152, there is EEI threatening service of a statutory demand. Page --

Nugee J: Sorry, was that 1, 152?

Mr Staunton: Page 152, yes.

Nugee J: Yes.

Mr Staunton: Then will you turn on, please, to page 168?

Nugee J: Yes.

Mr Staunton: 6th January, you have an email halfway down from Mr Millinder to Mr Bloom going to present a winding up petition.

Nugee J: Yeah.

Mr Staunton: And then, page 171, there is a statutory demand --

Nugee J: And it comes from EEI?

A8. **Mr Staunton:** Yeah. Now, of important to note page 174, there’s an assertion there’d been an assignment --

Nugee J: Yes, on the 26th June.

A9. **Mr Staunton:** On the 26th of June '15, indeed.

Nugee J: Yes.

Mr Staunton: Now --

Nugee J: Well, that was the document which Mr Millinder showed me, which is the board minutes.

Mr Staunton: Yeah, right.

A10. **Nugee J:** And that was one of the documents referred to in, in Penningtons letter of the 11th?

Mr Staunton: Indeed, and its tab, Mr Millinder's bundle, tab 27 I have it at.

Nugee J: Yes, yes.

A11. **Mr Staunton:** Second page in. Reading that second paragraph, what's assigned to EEI are the investments, the £200,000.

Nugee J: Yeah.

Mr Staunton: But not the cause of action, because in this second paragraph, third line:

"We agree to separate out what went in as an investment to the project, so there were two causes of action with the payment recovering funds invested and Empowering recovering consequential loss."

A12. So, it's still its claim.

Nugee J: Well, I'm not sure I've quite understood how that fits with the claim that was in the statutory demand. Because the statutory demand is for £200,000 on the lease premium and £330,000 in legal and technical project development processes, and that could be the parent's investment, could it not?

A13

A14. **Mr Staunton:** It might be, yes. But all of this point about assignment was dealt with in Mr Bloom's witness statement for Mr Justice Arnold.

Nugee J: Yeah.

Mr Staunton: And so therefore, it's also in my skeleton before Mr Justice Arnold in paragraph 12.

Nugee J: Yeah.

Mr Staunton: So, what Mr Justice Arnold had before him was a threat by EEI to serve a statutory demand with questions about whether the debt is disputed, whether it's a dispute between the parties which had been canvassed in correspondence, and secondly, whether in fact EEI had any claim.

Nugee J: Yeah.

A15 **Mr Staunton:** And the evidence before him, in my submission, was that until service of the statutory demand Mr Millinder had been advancing claims on behalf of Empowering Wind, not EEI.

Nugee J: Yes.

A16 **Mr Staunton:** It was its claim. And for that reason, Mr Justice Arnold grants the injunction. Defendant's bundle, tab two, page 9's the attendance note.

Nugee J: Yeah.

Mr Staunton: If you turn onto page 10, Mr Justice Arnold's decision at the foot of the page. If you turn over, page 11, fifth paragraph commencing on that page.

"Until recently."

Nugee J: Yeah.

Mr Staunton: And the following paragraph as well.

“The Respondent states.”

So, Mr Justice Arnold grants the injunction on two grounds --

Nugee J: Two grounds.

Mr Staunton: Essentially, yeah.

Nugee J: Because there's --

Mr Staunton: Dispute and doubts --

A17 **Nugee J:** There's doubt, doubt over the assignment and dispute over the claim.

Mr Staunton: Absolutely.

Nugee J: Yes.

Mr Staunton: And then Pennington Manches writes a non disclosure and the Consent Order is made.

Nugee J: Yes.

Mr Staunton: All too late.

A18 **Nugee J:** Do you want to, do you want to say anything about the statement on the first page of the attendance note, which I think is a statement by you?

“There's no other reference to force majeure in the lease.”

Because it's a point that Mr Millinder drew my attention to.

A19 **Mr Staunton:** Indeed, so I drew the attention of the Lord, of Mr Justice Arnold to the provision in the lease defining force majeure, and my simple point was and thereafter the lease is silent on force majeure, left hanging, which is --

Nugee J: But that's, but that's incorrect, Mr Millinder says.

A20 **Mr Staunton:** I don't, it's not.

Nugee J: Well, have we got the lease?

Mr Staunton: Yeah. Defendant's bundle, tab four, page 16, I think it is.

Nugee J: Yes.

A21 **Mr Staunton:** Turning onto page 22, there is the definition of force majeure.

Nugee J: Yes.

A22 **Mr Staunton:** And the only point I made to Mr Justice Arnold was, there's no further mention in the lease of force majeure.

Nugee J: Yes, but Mr Millinder says that's wrong.

A23 **Mr Staunton:** Well, he hasn't shown me the relevant paragraph.

Nugee J: Well, page 44 schedule five, paragraph six --

Mr Millinder: Schedule five, paragraph six.

A24 **Nugee J:** And there's a schedule headed Agreements and Declarations.

A25 **Mr Staunton:** No, indeed.

Nugee J: There does seem to be a provision that:

“If [a] a party’s prevented from performing its obligations by reasons of force majeure it shall not be in breach of such obligations.”

Mr Staunton: Yeah.

Nugee J: So, I think it wasn’t correct telling Mr Justice Arnold that there was no further reference to force majeure in the lease. I think that’s the point Mr Millinder was making.

Mr Staunton: (indicates agreement)

Nugee J: Do I assume, from what you’ve just, the way you’ve just addressed it, that you were unaware of that provision?

Mr Staunton: Well, if I was aware of it I wouldn’t have said that.

Nugee J: Well, that, that’s rather what I would have expected, yes. Yes, do you want to say any more about that?

Mr Staunton: No. It’s not specifically referred to in Mr Bloom’s witness statement either, at tab three. Paragraph eight is where he addresses the question of what’s contained in the lease.

Nugee J: Yes.

Mr Staunton: He mentions, in paragraph 8.4, he mentions schedule five.

Nugee J: It does say schedule five, clause six --

Mr Staunton: Sorry, yes.

Nugee J: Provided relief to either party.

Mr Staunton: Yeah.

Nugee J: Yes.

Mr Staunton: 8., paragraph 8.5. So, I can't now recall why I said that to Mr Justice Arnold, I can't believe I --

Nugee J: And there's a bit more in paragraph 19 as well.

“Even if there had been a force majeure event, that would only have [have] absorbed EW from any breach of its contractual obligations, not from its liability to pay rent.

Mr Staunton: Yeah.

Nugee J: Yes. Well, I can see that that might be (inaudible) but, but yes.

Mr Staunton: Yeah. Well, I wouldn't wish to be cavalier, nonetheless, it's all water under the bridge by the time Pennington Manches --

Nugee J: Well, I understand that.

Mr Staunton: Yeah, absolutely, yeah.

Nugee J: I understand that point.

Mr Staunton: Yeah.

Nugee J: And also, simply identifying that there is an argument which gives rise to a dispute doesn't, doesn't entail the consequence that the --

Mr Staunton: No, absolutely.

Nugee J: Petition should go forward.

Mr Staunton: Absolutely.

Nugee J: Yes.

Mr Staunton: So, undoubtedly there was a dispute, claims could have been but the Winding Up Court was not the appropriate place.

Nugee J: No.

Mr Staunton: Indeed. I needn't say anything about committal or recusal. I don't care to say anything about recusal.

Nugee J: No. Yes, thank you Mr Staunton. Well --

Mr Staunton: All right.

Nugee J: Mr Millinder, do you want to say anything in, in the way of reply?

Mr Millinder: I, I do --

Nugee J: Yes.

Mr Millinder: Your Lordship, yes. Fundamentally, the issue that we have is that Middlesbrough football club killed the project by refusing the connection. That is material because had that primary fact been disclosed it would have been blatantly obvious to the Court that Middlesbrough football club caused this loss to the Applicant.

Nugee J: Yeah.

Mr Millinder: That's all I have to say, Your Honour.

Nugee J: Thank you very much. Ms Jones, would you like to say anything?

Ms Jones: I would. I, I, I should say it on, upon instructions, as it were.

Nugee J: Yes.

Ms Jones: Just a few points which have occurred to me as, on listening to my learned friend. So, the first point is on whether there was material non disclosure, really picking up what Mr Millinder has just said, immediately Mr Millinder saw what had been said he, he was straight on to identifying, and as I say it's 172 pages, obviously material, material. And so, really my, my learned friend hasn't sought to suggest that it wasn't material. So, I, I, I would say that Your Lordship ought to find that there was material of non disclosure. The second point is that my learned friend was relying on there being a Consent Order to which Penningtons consented, but there's no evidence that Penningtons were on the record, and if one actually looks at the witness statement that my learned friend took you all to, Mr Stuart, at paragraph nine --

Nugee J: Yes.

Ms Jones: It's on page 4 of Mr Stuart. He says that we responded to Penningtons on the 12th January, and that's the one saying you should pay all our costs --

Nugee J: Yes.

Ms Jones: But it then says:

“No further correspondence was received from Penningtons in relation to this issue.”

Mr Staunton: This issue.

Ms Jones: Yes, well that's the costs issue. I mean, it's not saying, and we're, you know, we're addressing whether this, this order was agreed. It, it doesn't the order was agreed by Penningtons by a letter dated X, and moreover, it says Earth Energy agreed a Consent Order, but there's no evidence of how that happened either. So, you know, if my learned friend's going to come along and say well, a Consent Order was made and either Mr Millinder or Earth Energy or Penningtons positively agreed to this, then its up to him to put that evidence forward.

Nugee J: Yes.

Ms Jones: And then the third point that I wanted to make related to this point about force majeure not being in the lease. Now, if it was in Mr Bloom's statement that's never good enough.

Nugee J: No, and counsel --

Ms Jones: Not an ex parte --

Nugee J: The judges rely very heavily on what counsel say --

Ms Jones: Very heavily, and, and you know, it's, it's not disputed that that's what Mr Staunton said when he's refused in front of Your Lordship.

Nugee J: Yes.

Ms Jones: And again, I mean, that is a particularly material fact. One would look very differently if told that it's just not relevant to the lease at all, that would obviously have one effect. If it is in the lease then one would want to, to look at whether, in fact, that is force majeure, whether there was, whether there's a real dispute or just one that's manufactured. Of course, the effect of saying it's not even in there is to make it look as if the claim is manufactured, rather than the Defence.

Nugee J: Yes.

Ms Jones: So, I think those are the three points that I wanted to make on EEI's behalf.

Nugee J: Thank you very much. Well, I'll give a short judgment.

(judgment given)

Mr Staunton: My Lord, if you look at Defendant's bundle, tab three, that's the correct title to the proceedings.

Nugee J: Yes.

Mr Staunton: And Mr Millinder, when he issued his application, gets the parties the wrong way round. It just affects the question of how the order's produced, so it would still have that title, the order, and then the --

Nugee J: OK, yes.

Mr Staunton: Application 30th January dismissed. I invite you to make an order for the Claimant's, the Applicant's costs and it be paid not only by Earth Energy Investments but also Mr Millinder. Mr Millinder's quite clearly the driving force behind Earth Energy and therefore has exposed himself to an order for costs as well. Right.

Nugee J: Has there been any warning to Mr Millinder that, that he would be --

Mr Staunton: No.

Nugee J: Personally liable? Well, I think, am I not right in thinking that the Court of Appeal has said that if you want to make an application under Section 51 you ought to warn the, the, the person before?

Mr Staunton: I'll take it, Your Lordship, that's the case. Still a question of costs then against EEI.

Nugee J: Yes. Yes. Ms Jones, Mr Millinder?

Mr Millinder: Clearly, Your Lordship, I, I object to paying Middlesbrough football club's costs when these people have cost me and lost me circa £10.5 million in revenue from the wind turbine. I did lose £530,000. In fact, I lost over £700,000 and that doesn't include the monies I've invested since the insolvency, and these people were solely responsible for my losses, and therefore I contest paying their costs, Your Honour.

Nugee J: Yes. Have you seen the, the costs schedule?

Mr Millinder: I've seen their --

Nugee J: Did you get a copy of it?

Mr Millinder: I've seen their cost schedule, Your Lordship, yes.

Nugee J: Do you want to, do you want to say anything about the figures in it, if, if I'm --

Mr Millinder: I, I honestly don't know where they get their figures from because they haven't done anything.

Nugee J: Yes.

Mr Millinder: And that's really all I can possibly say on the matter.

Nugee J: Thank you. Ms Jones, do you want to add anything?

Ms Jones: I'm not sure that I can particularly say anything, My Lord. I mean, I assume that Mr Staunton's asking for summary --

Mr Staunton: Indeed.

Ms Jones: Assessment, and, I mean, to be absolutely honest in the absence of the solicitors on my side, it's (inaudible) to me.

Nugee J: Yes, yes, no. No, no, it's very difficult, isn't it?

Ms Jones: It does. Besides, I simply point out that one generally does not certainly obtain anything like a full.

Nugee J: No.

Ms Jones: I mean, I'm sure Your Lordship has much more experience of doing these things than I have, so.

Nugee J: Yes.

Mr Staunton: My Lord, can I just address you separately a question, basis of account, so assuming that you are going to make an order that EEI be --

Nugee J: Well, there's three points. Should I make an order --

Mr Staunton: Absolutely.

Nugee J: Should it be indemnity or standard --

Mr Staunton: Yeah.

Nugee J: And, well, four points --

Mr Staunton: Summary says.

Nugee J: Should, should it be summary or detailed, and if summary, what, what figure?

Mr Staunton: Yeah, so you've heard my submissions.

Nugee J: So, well, let me deal with them one by one.

Mr Staunton: Yeah.

Nugee J: So, the first question is whether EEI --

Mr Staunton: Pay the costs.

Nugee J: Should be ordered to pay Middlesbrough's costs. The CPR require me to consider first which party is successful. There's no doubt that Middlesbrough are successful party. It requires me to make an order that the unsuccessful party pays the successful party's costs, but I can make a different order. I have not been persuaded that there is a good reason for departing from the usual rule, which is the unsuccessful party pays the successful party's costs, and I therefore will order EEI to pay Middlesbrough's costs. Mr Millinder said eloquently that Middlesbrough's actions have cost him millions of pounds in lost revenue. That may or may not be true. I am unable to form any view as to whether that is right or not,

but these costs are the costs of this application which was something that EEI brought and which I have heard have, have failed, and it seems to me the costs must follow the usual rule. Yes. Now, did you want to say anything about basis of, of costs?

Mr Staunton: In, very briefly. It's a fairly hopeless application. He abandoned the second and the third, well, he abandoned the second limb, the committal, and --

Nugee J: Well, it's an application which has failed, that doesn't mean it was hopeless.

Mr Staunton: No. In my submission it was hopeless and therefore costs on the indemnity basis.

Nugee J: Yes. No, I, I'm asked to make costs on, award costs on the indemnity basis but there seems to me to be nothing so far out of the norm to justify an order for indemnity costs and I order costs on the standard basis. Yes. Summary or detailed?

Mr Staunton: Summary.

Nugee J: You want, you want summary. Do you want to say anything about summary assessment?

Ms Jones: No, I think probably better.

Nugee J: No. I agree. I will order summary assessment and quantum Mr Staunton.

Mr Staunton: Hourly rates look appropriate.

Nugee J: So, where are your solicitors? In Middlesbrough?

Mr Staunton: Well, it's in Newcastle.

Nugee J: Newcastle, yeah.

Mr Staunton: Yeah. And I think that they've used quite a bit of Category rate C to do the work. You've got my fee. If you turn on to the schedules at --

Nugee J: Where's, where's the bulk of this expense incurred?

Mr Staunton: In solicitors. If you turn onto tab five of the Defendant's bundle, down the page, we seem to have accidentally put in a lot of work under Category B, which doesn't seem to be right because if you look back to the first page of the schedule --

Nugee J: There aren't any Bs.

Mr Staunton: Correct, so you'll understand that, so there's been quite a bit of work, there hasn't been a heavy over reliance on Category A.

Nugee J: Does that mean I should move all the Bs into Cs?

Mr Staunton: Well, I've only just noticed it, but it seems to me that it must be the case.

Nugee J: Must be the case.

Mr Staunton: Yeah.

Nugee J: Yes.

Ms Jones: If I've understood, My Lord, I find this schedule is impossible to follow because if one looks, I mean, one's got the summary at the end --

Nugee J: Yes.

Ms Jones: But if you actually look at the, I think maybe mine was incomplete or something like that so --

Nugee J: Has it got page five of five at the end, Ms Jones?

Ms Jones: One, two, three, four, five, yes, I've got five pages, but I'm, I'm just, for example, looking for the witness statements.

Mr Staunton: Yes, well that'll be work on documents, won't it? The final tab, item number four.

Ms Jones: Yeah, but where, where is it in the actual? That's just, that's just the summary.

Mr Staunton: Yeah.

Ms Jones: But what I'm saying is where, where are, where is this in the actual schedule?

Mr Staunton: It's not, they seem to have just moved it all to, so if you look at the third page of the schedule itself.

Ms Jones: Yeah.

Mr Staunton: After such inspection, , or attendance at hearing, work done on documents as set out in the schedule. So, that will be included in the body of the schedule itself, sorry, the body of the M260 --

Ms Jones: I see.

Mr Staunton: But by reference it then takes you to the schedule. I agree it's not how one would conventionally do this, but I think it's clear enough.

Ms Jones: Yeah, and there's a business confusion about the --

Mr Staunton: B and C.

Ms Jones: Bs.

Nugee J: I think the ones marked B are in fact, I should compare it to description hearing, as there's four solicitors --

Ms Jones: Yeah.

Nugee J: A, B, C and D, whose grades are A, C, C and D, and I think that the column marked B is a second solicitor of £240 an hour. I think that's the explanation. So, I don't think it's actually inaccurate.

Ms Jones: Yes, I'm, I'm not quick enough to do the maths to see whether £180 at A and £120 at B gives us £936.

Nugee J: 1, 1.8 at £360 and 1.2 at £240 comes to £936 so, so the, the second column has been charged at £240 --

Ms Jones: Yeah.

Nugee J: An hour. So, so.

Ms Jones: £360, as I say, does seem a little --

Nugee J: Well, I was just looking at the --

Ms Jones: And £240's a little high for --

Nugee J: Guideline rates --

Ms Jones: Yes.

Nugee J: At page 60 and 64 --

Ms Jones: Yeah.

Nugee J: They're now some distance out of date because they go back to 2010, but Newcastle forms, falls within band 2 unless it's within a 2 mile radius of St Nicholas' cathedral. Do you know whether it is or not?

Ms Jones: No.

Mr Staunton: It is.

Nugee J: It is, so it's city centre Newcastle, so it's, it's band 1, which in 2010 was £217 for A, grade A and £161 for grade C. So, I think the rates are slightly higher for them than the guideline rates as they were, but as I say --

Ms Jones: Yes.

Nugee J: That was some time ago.

Ms Jones: And they, and they do all seem to have been done. I mean £240 again it's relatively --

Nugee J: Yeah.

Ms Jones: That's the rate if you're well qualified.

Nugee J: You're in a very difficult position Ms Jones --

Ms Jones: Yes.

Nugee J: It's not your fault at all. I think I am just going to draw a line under this case.

Ms Jones: Yes.

Nugee J: I have to produce a figure. These things are undoubtedly a rough and ready exercise. I am going to err on the side of nicety to the Applicant and summarily assess the costs at a sum of £10,000. That's quite a substantial discount not attributable to any particular matters but taking account of all the matters which could possibly have been said had there been the opportunity to go into matters in, in great detail. Yes, is there anything else?

Mr Staunton: Finally, My Lord, just very briefly, do you have, can I take you to the White Book, part 23.12 --

Nugee J: Yes.

Mr Staunton: Page 729.

Nugee J: Yes. You want, you want it to be said to be without, without, totally without merit.

Mr Staunton: Yeah. Know how much the, that the order should record that fact and the Court should consider whether to make a Civil Restraint Order. I needn't repeat what has been said. Your Lordship has clearly in mind arguments about merits.

Nugee J: I don't think I will record it as totally without merit. It seemed to me that, that, that there were matters which Mr Millinder drew my attention to which required some consideration.

Mr Staunton: Indeed. My, My Lord, are you going to invite me to prepare the order. I'm quite content to do so.

Nugee J: Yes, I think that would be helpful. Thank you --

Mr Staunton: Yeah.

Nugee J: If you would prepare the order, thank you very much.

Mr Staunton: Right.

Nugee J: Is there anything, Ms Jones?

Ms Jones: Very well, I'm, I'm, I'm happy to go, as it were (inaudible) --

Nugee J: Yes.

Ms Jones: Making sure, if that's OK.

Nugee J: Well, I'm very much obliged, yes. Thank you. Is there anything else?

Mr Staunton: Not at all.

Nugee J: No. Thank you very much. Yes.

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IN THE HIGH COURT OF JUSTICE

7 Rolls Buildings
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BEFORE:

THE HONOURABLE MR JUSTICE NUGEE

BETWEEN:

EARTH ENERGY INVESTMENTS LLP

CLAIMANT

- and -

**MIDDLESBROUGH FOOTBALL AND ATHLETIC
COMPANY (1986) LTD**

DEFENDANT

Legal Representation

Ms Jones QC (of counsel) under the CLIPS scheme on behalf of the Claimant

Mr Paul Millinder Litigant-in-person

Mr Ulick Staunton (of counsel) on behalf of the Defendant

Other Parties Present and their status

None known

Judgment

Judgment date: 5th February 2018
Transcribed from 15:40:39 until 16:03:59

Reporting Restrictions Applied: No

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The Honourable Mr Justice Nugee:

1. I have before me an application notice which has been issued by an LLP, Earth Energy Investments LLP, who has appeared by Mr Millinder, assisted by Ms Jones QC, who has appeared under the CLIPS scheme and has very helpfully taken me through the chronology of what is now quite a complicated history, and has supplemented Mr Millinder's submissions with some brief submissions of her own in reply on Mr Millinder's instructions, and as judges sitting in this Court always are, I am immensely grateful to Ms Jones for her assistance. There were three types of relief mentioned in the application notice, of which one was a mooted application to commit the Defendant for contempt of court, of which no more need be said, because Mr Millinder made it plain that he was not pursuing that relief before me. The third was an application that Mr Registrar Jones be recused or removed from the continued hearing of an application which is in progress, which is an application under rule 14.11 of the Insolvency Rules to set aside certain proofs of debt, and although that application is not before me, it is intimately connected with the matters that are. And Mr Millinder has said that it would be appropriate for the recusal application to be dealt with today, although accepting that the normal practice would be for the recusal application to be heard by the judge who was said to be conflicted.
2. I have been told that Mr Registrar Jones has adjourned that rule 14.11 application part heard, and that there is another hearing for the resumption of that application on the 26th March coming up, that he has indicated that any application for recusal should be formally made and that that has been done, and has indicated that he will determine any such application at the outset of the adjourned hearing. That seems to me to be entirely in accordance with the usual practice and the overriding objective, and it does not seem appropriate for me to get involved in a determination of those issues when Mr Registrar Jones has already indicated that he will deal with that application at the resumed hearing, so I put that matter on one side as well. The third application which needs to be considered at slightly more length is an application by EEI, as I will call them, to set aside an order made on the 16th January by Mr Justice Norris. It is necessary to give some account of the background, although given that I am sitting in the Applications Court and it is already quarter to four, I do not intend to do this in great detail.
3. In essence, a company called Empowering Wind MFC Ltd, which was a special purpose vehicle and was, I believe, a subsidiary of EEI, negotiated with the Applicant who has appeared by Mr Staunton, that is Middlesbrough Football and Athletic Company (1986) Ltd, which I will call Middlesbrough, for a suite of agreements under which it would, in effect, erect a wind turbine on a carpark next to Middlesbrough's stadium, the benefit to Middlesbrough being not only in the shape of an annual rent, but also the delivery of free electricity, and the benefit to Empowering Wind, or EW as I will call it, being to be able to generate more electricity which it could feed into the national grid and receive a tariff for. In the event, that project did not succeed. I have heard some explanation from Mr Millinder as to why that project did not succeed, his contention being that it was, in effect, all Middlesbrough's fault for failing to enter into an agreement called the connection agreement. The upshot of that was that EW was unable to generate any money, that meant it was neither able to pay rent under the lease, nor to pay what were quite substantial charges ostensibly payable under something called the energy supply agreement under which, if it was not supplying energy to Middlesbrough it

had to pay Middlesbrough a figure based on eight pence for each kilowatt hour of energy which Middlesbrough consumed.

4. On the basis of those matters, Middlesbrough demanded payment of money from EW, terminated the lease for non payment of rent and subsequently appeared as a supporting creditor in support of a petition to wind up EW brought by HMRC. In January of 2017, Middlesbrough received a statutory demand, not from EW which was by then in liquidation, but by EEI claiming over half a million pounds in respect of what could be briefly described as abortive costs, namely £200,000 which had been paid by EW for the premium for the lease, and a further £330,000 said to be for costs which had been incurred on the project. That led to an application initially without notice before Mr Justice Arnold by Middlesbrough, and a without notice order was made on the 9th January, and subsequently, to the order of 16th January made by Mr Justice Norris, which on its face is recited to have been made as a Consent Order. Mr Justice Arnold, on the 9th January, restrained the presentation of a winding up petition and Mr Justice Norris, on the 16th January, restrained the presentation of a petition or any further proceeding on any petition, and ordered the Respondent, that is EEI, to pay Middlesbrough £25,000 in respect of the Applicant's costs.
5. It is now suggested by Mr Millinder on behalf of EEI that the order of 16th January was obtained as a result of material non disclosure before Mr Justice Arnold on the without notice application on the 9th January. He relies for this on non disclosure of a large number of documents which, as I understand it, supported the statutory demand and which explained the background to the dispute, in particular the connection agreement which, in his submissions to me, he explained was the foundation of his argument that the project was, effectively, killed by Middlesbrough.
6. It is not disputed that those documents were not put before Mr Justice Arnold. I was also shown a note of the hearing in which Mr Staunton, who appeared for Middlesbrough then as he does for Middlesbrough today, says this:

“There is a definition of force majeure in the lease. There is no other reference to force majeure in the lease.”

That was something he repeated before me, but in fact, there was a provision in the lease at schedule 5, paragraph 6, which provided that:

“If either party is prevented for any period of time from performing its obligations under this lease by reason of force majeure, that party shall not be in breach of such obligations for so long as, and to the extent to which such reason shall subsist.”

7. It is true that that provision was, in fact, referenced in the evidence, being a witness statement of Mr Bloom on behalf of Middlesbrough that was put before Mr Justice Arnold on the 9th January, both at paragraph 8.5 where that clause is referred to, and at paragraph 19, where he refers to a letter in which he had pointed out that even if there had been a force majeure event that would only have absolved EW from any breach of its contractual obligations, not from its liability to pay rent. I agree, however, with Ms Jones, that on an ex parte application judges are far more likely to pay attention to what counsel tells them than to matters disclosed in the evidence,

and the statement by Mr Staunton, I think one must conclude, was in fact inaccurate, although I have no reason to think that Mr Staunton in any way misled Mr Justice Arnold deliberately. Ms Jones suggested that the non disclosure of the material which Mr Millinder relies on was undoubtedly material. It seems to me, however, that one must bear in mind the nature of the application that was brought before Mr Justice Arnold and then continued before Mr Justice Norris.

8. The application, as is very common in this Court, was to restrain the presentation of a petition on the basis that a statutory demand was served on the company which contained within it an implicit, if not explicit, threat to present a petition on the basis of the demand, in circumstances where the company takes the view that the debt is bona fide disputed on substantial grounds. In this case, two separate grounds were advanced by Middlesbrough, both in the evidence and by Mr Staunton before Mr Justice Arnold. One related to the underlying nature of the claim by EEI, which was a question as to whether it was right that it was Middlesbrough's fault that the project had collapsed and whether there was a cause of action for the sums which had been thrown away as a result, and it does seem to me that the bulk of the non disclosure went to that issue. The other was a question as to whether EEI had any cause of action vested in it at all.
9. EEI's appearance on the scene, as I understand it, was first apparent to Middlesbrough in the statutory demand, there having been correspondence before that date in which EW had been putting forward various claims against Middlesbrough. This was all dealt with in the evidence of Mr Bloom, who said that according to the statutory demand, the alleged debt was assigned by EW to EE on the 29th June 2015, and then makes a number of points in that regard, namely, that the lease had not been terminated on that date, therefore EW's alleged claim against MFC did not even exist at the purported date of assignment, and then he refers to an email of 15th December 2016 in which Mr Millinder stated that he had the right to progress the claim:

“But I shall assign to its parent company.”

and that:

“EW's liquidation did not prevent us from signing rights.”

and put forward the contention that it was to be implied from these statements that as at 15th December 2016 no such assignment had occurred.

10. It is true that one of the documents relied on as not having been disclosed is board minutes of EW dated 29th June 2015, in which there was some discussion of how to react to Middlesbrough's demand for £255,000, and that that includes a passage which could be a reference to assignment to EEI as follows:

“We agreed to tidy up loose ends on some of the feeds and the 200K that we paid from other accounts of Earth Energy Investments as parent of Empowering MFC, as assigning those investments representing what we put into project. We agreed to separate out what went in as investment to the project so that there are two causes of action that the parent recovering funds invested, and Empowering MFC recovering consequential loss, including the feed in tariff

revenue. We have agreed this to mitigate loss in litigation to an extent.”

11. And then later down:

“We discussed legal action and the risks involved. We’d agreed to discuss with various solicitors and get another legal opinion on the case.”

It is that which is now relied on as an assignment to EEI. Mr Justice Arnold’s reaction to what was put before him was to say that until recently the claim had been made by EW; that it was only in the statutory demand that the Respondent emerged as entitled to the claim; that the Respondent stated that the claim was assigned on 29th June 2015; and that the Applicant’s evidence gave real doubt to that date.

12. It does not seem to me that disclosure of the material other than the board minutes would have caused any change in Mr Justice Arnold’s view on that question, the two being quite separate questions. And I do not think that the disclosure of the board minutes, although it would have explained the basis upon which it was said that the assignment had taken place on the 29th June would have been likely to have persuaded Mr Justice Arnold that the position as to assignment was so clear as to give rise to no bona fide and substantial dispute, because of the material that was put before him by Mr Bloom. Even taking the board minutes on their own face, they discuss doing various things but end up with the decision to discuss matters with various solicitors and get another legal opinion, and I think it likely that had that been before Mr Justice Arnold the conclusion that one would have drawn from all the material is that it was still unclear whether the assignment had taken place on the 29th June 2015 or whether it was something that was being discussed as a way forward.
13. In those circumstances, it does seem to me to be likely that the material that was withheld or not disclosed would not in the end be likely to have made a difference to the decision on the 9th January, which was simply to grant a short injunction until a return date of 16th January to enable the matter, in the usual way, to be reconsidered at an on notice hearing. The on notice hearing on the 16th January did not, in fact, take place because, as I have said, the matter was disposed of by consent. I have had less full information as to how the Consent Order came about than one would have expected, although it is fair to say, I think, that it was not until very recently that it became apparent that Mr Millinder was contending that he did not entirely agree to the Consent Order that had been made.
14. I wrote down what he said to me and he said:

“I agreed for the order to continue but for each party to bear its own costs.”

And then he said that:

“Middlesbrough’s solicitors, Bond Dickinson, were trying to charge me £47,000. Penningtons agreed the Consent Order, but I never agreed to the £25,000.”

15. As I say, the evidence before me is not as full as one would have expected to explain how it came about that a Consent Order was, in fact, signed, and what I was told by Mr Millinder was that he subsequently complained about Penningtons' conduct which led to the Consent Order being made, but I think it very unlikely that Mr Justice Norris would have made a Consent Order without there being before him some prima facie material that either the representative or the solicitor for the parties had signed a form of consent. I was told that there was no hearing on the 16th January and the matter was dealt with on paper. My experience is that the Court will not do that unless it has a signed copy of the order. In those circumstances and in the circumstances where Penningtons had taken the point in a letter of the 11th January, almost immediately, that there had been non disclosure, it does seem to me that Mr Staunton is right that even assuming that the non disclosure on the 9th January was material, matters had moved on by the 16th January. EEI had a choice to make, which was either to rely on the non disclosure to try and set aside the original order or, as Mr Millinder appears to have done, to accept that there was a dispute, as to the debt which meant it was appropriate for the order to continue.
16. As I understood Mr Millinder, he did not really object to the continuation of the injunction on the 16th January and it was just the question of the costs of the £25,000. In those circumstances, it seems to me that I cannot conclude that the order of 16th January should be set aside. I have not got material which would adequately explain that there was an order which on its face was made by consent was not truly made by consent, and on the basis that it was made by consent, it does not seem to me that the non disclosure on the 9th January, which Penningtons were aware of and drew attention to in their letter of the 11th January, was responsible for the order being made on the 16th January. What was the cause of the order being made on the 16th January was the decision of EEI no longer to contest the substantive relief. In those circumstances, I propose not to set aside the order of 16th January.

This Transcript has been approved by the Judge.

The Transcription Agency hereby certify that the above is an accurate and complete recording of the proceedings or part thereof.

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