IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT
OF ENGLAND & WALES

No. CR-2017-000140

Rolls Building
Fetter Lane
London EC4A 1NL

Thursday, 7 June 2018

Before:

HIS HONOUR JUDGE PELLING QC
(Sitting as a judge of the High Court)

B E T W E E N :

EARTH ENERGY INVESTMENTS LTD — Applicant

- and -

MIDDLESBROUGH FOOTBALL & ATHLETIC CO (1986) LTD — Respondent

The Applicant appeared In Person by Mr Millinder.

MR STAUNTON (instructed by Womble Bond Dickinson (UK) LLP) appeared on behalf of the Respondent.

J U D G M E N T

D R A F T

JUDGE PELLING :

1 There are two main applications before me today. The first is an application in the name of Earth Energy Investments LLP ("EEI") for an order discharging what is ostensibly a consent order made on 16 January 2017 by which EEI was ordered to pay £25,000 by way of a costs' contribution to Middlesbrough Football & Athletic Company (1986) Ltd ("Club") and to set aside an order made by Nugee J on 5 February 2018 by which he had dismissed what the Club maintains was a materially identical application to that now made before me in relation to the 16 January consent order. The second main application before me is an application to rescind an order made on 28 March 2018 directing that EEI be wound up. Since the winding up order depends upon EEI being liable to the Club for £25,000 under the 16 January consent order, it was submitted by the Club that I should determine the application to set aside that order first. Mr Millinder who is or claims to be interested in EEI and to be entitled to act on its behalf in these proceedings does not oppose that course.

2 Ordinarily, it would be necessary for me to set out at some length the background facts relevant to the application. Happily, I do not have to in the circumstances of this case simply because I am able to adopt what Nugee J said in para.3 to 4 of his judgment dismissing EEI's earlier application to discharge the order of 16 January.

3 As Nugee J said at para.2 of his judgment, the principle application before him was an application to "*set aside an order made on 16 January by Norris J*." The relevant background was set out by Nugee J in para.3 to 4 of his judgment in these terms.

> "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 &

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 car park next to Middlesbrough 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, the project did not succeed. I heard some explanation from Mr Millinder as to why the 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 8p for each kilowatt of hour of energy which Middlesbrough consumed."

"On the basis of these 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 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 aborted 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. This led to an application initially without notice before Arnold J by Middlesbrough and a

> without notice order was made on 9 January and subsequently to the order of 16 January made by Norris J which, on its face, is recited to have been made as a consent order. Arnold J on 9 January restrained the presentation of a winding up petition and Norris J on 16 January restrained the presentation of a petition or any further proceedings on any petition and ordered the respondent, that is EEI, to pay Middlesbrough £25,000 in respect of the applicant's costs."

4 It is necessary that I set out in more detail the steps leading to the order made by Norris J. That can best be done by reference to the correspondence that passed between the Club's solicitors, Bond Dickinson, and the solicitors acting for EEI at that time, Pennington Manches.

5 Following the grant by Arnold J of the injunction on 9 January 2017 it became apparent that there had been what EEI and its solicitors regarded as a serious non-disclosure. On 11 January 2017 Penningtons wrote to Bond Dickinson in these terms:

> "We have been instructed to represent EEI in relation to the injunction obtained by your client restraining the presentation of a winding up petition and in relation to the return date. We have seen the three witness statements and exhibits in support of the without notice injunction made on 9 January 2016 and are concerned that material information was not put before the court ..."

There are then set out eleven separate categories of material which it is said had been omitted including most of the documents which are said to constitute the relevant agreements, some board minutes and some email correspondence. The letter then continued as follows:

> "Please explain why this material was not put before the court. In any event, going forward our client agrees that the injunction should continue in the same terms as the interim order obtained by your client and until further order of the court or agreement of the parties. However, given the failure by your clients to provide full disclosure to the court, the appropriate order as to costs is that each party bears its own. If this cannot be agreed by four pm on 12 January 2016 we have instructions to attend the hearing on Monday for the purposes only of arguing that your client should not be entitled to its costs."

The focus of the application before me is on the issue concerning costs. Mr Millinder maintains that he was the person giving instructions to Penningtons and that the final paragraph of the letter set out above reflects his instructions which he says never changed.

6 Following a response by Bond Dickinson to the letter quoted above, Penningtons wrote again on 12 January 2017 in these terms insofar as is material:

> "We refer to our previous correspondence in your letter of today. In order to dispose of the hearing on Monday and so as to avoid any further costs, we confirm our client will agree to a continuation of the interim injunction as set out in our letter of yesterday and agrees to pay your client's costs to be assessed on the standard basis if not agreed. Please let us have a draft order to dispose of this matter for our agreement."

Mr Millinder maintains that that letter and all the others to which I refer below were written without his instructions.

7 Following some further email and letter correspondence concerning settlement that I need not take up time setting out, on 12 January at 1945 Mr David Niven, the partner at Penningtons acting for EEI on the instructions of Mr Millinder, emailed Bond Dickinson as follows.

> "I have instructions from my client to agree to pay £25,000 within 21 days in respect of your client's costs as earlier requested. Please confirm by return settlement on this basis."

This was followed by an email from Mr Stewart of Bond Dickinson at 2112 on 12 January which was in these terms:

> "I confirm that my client will agree to accept a payment of £25,000 within 21 days. We will forward a revised consent order in the morning for signature."

A consent order was produced and it was apparently signed on behalf of EEI by Penningtons and was approved and sealed without any formal hearing taking place. The consent order contained at para.1 a provision in the terms summarised by Nugee J in the judgment quoted from earlier and then at para.2 provided as follows:

> "The respondent shall by four pm on 3 February 2017 pay the applicant £25,000 in respect of the applicant's costs of this application."

It is common ground that that sum was never paid.

8 I can now move forward to 30 January 2018 because on that date EEI acting now by Mr Millinder in person issued the application that was ultimately heard and determined by Nugee J by his judgment delivered on 5 February 2018. The relief sought on that application was "*to set aside the order of 16 January 2017 due to significant material non-disclosure of the application hearing of 9 January 2017* ..." That application was supported by a lengthy witness statement from Mr Millinder also dated 30 January 2018 that sets out the background but which I do not need to summarise at this stage having regard to the summary set out earlier in this judgment. Broadly, Mr Millinder sought an order setting aside the consent order on the basis of the non-disclosure that took place when the application for the order made by Arnold J was heard. The non-disclosure relied upon was that summarised in the letter from EEI's former solicitors quoted above and which led ultimately to the consent order. Further, or alternatively, Mr Millender maintained that EEI had a cross-claim to recover sums paid by EW to the Club by way of advance rent, being the sum of £200,000 referred to by Nugee J in his summary set out above, and the further £330,000 which it is alleged constituted wasted costs incurred in attempting to perform the agreement.

9 It was common ground before me, as it was before Nugee J, that this claim can only be advanced by EEI if the right to claim those sums has been assigned by EW to EEI . Before me, all the arguments advanced by Mr Millinder before Nugee J were relied on again with the only material difference as far as I can see being that before me Mr Millender has placed much greater emphasis on his assertion that the £25,000 was not due to the club because Mr Millinder had never agreed to pay it and had not instructed his solicitors to agree to pay it.

10 The hearing before Nugee J lasted approximately one hour and 40 minutes - see the cover page of the transcription of the hearing. Mr Millinder addressed Nugee J at length both

himself and by Ms Elizabeth Jones QC appearing under the CLIP scheme on behalf of the applicant. At the conclusion of the hearing, Nugee J delivered a judgment dismissing the application in essence because (i) he was not satisfied that there had been a material non-disclosure, (ii) any entitlement to rely upon the non-disclosure could not survive the making of para.1 of the consent order and the agreement which had been reached leading to it; and (iii) he was not satisfied that the evidence demonstrated any effective assignment of EW's causes of action to EEI.

11 Mr Millinder has relied before Nugee J on a board minute as constituting the relevant assignment. He relies on the same document before me. The minute purported to record a meeting between Mr Millinder and his father. It purported to be a meeting of EW or at any rate is recorded on EW letterhead. Insofar as is material, the minute was to the following effect:

> "We agreed to tidy up loose ends on some of the fees and the £200,000 that we paid from other accounts so that EEI as parent of EW is assigned those investments representing what we put into project. We agreed to separate out what went in as investments to the project so that there were two causes of action, with the parent recovering funds invested and empowering MFC recovering consequential loss including the feed in tariff revenue. We agreed this would mitigate loss in litigation to an extent. We discussed how we will quantify the claim and agreed to base this on the base tariff secured in 2013 to December 2014 when the turbine would have been constructed along with the GH reports verifying energy output. We discussed legal action and the risks involved. We agreed to discuss with various solicitors and get another legal opinion on the case. We agreed we cannot keep investing money into the project when it appears that they have killed it by preventing connection. PM is

> to write to them to set the position in clear terms, let them know we are contemplating legals. PM agreed he will try to curb his feelings in particular towards Robin Bloom. We agreed to get further legal advice and come up with a plan to recover the losses."

The document is then signed by Mr Millinder, who is appearing before me, and his father, Mr Alan John Millinder.

12 Nugee J was considering the alleged assignment in the context of an assertion that the failure to disclose the document was a material non-disclosure by the club when applying for the without notice order made by Arnold J. Nugee J rejected this material as constituting an assignment at para.12 of his judgment in these terms:

> "It does not seem to me that disclosure of the material other than the board minute would have caused any change to Arnold J's view on that question, the two being quite separate questions, and I do not agree 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 29 June, would have been likely to have persuaded Arnold J that the position as to assignment was so clear as to give rise to no *bone fide* and substantial dispute because of the material that was before him by Mr Bloom. Even taking the board minutes on their 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 is likely that had that been before Arnold J, the conclusion that one would have drawn from all the material is that it was still unclear whether the assignment had taken place on 29 June 2015 or whether it was something that was being discussed as a way forward. 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 9 January which was simply to grant a short injunction until a return date on 16 January to enable the matter in the usual way to be reconsidered on an on notice hearing. The on notice hearing on 16 January did not in fact take place because, as I have said, the matter was disposed of by consent."

13 Before me, counsel for the Club relies on those conclusions as giving rise to an estoppel or in any event submits that I should reach the same conclusions for the same reasons. He further submits that the conclusion that the minute records only an agreement to assign if fortified by two further documents. The first, and perhaps potentially the most significant, is a letter from Prospect Law dated 27 February 2017 disclosed by Mr Millinder in these proceedings. At para.3 the letter of advice, which itself runs to some 116 paragraphs over 26 pages, states as follows:

> "We are advised that the claim will need to be assigned as a result of the winding up of the SPV. We have not yet considered the papers in the insolvency proceedings though we may need to do and we have not considered the issue of an assignment. Both these matters lay outside the scope of this initial advice."

The advice being sought concerned "*a potential claim against Middlesbrough Football Club for its failure to cooperate in order to allow the successful completion of a renewable energy project at its stadium.*" The advice letter then proceeds to advise in some detail. Para.16 the letter of advice ended in this way:

> "In conclusion, we believe that there is a *prima facie* case against MFC for frustrating the project that had a reasonable prospect of success. The logical next steps will be to analyse the quantum and the further evidence, including expert evidence, that would be required to substantiate such a claim. First, however, it would be necessary for PM to secure a valid legal assignment of any claims that EW MFC has against MFC."

In addition, the Club also rely on the evidence of Mr Jeremy Robin Bloom contained in his witness statement of 8 January 2017 at para.22.2 where he says this:

> "In his email of 15 December 2016 referred to above ... Mr Millinder stated that as the majority creditor of EW he had the 'right to progress the claim that I shall assign to its parent company' ..."

The relevant email is exhibited and it is perhaps unnecessary for me to quote from it at any length other than to say that in the third paragraph of the relevant email there is a statement to the effect summarised in the evidence quoted above.

14 The point made by the Club is that this material is manifestly inconsistent with there being an assignment in place at the date of the minute, thereby providing further support for Nugee J's conclusion as to the effect of the minute. Mr Millinder submitted that there were in effect two assignments that were relevant, one relating to the costs' claims that he relies upon in these proceedings before me and one relating to a damages' claim that he does not seek to rely on and to which the legal advice is focused.

15 I am not persuaded that that distinction is made out. I do not accept that the rent repayment element of the claim is anything other than a consequential loss claim since the claim would

be to recover by way of damages or compensation for unjust enrichment the advance rental payment that had been paid over unconditionally. I am not satisfied that the £200,000 referred to in the minute is a reference to the advance rental payment. Had that been what was intended, it would have been easy to say so. On the face of the minute, it is true to say that there is a reference to two causes of action, one concerning the sums invested and one concerning consequential losses, but what is relied upon here appears to be a consequential loss claim which was to remain with EW and which had not been assigned by the time the advice letter referred to above same to be written. The real point remains, however, that the minute is not an assignment of anything for the reasons identified by Nugee J and there is no reference to any assignment of any sort having been made in the legal advice which is relied upon by the Club. In those circumstances, as it seems to me, the position is no different or possibly even stronger than it was when Nugee J came to address that issue.

16 It is next necessary to consider the position relating to para. 2 of the consent order. As I have explained, Mr Millinder asserts that he did not give instructions to Penningtons to consent to an order in the terms that in fact were made and which is described on its face as a consent order and on its face to have been signed by Penningtons. At the hearing before Nugee J, Mr Millinder had asserted that the £25,000 element of the order was made without his agreement - see the transcript of the proceedings at p.53 of 88, 54 of 88, 55 of 88 and p.56 of 88).

17 Nugee J ruled on these issues at para.13 to 16 of his judgment in these terms. Having said what I have quoted above from para.13, he then continued as follows:

> "I have had less full information on 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 only became apparent that Mr Millinder was contending that he did not entirely agree to the consent order that had been made. 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, 'Middlesbrough's solicitors, Bond Dickinson, were trying to charge £47,000. Penningtons agreed the consent order but I never agreed to the £25,000.'

"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 Norris J 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 16 January and the matter was dealt with on paper. My experience is that the court will not do that unless it is a signed copy of the order. In those circumstances and in the circumstances where Penningtons had taken the point in a letter of 11 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 9 January was material, matters had moved on by 16 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 that it was appropriate for the order to continue.

"As I understand it, Mr Millinder does not really object to the continuation of the injunction on 16 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 16 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 9 January which Penningtons were aware of and drew attention to in their letter of 11 January was responsible for the order being made on 16 January. What was the cause of the order being made on 16 January was the decision of EEI no longer to contest the substantive relief and in those circumstances I propose not to set aside the order of 16 January."

18 In my view, Mr Millinder's case on this point must be rejected for the following additional reasons; first, there is no evidence that any mistake was made by anybody. Had an apparently competent solicitor made a mistake of the sort alleged, it would have been fully and frankly admitted and either an application made to rectify the error using the residual discretion conferred on the court by the Civil Procedure Rules or at least the mistake would have been acknowledged and the client advised to seek independent advice elsewhere.

19 Secondly, if and to the extent the absence of such evidence before Nugee J could be explained, it cannot in relation to this application which is being heard some three months later and after Nugee J had drawn attention to the absence of evidence in the judgment, the relevant parts of which are set out above. The evidence before me is no different in any material respect to that which was deployed before Nugee J other than that the correspondence leading to the consent order was not before him as it is before me.

20 Against that background and in those circumstances I now turn to the application to set aside the consent order and Nugee J's order. It is conceded that the court has jurisdiction to vary

a consent order - see para.33 of Mr Staunton's skeleton submissions. However, I am entirely satisfied that I should not set aside the consent order made on 16 January 2017. I reach that conclusion for the following reasons. First, the application set aside the consent order made on 16 January 2017 is a collateral challenge to Nugee J's judgment and order that is entirely unwarranted unless the application to set aside Nugee J's order succeeds. There is no proper basis for me to discharge Nugee J's order because CPR 3.17 is an exceptional provision and one that is simply not engaged on the facts of this case given the scope of that provision as it has been construed in the case law concerning it.

21 Secondly, all the facts and matters that have been relied on before me as justifying the setting aside of the consent order of 16 January were gone into in significant detail before Nugee J. There was nothing not considered by him at that hearing that is before me apart, possibly, from a greater emphasis being given to an alleged absence of agreement by Mr Millinder to the costs' order. However, I am not able to act on that on the basis of his assertion given the inherent improbability of what is asserted for the reasons I have identified in detail already. Mr Millinder claimed to have evidence to make good his assertion that he had not agreed the costs order based, I think, on the dispute which he maintains he has with Penningtons. If that is so, then it is surprising that that material has not been produced and it all the more surprising given that Nugee J had expressly referred to the absence of evidence relevant to this point. Reliance on alleged non-consent to the costs' order is unarguable in addition because there is no evidence of any sort that shows the Club or its advisers knew or even could or ought to have known of the alleged mistake. It is difficult in those circumstances to see how the alleged absence of consent could vitiate the agreement to settle in the terms of the consent order or engage the exceptional jurisdiction to vary a consent order.

22 If and to the extent that reliance was placed on non-disclosure, the reasons why the application failed before Nugee J apply with equal force to the application before me. There is no answer to the point made concerning the effect of para.1 of the consent order vitiating the effect of any non-disclosure and the non-disclosure was not material for all the reasons identified by Nugee J.

23 In those circumstances, this application to discharge the consent order and the order of Nugee J must fail and is dismissed.

CERTIFICATE

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This transcript has been approved by the Judge (subject to Judge's approval)

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Neutral Citation Number: [2018] EWHC 2095 (Ch).

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY & COMPANIES LIST

7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

BEFORE:

HIS HONOUR JUDGE PELLING QC sitting as a Judge of the High Court

BETWEEN:

EARTH ENERGY INVESTMENTS LLP	**APPLICANT**
- and -	
MIDDLESBROUGH FOOTBALL & ATHLETIC COMPANY (1986) LTD	**RESPONDENT**

Legal Representation
The Applicant appeared by its director Mr. Millinder
Mr. Ulick Staunton instructed by [] appeared for the Respondent

Judgment

Judgment date: 28 June 2018
Transcribed from 15:54:35 until 16:47:41

Reporting Restrictions Applied: No

Number of folios in transcript 91
Number of words in transcript 6,502

His Honour Judge Pelling QC:

1. This is an application made by the Respondent to the applications I determined on 7 June, Middlesbrough Football Club, who I refer to hereafter as 'the club' for an Extended Civil Restraint Order against Mr Millinder following upon the various applications which have been made in these and related proceedings which, it is maintained by the club, are applications which were totally without merit.

2. The applications that are relied on for these purposes are four in number being first an application determined by Mr Justice Snowden on 16 May 2018, secondly, but faintly, the application to rescind the Winding Up Order made against Earth Energy Investments LLP, thirdly, the application that I determined on 7 June last, being an application brought by Mr Millinder in the name of Earth Energy Investments LLP, for an order setting aside a Consent Order and setting aside a judgment of Mr Justice Nugee refusing to set aside a Consent Order and, finally, an application which I dismissed earlier today and which, although not very clear on the face of the application notice, was an attempt to challenge a decision made by Mr Registrar Jones dismissing an application brought by Mr Millinder in the name of Earth Energy Investments LLP, to set aside or have discharged various proofs said to have been lodged with the liquidator of Earth Energy Investments by the Club.

3. In considering an application for an Extended Civil Restraint Order the relevant principles are these. First, on the case law as it currently stands, in order for there to be jurisdiction to make the order sought, I must be satisfied that at least three claims or applications have been brought by the party against whom an Extended Civil Restraint Order is sought, which were totally without merit. Secondly, if that jurisdictional hurdle is passed, I must be satisfied in the exercise of my discretion that it is, in all the circumstances, appropriate to make an Extended Civil Restraint Order.

4. This application is made against Mr. Millinder personally although the applications relied on have been issued in the name of a company controlled by him. It is not in dispute between the parties however that the Court has power to make an Extended Civil Restraint Order against the person who is the real party behind totally without merit applications that have been made in the name of corporate entities - see in this regard, the judgment of Mr Justice Newey, as he then was, in CFC 26 Ltd v Brown Shipley and Co Ltd and Others [2017] EWHC 1594 (Ch) particularly at paragraph 20 where Mr Justice Newey says this:

> "On balance, it seems to me that, in a comparable way, references in Practice Direction 3C to a "party" who has issued claims or made applications, or to a "party" issuing claims or making applications, should be read as extending, not only to the named claimant or applicant but, where different, to the "real" claimant or applicant. Where the person against whom a CRO is sought has been the "real" party behind totally without merit claims or applications, it must, I think, be possible to take them into account. Likewise, if a claim or application is issued in the name of someone who is not subject to a CRO, but the "real" claimant or applicant has had such an order made against him, the CRO will, as it seems to me, bite on the claim or application. That is by no means, though, to say the CRO will be in point wherever, say, the person subject to it has an interest, however small, in a company or trust that brings a claim or makes an application."

5. The final point that perhaps ought to be made by way of general introduction is that a Civil Restraint Order is not a bar to the commencement of a meritorious claim or application. Quite the contrary, a Civil Restraint Order operates so as to provide a filter through which a meritorious Applicant or Claimant can pass simply by demonstrating to the Court that the claim is an appropriately arguable one that ought to go forward for determination by a Court upon its merits. That decision is taken by a High Court Judge, on the basis of materials lodged by someone who is the subject of a CRO.

6. The first stage therefore is to satisfy myself that there are at least three applications which are totally without merit.

7. The first relied upon by the Club is an application determined by Mr Justice Snowden by a judgment delivered on 16 May 2018. That application was an application for an order requiring the Court to consider:

> **"The Claimant's claim and make an interim costs order against the Defendant based on the Claimant's quantum of claim to compensate in the interim for loss of damages to the Claimant as a result of winding up its sole purpose company."**

Mr Justice Snowden dismissed that application essentially on two grounds. The first was that Earth Energy Investments LLP was itself the subject of a Winding Up Order made by ICC Judge Barber on 28 March 2018 and thus Mr Justice Snowden concluded, at paragraph 5 of his judgment, that Mr Millinder was not, and could not be, authorised or empowered to issue or pursue any application on behalf of Earth Energy Investments LLP. As Mr Justice Snowden observed, at paragraph 6 of his judgment:

> **"On that basis alone the application must fail."**

The application also failed for the reasons identified in paragraphs 7 and 8 of the judgment - that is to say that it was an application for an interim order as to costs or damages to be made in favour of Earth Energy Investments LLP when no claim for compensation had been issued by that entity in an appropriate form under CPR Part 7. That being so, no question could arise of any damages being awarded. As Mr Justice Snowden observed, at paragraph 8, the effect of Mr Millinder's application was an attempt to jump the queue of cases and to have it heard in the Interim Applications Court and to prejudge matters which stood adjourned or be listed to be heard on a future occasion and to advance claims which had not yet been the subject of any originating process.

8. Counsel then appearing for the club applied to the Judge for an order that certified the application to have been totally without merit. The Judge concluded that it would be inappropriate to do so essentially because there was a pending application to rescind the Winding Up Order made in relation to Earth Energy Investments LLP and he considered that it would be appropriate for the question of whether or not the application was totally without merit to be resolved finally by the Judge before whom that application came, as indeed it came before me on 7 June. The Judge concluded, in the course of argument, that the Judge hearing the application in June would be in a position to decide the question with the added benefit of having looked at the other applications then adjourned over until 7 June but he recognised that it might be that

the Judge would conclude that the only person who could certify the application as totally without merit would be him.

9. In my judgment in the circumstances of this case I can and should reach a conclusion as to whether the application was totally withput merit by reference to the reasoning of the Judge in dismissing the application. To do otherwise would not be an appropriate use of judicial ressources and would expose all parties to unneccessary additional costs. In any event, it has long been recognised that it is open to a Court to conclude that an application is totally without merit even though not formally certified as such by reviewing the judgment and the application itself. The reasons identified by Mr Justice Snowden in dismissing this application make it abundantly clear that the application was totally without merit since Mr Millinder had no locus to bring the application which was the primary basis on which the application to Mr Justice Snowden failed but also, in any event, because he sought relief on behhalf of Earth Energy Investments LLP that the Court was incapable of giving on any proper analysis of the Civil procedure Rules. Thus, I conclude, that the application determined by Mr Justice Snowden was totally without merit.

10. The second application relied upon by Middlesbrough Football Club as constituting a totally without merit application was the application made by Mr Millinder to set aside or to rescind the Winding Up Order made against Earth Energy. That was an application which had not previously been made. It was an application which, as I suggested in the course of the submissions that were made this morning, engaged a different test and different evidence to that which had been considered previously albeit by reference to a topic that had previously been considered. In those circumstances, whilst the application failed for the reasons I gave at the time, it is nonetheless difficult to see how it would be proper to certify that in and of itself as being a totally without merit application.

11. I turn next to the third application relied upon by the Club namely the application to me to set aside the order of Mr Justice Nugee refusing to set aside the Consent Order (being the Order defined as such in my judgment dismissing that application) and to set aside the Consent Order. The material that was deployed in support of the application to set aside the Consent Order and the order made by Mr Justice Nugee was not materially different from the evidence which was considered by Mr Justice Nugee when he dismissed the earlier application to set aside the Consent Order.

12. Two points were at issue on the application before me. First it was asserted that there had been no agreement to the effect set out in paragraph 2 of the Consent Order, which imposed upon Earth Energy an obligation to pay £25,000 contribution towards the costs of the Club in relation to the proceedings in which the Consent Order was made. Secondly, it was asserted that the order had been obtained by material non disclosure of critical documents including, in particular, a set of minutes which it was contended contained assignments of causes of action to Earth Energy from its subsidiary by operation of which Earth Energy had a cross claim against earth Energy that was significiantly in exess of the sum claimed by the Club.

13. Mr Justice Nugee had concluded, as did I, that the document relied on by Mr. Millinder did not even arguably constitute an assignment but evidenced at best an agreement to explore the possibilities of assignment with a view to enabling any claims to be brought in the future by Earth Energy. In addition, the Club deployed before me two pieces of correspondence, both emanating directly or indirectly from Mr Millinder, each of

which was entirely inconsistent with the suggestion that there was an assignment in place as alleged. These documents were now shown to Mr. Justice Nugee. That they been I have no doubt that they would have fortified the view he came to when making his order. This material – that is the minutes and the correspondence - led me to conclude that there was no proper basis to set aside Mr Justice Nugee's order and there was no realistically arguable cross claim avaialable to Earth Energy that provided a proper basis for setting aside the Consent Order.

14. In relation to the assertion that there had been no agreement on the part of Mr Millinder as to the making of paragraph 2 of the Consent Order, I drew attention to the fact that Mr Justice Nugee had indicated, in his judgment, that there was an absence of evidence on that issue which it was legitimate to expect would be put right between the date when Mr Justice Nugee's order was made and the date of the hearing before me but, in the event, it was not. In those circumstances the reality is that the application to set aside Mr Justice Nugee's order and set aside the Consent Order that was heard before me, was an application that was totally without merit because it proceeded by reference to essentially all the evidence that was heard before Mr Justice Nugee. If Mr. millinder was disatisified with the outcome before Mr. Justice Nuge his proper remedy was to apply either to that Judge of the Court of Appeal for permission to appeal.

15. The fourth application relied upon by Middlesbrough Football Club as being totally without merit was the application which came before me this morning. As it was drafted, the application described various forms of relief sought but it proceeded principally as an application that I should set aside an order made by ICC Judge Jones by which he dismissed an application made under the Insolvency Rules by Mr Millinder in the name of Earth Energy seeking to set aside or have discharged various proofs allegedly lodged by the Club with the Official Receiver as the initial liquidator of Earth Energy.

16. The application before ICC Judge Jones was opposed and was adjourned. Between the date when it was adjourned part heard, and its resumption, Mr Millinder applied for an order requiring ICC Judge Jones to recuse himself on the grounds of either actual or apparent bias. When the matter came back before ICC Judge Jones both the application that he recuse himself and the application brought by Mr Millinder in relation to the proofs failed and were dismissed. The remedy that was available in relation to that result was one which was only available to Earth Energy and was to apply for permission to appeal from the order made ICC Judge Jones. No such applicationw as made. The basis on which the application before ICC Judge Jones failed was that none of the proofs that were described had been admitted to proof in any formal sense because there were no assets available in the winding up and therefore there was no basis on which the proofs could be processed.

17. Mr Millinder maintains that the lodging of the proofs or claims to be a creditor by the Club is having a material effect on his ability to advance what he maintains is a viable claim available to Earth Energy in relation to losses said to have been suffered as a result of the failure by the Club to proceed with a joint venture, which Mr. Millinder maintains was a breach of contract or duty owed by the club in its capacity as a party to the joint venture. The effect of the Club's claims is set out in a letter from the Official Receiver dated 16 June 2017 in which the Official Receiver says that because his office had received claims of about £4,900,000 of which the claim submitted by Mr Millinder totalled £770,000, Mr Millinder's interest as a creditor was less than *25*% of the known

liabilities and thus Mr Millinder was unable to commence the decision making process by which the Official Receiver could be replaced by a liquidator.

18. As counsel for the Club submits, ICC Judge Jones determined the application before him on the basis that there were no formal proofs and that any such application was by therefore by its nature premature. In those circumstances it seems to me the application before me this morning was one which was totally without merit. The only entity with locus to challenge ICC Judge Jones' decision was Earth Energy but Earth Energy is in liquidation so only the Official receiver could commence such proceedings. Mr. Millinder has no locas to do so just as he had no locus to commence the application dismissed by Mr. Justice Snowden. In any event any such challenge would have to be by way of appeal not an application to set aside the order made by the Registrar. In those circumstances the application before me this morning was bound to fail and I certify it to have been totally without merit.

19. There are therefore a minimum of three applications that have been dismissed on the basis either that they have been certified as totally without merit or on proper analysis were totally without merit. The more difficult question that now arises is whether in exercise of my discretion I should make a Civil Restraint Order as sought against Mr Millinder.

20. The submissions made in support of making such an order, in summary, come to this. First, it is submitted tht Mr Millinder has bombarded a wide variety of different people, including counsel for the club, the solicitors for the club, club officials and directors, Court officials and judges with correspondence which strays very far from what is appropriate even in hard fought litigation. Secondly, it is said that the applications which have been brought show the classic signs of a vexatious litigant being a refusal to take no for an answer and the repetitious making of applications which go over the same ground again and again in order in an attempt to advance claims that Mr. Millinder is convinced are bound to succeed. Thirdly, and as a result of each of those points, it is submitted that the club has been exposed to significant legal cost as a result of the activities of Mr Millinder, which would otherwise have been avoided and needs to be brought under control. And it is further submitted that significant Court resources have been used as a result of the various applications made by Mr. Millinder, which could otherwise have been avoided.

21. The partial chronology that I set out in the course of my earlier judgment concerning the multiple applications that have been made make good the point concerning the use of Court resources. A particular and perhaps extreme example concerns the application in relation to the Consent Order where the original Consent Order having been made, Mr Millinder applied to have it set aside, which application failed before Mr Justice Nugee. A further application was then issued by Mr. Millinder seeking to set aside both that order and the Consent Order. Thus, in the end, two fairly lengthy hearings took place in relation to a Consent Order when at least one of those applications should never have been made and possibly both of them.

22. Turning first to the detail of the correspondence it is necessary that I should quote from a selection that was identified by counsel in order that readers of this judgment can understand the nature of the difficulty. The correspondence relied upon by counsel for the football club is confined to the period between the orders I made on 7 June and the hearing today. There is earlier correspondence which has a similar flavour but is not relied upon and I need not refer to it.

23. On 14 June, Mr Millinder sent an email to Mr Kevin Gray, a solicitor and partner at the firm of solicitors acting for the club. It contained the following:

> **"I also need to inform you that I have laid information on the DJ sitting in the Magistrates' Court for warrants for the arrest of Mr Gill, Mr Stewart, Mr Brown and the body corporate Middlesbrough Football & Athletic Club (1986) Limited, those parties concerned and others explicit. A further warrant will follow for Mr Staunton …"**

As I understand it Mr Gill and Mr Brown are both partners in the Claimant's solicitors, Mr Staunton is counsel who appeared before me on 7 June and has been primarily the counsel instructed on behalf of the club during these proceedings. On the same day, there was an assertion made in email correspondence by Mr Millinder that the solicitors acting for the club were in breach of its insurance covenants:

> **"For engaging in fraud, blackmail and corruption, needless to say a fundamental breach of trust."**

In the same email, Mr Millinder referred to the club having:

> **"… made an unwarranted demand with menaces as in Section 21 of the Theft Act 1968 …"**

And a little later, in paragraph 6 of the same email, he said this:

> **"I refer to Exhibit 16 which made the position perfectly clear, you choose to ignore it because you were reliant upon the later collusion between Registrar Briggs and Radcliffe Chambers to seek to 'bury the issue' again acting dishonestly and against the interests of justice in contravention of your duties in the SRA code."**

24. The tone continued with an email of 18 June, again to Mr Gray, saying this:

> **"Your partners are guilty of fraud and you come back dictating to me after destroying my business reputation and causing me significant losses and breach of trust with your criminal misconduct. You are an utter cretin and a joke, that is all I will say for now."**

25. On 18 June, Mr Millinder sent an email to an official here at the Rolls Building, a Mr Steve Rogers, with copies to various others including Mr Staunton, the Chancery Judges' listing department, and Miss Charlotte Brice, one of the Chancery listing officials employed at the Rolls Building. In that email, apart from anything else, it contained the following:

> **"Justice is not subject to status and fraud is fraud whether committed by white collar criminal lawyers or anyone else … no advantage should be gained by fraud that includes Court orders and any disproportionately inflated costs of the other side. Nobody is paying for their misconduct, least of all me. That also goes for the £25,000 obtained in fraudulent non-disclosure and indeed, most critically, the unwarranted demand date of 25 June 2015. All bets were off from**

that date in relation to the club's defence, it was unwarranted plain and simple. Please ensure the Judge gets sight of this email chain and the enclosures."

In another email of 18 June, addressed to Mr Rogers here at the Rolls Building, and to ICC Judge Jones, Mr Millinder said, amongst other things:

"It is not for me to make an application to put right gross judicial error. The only application I will be making is to lay the information to prove the offences at the Magistrates' Court. Please do send me that judgment by return, it should have been available on the system three months ago …"

26. On 19 June, a further email was sent by Mr Millinder, to various addressees including the clerks at Radcliffe Chambers, the Chancery listing section, Mr Rogers, who I have mentioned already, and various partners at the club's solicitors as well as Mr Hannon, the Official Receiver. In that email, Mr Millinder said this:

"I note, despite my numerous requests since 4 January 2017, you failed to disclose the first and second proofs of debt claims that you made against Empowering Wind MMC Ltd … in addition the same is needed as evidence in criminal prosecutions in process at the Magistrates' Court. I ask for you to make the disclosure referring to standard disclosure in CPR Part 31, as usual you failed to disclose … Mr Hannon had a legal duty to disclose same to me in January 2017 … hence my request is still outstanding at today's date and if I do not have these by 4pm today without fail in their complete form, I will be heading to the Interim Applications Court to deal with an application pursuant to CPR Part 31, against Mr Staunton, Womble Solicitors and Hannon so as to obtain this evidence. Clearly you would be liable for costs if you force this position on me …"

As will be apparent Mr Staunton was counsel primarily instructed on behalf of the club in relation to these proceedings, the entity described as:

"Womble Solicitors"

Are Womble Bond Dickinson, the solicitors acting for the club in these proceedings and:

"Hannon"

Is Mr Hannon, the Official Receiver.

27. On 19 June 2018, an email was sent direct, by Mr Millinder, to ICC Judge Jones. Again, it was a relatively lengthy email and it is probably unnecessary for me to set it out in total however in the email he referred to various damages claims that he was proposing to make and then said this:

"It would cost me nothing to file the damages claim because I already have (<u>inaudible</u>) claiming damages dated 9 January 2017 and in this respect you cannot and should not have become involved in complex

and protracted proceedings being heard by senior judiciary. I contend that in fact, by having done so, your order is void ab initio and request therefore that you take this into account by setting it aside without application …"

This was a reference to the orders made by ICC Judge Jones that I referred to earlier in this judgment concerning the proofs.

28. On 20 June, Mr Millinder emailed a number of addressees including various partners at Womble Bond Dickinson, the Solicitors Regulatory Authority and the Chancery listing section, in these terms:

"Unless you provide me by return with copies of the first and second proof of debt, received by 1pm at the outside by email, I will make the application in the Interim Applications Court to obtain the evidence you've been withholding both from Mr Hannon and Womble Bond Dickinson this afternoon in preparation for a hearing of the 28th and because I need the evidence for criminal proceedings at York Magistrates. I have only been asking since 4 January 2017 and, as a result of this fraudulent non disclosure and breach of duty, it has resulted in that Section 1 Magistrates' Court application against Mr Hannon …"

29. This was followed on 21 June by an email sent direct to Mr Staunton, with copies to various partners at Womble Bond Dickinson and Miss Brice, the Chancery listing official I mentioned earlier, and to the Chancery listing sections here at the Rolls Building and apparently to Northumbria Police and to an identified Metropolitan Police officer. The subject was said to be:

"Section 1 Magistrates' Court Act 1980 and Section 2 and 4 of the Fraud Act - Mr Staunton."

The email contained the following statement:

"I trust I'm not going to get any response from your client and in any case you have made a false representation as in Section 2 of the Fraud Act 2006 when on 19 September 2016 you attended Court to make that false representation in full knowledge of the full background. After having viewed the papers you made that false representation in the sum of £256,206.69 on 19 September 2016 with intent to cause loss to another. On the balance of probabilities, given that you are of counsel and clearly you did review the papers before attending Court, you clearly did know then what you were doing was of dishonest intent. I allege therefore that you are also guilty of the offence of fraud by use of position where you had a duty to disclose a full and fair account of the correct accurate position of law. You failed to do so and you acted with intent to cause loss to another based on that false representation. On 9 January 2017, you then attended an ex parte hearing where your client withheld 172 pages of witness exhibit that should otherwise have (<u>inaudible</u>) statutory demand …"

Continuing:

> **"Would you jump off a bridge also if your client told you to do it? I will be laying a case at the Magistrates' Court against you by first thing in the morning unless I receive your fully rationalised and honest account of your position by 4pm today …"**

On 21 June, at 17.53, Mr Millinder sent another email, addressed to various addressees including Miss Brice, the Chancery listing section here at the Rolls Building, Mr Staunton, various partners at Womble Bond Dickinson, Andrew Field MP at Parliament UK and Mr Hannon and to someone at the Insolvency Service, with copies sent to various police officers. The email was to the following effect:

> **"Again, as usual, absolutely no response given. I'm done with this nonsense, fraud, thefts and abuse of position from those that purport to be judges. They act against the public interest to assist other dishonest jobsworth members of the legal and insolvency cabal, intent on stealing people's assets. As for Staunton and the rest of the clowns at Womble solicitors, this is now personal business between you and I. It is business that you are not going to resolve because now things are going to be done my way. I'm sick of this abuse of our justice system, collusion from dishonest scum that are intent on stealing from my estate and making me pay for the privilege of their misconduct. There is no justice in that Court because it has been infected with this cancer of corruption and filth such as the likes of Staunton and co that then go on to become judges. That is the root of the problem and it is all too evident in my case. I am not the one looking utterly foolish and incompetent though, you have played games with the wrong party. I take it personally and I am coming for all of you corrupt, dishonest jobsworth …"**

30. This was preceded by an email to Miss Brice at the Chancery listing section here at the Rolls Building, on 21 June, in which he criticised her personally for fixing the hearing on 7 June before with me. He said of me:

> **"You decided it would be prudent to bring HHJ Pelling QC into my complex case, all the way from Manchester. I allege he's connected with Peel Holdings, the party which is subject to litigation for making a false representation and causing me loss and delay of over a year. That is one issue but that is not the issue in question … why would I have to extend further resources to put right these wrongs? My case needs to be heard by Mr Justice Nugee or Mr Justice Arnold but I would be very happy for any decent High Court Judges, including Mr Justice Snowden to hear this case. You made sure it was HHJ Pelling QC, all the way from Manchester, what a coincidence …"**

Before moving on I record that I have no connection with Peel Holdings of any sort (other than having heard cases to which it or a subsidiary was a party) and was not aware I was to be listed to hear this case until after I started my London sitting in the Rolls Building back at the end of June.

31. I turn next to an email of 20 June, which Mr Millinder had sent to various people in which he said, amongst other things:

> **"I want justice and I'm coming to get it. I pity anyone else that attempts to circumvent it, I will take out each and every single one of you that has aided and abetted these frauds in the public interest for the good of our country so others do not have to suffer as a result of dishonest jobsworths in office … please send this to Chief Registrar Briggs, Jones, HHJ Pelling QC and confirm it's been done."**

32. These emails, it is submitted, show a very unsatisfactory approach to litigation particularly when looked at in the light of the applications which have been made totally without merit which I referred to earlier in this judgment. It is entirely unnecessary for correspondence of this sort to be sent although I am bound to say that I accept that a large part of it is driven by a sense of frustration arising from a belief, on the part of Mr Millinder, that there is a cause of action available to Earth Energy Investments Ltd or its subsidiary which, if only it could be commenced and adjudicated upon, would result in substantial damages being awarded against the club.

33. In essence, Mr. Millinder alleges that therew as a joint venture between Earth Energy and its subsidiaries on the one hand and the Club on the other whereby a wind and turbine electricity generating set would be installed on land rented by Earth Energy's subsidiary from the club which would then yield electricity for use by the club for which the club would pay Earth Energy's subsidiary, with any surplus electricity being sold to the National Grid. There were difficulties in relation to the delivery of the scheme generated, in particular, by a claim by the local regional airport that the wind generator would interfere with flight operations at that airport. That airport is owned, so it is asserted by Mr Millinder, by Peel Holdings, which explains the significance of the reference to Peel Holdings in the emails I referred to earlier. He maintains that there is a cause of action available against Peel Holdings in relation to the delay caused to the project by an assertion that the wind generator would interfere with operations at the airport which, Mr Millinder maintains, were without foundation and were eventually conceded having been discussed for some months perhaps even, as mentioned, as long as a year.

34. Mr. millinder maintains that there is a claim available to the subsidiary by reference to the fact that the Club refused to sign what is referred to in these proceedings as the connection agreement. The connection agreement was an agreement, as I understand it, between the club and a commercial electricity generating company concerning the ownership of a substation and its connection to the wind generator. Mr Millinder maintains that the failure to sign that agreement was what brought the joint venture arrangements to collapse. He maintains that the club was either under a contractual or some other duty to execute the connection agreement and that in consequence there is a cause of action available to the subsidiary against the club for losses arising from the failure to sign that agreement.

35. The detail of how, in law, that is likely to work has never been fully explained but the consequence of all that has taken place comes in the end down to a belief, on the part of Mr Millinder, that there is a cause of action which he would wish to proceed with against the club to recover damages resulting from the loss of the business opportunity that would have been represented by the construction of the wind generator which he has been precluded from advancing by reason of the causes of action being vested in companies which are in liquidation.

36. In order that Mr. Millinder may make the claim he belives is available, h needs to control Earth Energy. That is why he applied to set aside the Consent Order because it is the Consent Order which contains the obligation to pay £25,000 which is the basis on which Earth Energy was wound up. It is why he sought to set aside the order of Mr Justice Nugee because he had refused to set aside the Consent Order which contains the obligation which is the basis of the winding up proceedings against Earth Energy. He sought to have the Winding Up Order rescinded for similar and obvious reasons. If he cannot set aside the winding up order then he wishes to bring about the appointment of a liquidator over Earth Energy Investments who can be relied upon to bring a claim against the Club, which is why he commenced the proceedings determined by ICC Judge Jones.

37. In all those circumstances I accept the submission that Mr. Millinder has consistently refused to take no for an answer resulting in repetitious applications which go over the same ground again and again in order to advance claims that Mr. Millinder is convinced are bound to succeed. I accept too that this has resulted in the Club incurring significiant legal expense that it would otherwise have avoided and use of public resourcs that would not otherwise have been needed for these proceedings. Mr. Millinder has disclosed no insight into the vexatious nature of this activity. On the contrary, in the course of his submissions, he very fairly said that that is precisely what he intended to continue as he has in the past.

38. In those circumstances, I accept the submission that it is highly likely that further applications will be issued in the future designed to secure the ability of Mr Millinder to bring the claim he maintains is available to Earth Energy or its subsidiary, against the Club. It is likely, having regard to the correspondence that has passed before that if, and to the extent these further applications fail, there will be further unpleasant correspondence addressed to those who are doing their best to ensure that these various applications are dealt with in accordance with relevant legal principle. I am entirely satisfied, in the circumstances of this case, that the time has now come to put in place a filter that limits Mr. Millinder to making applications that he can demonstrate are realistically arguable by making an Extended Civil restraint Order. I propose to make one therefore which will identify the Judge to whom applications are to be made before they can be issued as being Mr Justice Arnold with the reserve Judge being Mr Justice Norris.

39. I emphasise that the filter will not prevent the bringing of meritorious claims which are legally realistically arguable but it will preclude further applications such as those which have been determined so far which end up being dismissed as totally without merit.
