Neutral Citation Number: [2019] EWHC 226 (Ch)

Case No: CR-2017-000140

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

The Rolls Building
The Royal Courts of Justice
7 Rolls Building, Fetter Lane,
London EC4A 1NL

Date: 08/02/2019

Before:

Sir Geoffrey Vos, Chancellor of the High Court

B E T W E E N

MIDDLESBROUGH FOOTBALL & ATHLETIC COMPANY (1986) LIMITED
Applicant

and

(1) EARTH ENERGY INVESTMENTS LLP (in liquidation)
(2) PAUL MILLINDER (joined by an order of HHJ Pelling QC dated 7th June 2018)

Respondents

and

PAUL MILLINDER

Applicant

- -

Mr Paul Millinder appeared in person

Mr Ulick Staunton (instructed by **Womble Bond Dickinson (UK) LLP**) appeared for **Middlesbrough Football & Athletic Company (1986) Limited**

Mr Anthony Hannon, Official Receiver, appeared as the liquidator of Earth Energy Investments LLP and Empowering Wind MFC Limited

Hearing date: 22nd January 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Sir Geoffrey Vos, the Chancellor of the High Court:

Introduction

1. This case arises from the relationship between Mr Paul Millinder ("Mr Millinder") and his companies on the one hand and Middlesbrough Football & Athletic Company (1986) Limited ("Middlesbrough")[1] on the other. The background was an arrangement between the two sides for the construction of a wind turbine at Middlesbrough football ground. Sadly, however, the relationship quickly deteriorated, and both sides resorted to litigation. Mr Millinder has tried, again and again, to assert his companies' legal rights against Middlesbrough, and Middlesbrough has resisted those attempts and has sought to wind up Mr Millinder's companies. There has never been any substantive resolution of the underlying contractual issues between the parties, which is regrettable, because, at its foundation, that is what the case is about. Instead, the parties have become enmeshed in a web of procedural and insolvency issues, culminating in the grant of an extended civil restraint order against Mr Millinder personally.

2. Mr Millinder accepted, in the course of oral argument, that he had made a number of mistakes in his conduct of the litigation. He also came close to conceding that it would have been better if he had in the past avoided the strong language and accusations that characterised his correspondence with court officials, lawyers and judges, as he became more and more frustrated with the situation that faced him.

3. As will appear from this judgment, this case provides an example of how those making use of limited liability companies for their trade need to understand the consequences of so doing. Once companies are wound up, the directors no longer have control of their affairs. That has been Mr Millinder's problem, but it is one that he seems not, until recently perhaps, fully to have understood.

4. It is against this background that I have to decide a relatively simple question, namely whether the extended civil restraint order granted against Mr Millinder personally on 28th June 2018 (the "ECRO") should be discharged or set aside. Unfortunately to decide this question properly, it is necessary to go into much of the background. I have read some 20 files of papers and had the benefit of a full day of oral argument.

Mr Millinder's application

5. Mr Millinder issued an application notice on 30th September 2018 in case number CR-2017-000140 in which he asked the court to make an order pursuant to CPR Part 3(3) (on its own initiative) to "vary and set aside orders accordingly, granting relief appropriately in remedy of miscarriage of justice against the malicious" winding up orders, on the grounds that there should be a determination of fraudulent non-disclosure and misrepresentation (the "Application").

6. Despite the precise terms of Mr Millinder's application dated 30th September 2018, one of his main challenges is to the ECRO that HH Judge Pelling QC had made against him for the reasons given in his judgment of 28th June 2018 ("HHJ Pelling's judgment"). HHJ Pelling's judgment granted the ECRO on the basis that Mr

[1] Company number 01947851.

Millinder had made, whether on his own behalf or on behalf of one of his companies, a minimum of three applications that had been dismissed and were totally without merit. HHJ Pelling decided, in his discretion, to grant the ECRO against Mr Millinder on the ground that he had consistently refused to take 'no' for an answer resulting (a) in repetitious applications and in Middlesbrough incurring significant legal expenses that it would otherwise have avoided, and (b) in the use of public resources that would not otherwise have been needed. He decided that Mr Millinder had disclosed no insight into the vexatious nature of this activity, and that it was highly likely that Mr Millinder would make further applications and write further unpleasant correspondence to pursue the claims of his (former) companies that he was convinced were justified. It may be noted at this stage that Mr Millinder has in fact never appealed any of the decisions that have been made against him.[2]

7. The Application also asks the court to set aside orders made by ICC Judge Jones on 26th March 2018, a winding up order made against Earth Energy Investments LLP ("Earth Energy") on 28th March 2018, and to determine that none of Mr Millinder or his companies ever owed any monies to Middlesbrough. As will later appear, the basis on which I directed the hearing that has given rise to this judgment was as an application to discharge the ECRO, made under paragraph 3.2(2) of Practice Direction 3C. No permission has been given under the ECRO for any other applications to be made, though I will need in the course of this judgment to consider aspects of the orders that Mr Millinder seeks to challenge.

Relevant corporate entities

8. Empowering Wind Limited ("Empowering Wind")[3] was a company whose directors were Mr Millinder and his brother, Mr Alan John Millinder ("Mr A.J. Millinder"). It was dissolved on 18th November 2014. The sole shareholder was Mr A. J. Millinder.

9. Empowering Wind MFC Limited ("Empowering Wind MFC"),[4] was a sole-purpose company that was compulsorily wound up on 19th September 2016. The two directors of Empowering Wind MFC were Mr Millinder and Mr A.J. Millinder.

10. Earth Energy was a company incorporated on 28th April 2014 and compulsorily wound up, as I have said, on 28th March 2018. Earth Energy held 99% of the shares in Empowering Wind MFC and Mr Millinder held the remaining 1%. Mr Millinder was the sole director of Earth Energy when the winding up began.[5]

Factual background

11. On 7th July 2008, Middlesbrough was granted planning permission to erect a wind turbine at its Riverside Stadium, subject to a condition requiring the submission of

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2 Subject to one unsuccessful application he made for permission to appeal on 24th July 2018 to which I will refer in due course.

3 Company number 07718596.

4 Company number 08369504.

5 Clean Tech Investments Ltd was a director between 28th April 2014 and 12th June 2015. Both Mr Millinder and Clean Tech Investments Ltd were LLP Designated Members.

and approval by the local planning authority of a scheme to alleviate the impact of the development on the nearby Durham Tees Valley Airport.

12. On 15th June 2012, Middlesbrough entered into an option agreement with Empowering Wind whereby Middlesbrough granted Empowering Wind an option for a period of 4 months to lease part of its Riverside Stadium (the "Property") to construct a 90-metre wind turbine (the "wind turbine") in accordance with the planning permission granted on 7th July 2008 (the "development").

13. Mr Millinder alleges that in November 2012, Northern Powergrid (Northeast) Limited ("Northern Powergrid") made Middlesbrough aware that a grid connection was conditional on it taking ownership of the dedicated sub-stations at the Property.

14. On 17th June 2013, Middlesbrough granted Empowering Wind MFC a lease of the Property for 26 years (the "Lease") in consideration of a premium of £200,000 (paid on execution). The rent reserved by schedule 7 of the Lease included a capacity rent of £50,000 per annum payable in certain events, which in fact occurred from 17th June 2014, and the provision by Empowering Wind MFC to Middlesbrough of up to 1,500 megawatt hours of electricity per annum free of charge. Paragraph 3.4 of schedule 5 to the Lease included a binding arbitration clause. The definition of "force majeure" in the Lease and paragraph 6 of schedule 5 to the Lease envisaged that Empowering Wind MFC would be absolved from liability to Middlesbrough caused by any event or circumstance beyond its reasonable control, provided that lack of funds was not to be regarded as a cause beyond Empowering Wind MFC's reasonable control. As will later be seen, Nugee J held on 5th February 2018 that Middlesbrough's counsel had unwittingly misled Arnold J at a hearing on 9th January 2017 into thinking there was no relevant provision in the Lease save for the definition of "force majeure".

15. It is common ground that on 17th June 2013 Middlesbrough and Empowering Wind MFC entered into an energy supply agreement (the "ESA"), by which Empowering Wind MFC agreed to supply the energy produced by the wind turbine to be installed at the Property to Middlesbrough for 20 years from the "Commissioning Date". Under clause 3.4 of the ESA, Empowering Wind MFC agreed to ensure that the "Start Date" was within 12 months of 17th June 2013, and agreed, if it failed to achieve that Start Date, that it would pay Middlesbrough for the electricity it consumed at the Property until the Start Date at the rate of £0.08/kilowatt hour. Clause 2.1 of the ESA provided that certain of its terms (excluding clause 3.4) would only commence on the satisfaction of condition precedents namely the commissioning of the wind turbine and Empowering Wind MFC entering into a connection agreement with the local electricity distributor. The force majeure clause in the ESA absolved both parties from liability to each other for delay in performance or non-performance due to and caused by any event or circumstance beyond its reasonable control. The ESA is actually dated 7th November 2013 (rather than 17th June 2013), but it seems also to be common ground that it was amended on 7th November 2013.

16. On 8th July 2013, Northern Powergrid wrote a letter setting out the costs of the grid connection required for the wind turbine project, suggesting that it was a condition precedent that Middlesbrough took ownership of the "two jointed out [sub-stations at the Property]".

17. In September 2013, Empowering Wind MFC submitted to the local planning authority a mitigation scheme in relation to the impact of the development on Durham Tees Valley Airport. Disagreements over the suitability of the mitigation scheme led to delays in its approval. It was ultimately approved by the local planning authority on 23rd December 2014. This caused delay to the construction of the wind turbine.

18. On 7th November 2013, Empowering Wind MFC and Middlesbrough entered into a Connection Agreement Deed (the "Connection Deed"), by which Middlesbrough undertook, from the Commissioning Date defined in the ESA, to ensure that, for the remainder of the term of the Lease, it would: "(subject to the terms of the connection agreement between Empowering Wind MFC and [Northern Powergrid]) neither terminate nor tamper with the connection from the switchboard within the 11kV substation to the Equipment [as also defined in the ESA]".

19. From 17th June 2014, the rent reserved by schedule 7 of the Lease fell due from Empowering Wind MFC to Middlesbrough under the terms of the Lease, but was unpaid.

20. On 23rd December 2014, Middlesbrough Council decided to remove the condition attached to the planning permission, thereby giving Empowering Wind MFC permission to construct the wind turbine. This came about as a result of Empowering Wind MFC commissioning an expert report, in November 2014, which showed that the condition was not necessary.

21. Mr Millinder alleges that Middlesbrough failed to sign a draft grid connection agreement dated February 2015 with Northern Powergrid (the "draft Connection Agreement"), and that that failure prevented the project from being fulfilled. In effect, he contends that Northern Powergrid, the distribution network operators for the North East, had specified as a requirement for connection that Middlesbrough took ownership of two sub-stations at the Riverside ground, which it ultimately failed or refused to do. He points specifically to a draft asset sale agreement between Middlesbrough and Northern Powergrid dated February 2015 relating to the sale of the substations and other equipment, which Middlesbrough did not sign.

22. On 25th June 2015, Middlesbrough invoiced Empowering Wind MFC for rent allegedly payable under the Lease and energy payments allegedly payable under clause 3.4 of the ESA. By a letter of the same date from Middlesbrough to Empowering Wind MFC, Middlesbrough threatened to enforce its claims totalling £256,269.89 by forfeiture of the Lease under paragraph 1 of schedule 5 and termination of the ESA under clause 7.

23. Mr Millinder contends that, on 29th June 2015, Empowering Wind MFC assigned to Earth Energy a debt of £200,000 allegedly owed by Middlesbrough to Empowering Wind MFC (the "alleged assignment"). Mr Millinder submits that the debt of £200,000 was in respect of the Lease premium paid by Empowering Wind MFC to Middlesbrough, which Mr Millinder claims was obviously repayable by Middlesbrough to Empowering Wind MFC, because of Middlesbrough's failure to allow the electricity network connection to proceed. Mr Millinder also claimed that £330,000 by way of consequential damages was owed by Middlesbrough to Empowering Wind MFC at this stage.

24. The alleged assignment is said to have taken place at a board meeting of Empowering Wind MFC on 29th June 2015 attended by Mr Millinder and Mr A.J. Millinder. The board minute included the following:-

> "**We agree to tidy up loose ends on some of the fees and the £200k that we paid from other accounts so that [Earth Energy]**, as [parent of Empowering Wind MFC] **is assigned those investments, representing what we put into the project**. We agreed to separate out what went in as investment to the projects so that there are two causes of action, with [Earth Energy] recovering funds invested and [Empowering Wind MFC] recovering consequential loss, including the feed in tariff revenue. We agreed this would mitigate loss in litigation to an extent [emphasis added].
>
> ….
>
> 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 they have killed it by preventing connection. [Mr Millinder] is to write to them to set the position in clear terms, let them know we are contemplating legals. (…)
>
> We agreed to get further legal advice and come up with a plan to recover the losses."

Mr Millinder contends that Middlesbrough's non-disclosure of these minutes (the "Minutes") to Arnold J on 9th January 2017 vitiates the subsequent orders that were made. He also submits that the words emphasised in the Minutes above amount to a legal assignment by Empowering Wind MFC to Earth Energy of an alleged debt of £200,000 due from Middlesbrough.

25. On 25th July 2015, Middlesbrough sent Empowering Wind MFC "notices of non-payment" requiring the alleged non-payment breaches to be remedied by set dates, failing which the Lease and the ESA were to be terminated.

26. In the result, Middlesbrough then purported to terminate the ESA for non-payment and to forfeit the Lease on 19th August 2015.

27. Thereafter in the latter part of 2015, the dispute continued in correspondence between Middlesbrough and Empowering Wind MFC about Middlesbrough's entitlement to terminate the Lease and the ESA. Mr Millinder's main contention on behalf of Empowering Wind MFC was that it was protected by the force majeure clauses in each of the Lease and the ESA. There was also an ongoing argument at this stage about whether or not Middlesbrough should agree to take ownership of the sub-stations. Middlesbrough argued that Empowering Wind MFC was not protected by the force majeure clauses and that it was not obliged to accept ownership of the sub-stations.

28. On 2nd June 2016, the Commissioners of Her Majesty's Revenue and Customs ("HMRC") presented a petition to wind up Empowering Wind MFC in respect of unpaid tax liabilities.

29. On 29th July 2016, Middlesbrough served a notice of intention to appear on the hearing of HMRC's petition, claiming to be a creditor of Empowering Wind MFC in the sum of £256,269.89.

30. On 23rd August 2016, Empowering Wind MFC was dissolved.

31. On 19th September 2016, Chief Registrar Baister made an order restoring Empowering Wind MFC to the register, and made a compulsory winding up order in respect of it. Mr Ulick Staunton, counsel for Middlesbrough, attended this hearing. Mr Millinder contended in his written submissions that Mr Staunton's submission to Registrar Baister that Middlesbrough was a creditor of Empowering Wind MFC in the sum of £256,269.89 caused him "to conclude that [Mr Millinder] had not engaged with, nor disclosed a creditor in the CVA arrangement process when in fact [he] had engaged and completed the agreement in principle with the 3 legitimate creditors" and that "the winding up was orchestrated between Mr Staunton and Registrar Baister who disallowed [Mr Millinder] the opportunity of making any submission to negate Mr Staunton's false misrepresentation resulting in the hearing lasting less than 5 minutes in the Wednesday winding up Court". Mr Millinder contends that "these actions constituted a violation of Article 6 of the [European Convention on Human Rights] in preventing [him] from [receiving a] right to a fair and unbiased civil hearing in this Court, the Public Authority for the purposes of the [Human Rights Act 1998]" and that the winding up order was founded on fraud.

32. On 15th December 2016, Mr Millinder emailed Mr Jeremy Robin Bloom, Middlesbrough's general counsel, ("Mr Bloom"), asking Middlesbrough to repay the monies he had personally invested in the wind turbine project (presumably the £200,000 paid as the Lease premium) (the "December 2016 email"). The December 2016 email also touched on the issue of assignment. Mr Millinder wrote:-

> "I have established the correct legal position around Force Majeure and I, as majority creditor of Empowering Wind LTD [by which he seems to have meant Empowering Wind MFC], have the right to progress the claim that I shall assign to its Parent Company [by which he seems to have meant Earth Energy] …".

Middlesbrough contends that this email contradicts Mr Millinder's suggestion that there had been a valid assignment in the Minutes.

33. On 6th January 2017, Earth Energy issued a statutory demand against Middlesbrough seeking recovery of the sum of £530,000, comprising the £200,000 paid under the Lease together with a further £330,000 for unspecified legal and technical project development costs incurred until May 2015. It was alleged that both these debts had been assigned to Earth Energy. The statutory demand alleged in outline (a) that Middlesbrough had unlawfully terminated the Lease, (b) that Empowering Wind MFC could rely on the force majeure provisions in the Lease and the ESA as absolving it from any indebtedness to Middlesbrough, (c) that Middlesbrough had been responsible for the failure to satisfy the condition precedent to the ESA requiring the completion of a connection agreement, (d) that Empowering Wind MFC was not responsible for the delays caused by the need or failure to satisfy planning condition relating to the Durham Tees Valley Airport, and (e) that Empowering Wind MFC

would not have been wound up by HMRC for unpaid tax liabilities had Middlesbrough not breached its contractual obligations, and falsely represented to the Companies Court that Empowering Wind MFC owed it £256,269.89.

34. On 9th January 2017, Arnold J granted Middlesbrough a without notice injunction restraining Earth Energy until 16th January 2017 from presenting a petition to wind up Middlesbrough on the ground that the original debt (allegedly due from Middlesbrough to Empowering Wind MFC) was known to be disputed, and that the alleged assignment of any claim by Empowering Wind MFC to Earth Energy was disputed. This order was made in a new insolvency application numbered CR-2017-000140, in which the application for the ECRO was also made. Mr Millinder contends that the order ought to have been set aside as Middlesbrough failed to disclose crucial documents demonstrating that Empowering Wind MFC had a good claim (particularly the Connection Deed, the draft connection agreement and the draft asset sale agreement) and that it had assigned its claim (at least for the £200,000) against Middlesbrough to Earth Energy (particularly the Minutes).

35. On 11th January 2017, Earth Energy's then solicitors, Penningtons Manches LLP, wrote to Middlesbrough's solicitors complaining that material information had not been put before the court at the hearing on 9th January 2017. They referred to documents including the Connection Deed, the draft "Northern Powergrid Connection Agreement" dated 12th December 2012, and the "Northern Powergrid Asset Sale Agreement" (the draft dated February 2015 between Middlesbrough and Northern Powergrid relating to the sale of the sub-station equipment) and the Minutes. The letter sought an explanation, but said that in any event, going forward, Earth Energy agreed that the injunction should continue in the same terms until further order or agreement. The letter concluded by suggesting that each party should bear its own costs in the light of Middlesbrough's failure to provide full disclosure to the court. They said they would attend court at the return date only to argue costs if that was not agreed by 12th January 2017.

36. On 16th January 2017, a consent order was made by Norris J in claim numbered CR-2017-000140, continuing Arnold J's order, and requiring Earth Energy to pay Middlesbrough's costs in the sum of £25,000 by 4pm on 3rd February 2017 (the "consent order"). It appears that there was no substantive hearing before Norris J, but that he was probably provided with a minute of order signed by Penningtons Manches LLP on behalf of Earth Energy. Mr Millinder says that he is unaware of how Earth Energy's consent was signified, and denies that he agreed to pay the costs at all. The costs were not, in any event, paid by the due date or at all.

37. On 16th November 2017, Earth Energy made an application in Empowering Wind MFC's winding up (petition number CR-2017-008690) for an order that Middlesbrough's proof of debt against Empowering Wind MFC be rejected and for other relief (the "proof application"). Earth Energy applied in the same application to disclaim the ESA as an onerous contract, to assign Empowering Wind MFC's rights of action for breach of the Lease and the ESA against Middlesbrough to Earth Energy, and to appoint a Mr Chris Parkman ("Mr Parkman") as liquidator of Empowering Wind MFC in place of Mr Anthony Hannon ("Mr Hannon") to prosecute the claim against Middlesbrough.

38. On 21st November 2017, it appears that the bailiffs attended at Earth Energy's premises seeking to levy execution on its goods in respect of a debt of £619,774.48, instead of the £25,000 costs order. Mr Millinder describes this as one of a series of "unwarranted demands" by Middlesbrough. It seems, however, that this was a mistake by the enforcement officer, who took the claim from the recital to the order rather than from the order itself. Whatever the truth of these events, they do not seem to me to affect what I have to decide.

39. On 21st December 2017, ICCJ Jones began hearing, and then adjourned, the proof application. He spent some time trying to explain to Mr Millinder the realities of winding up, and how he would need to put together a package to fund any liquidator if a claim were to be pursued by Empowering Wind MFC against Middlesbrough. He adjourned the matter to give Mr Millinder an opportunity to do exactly that.

40. On 30th January 2018, Earth Energy issued an application to set aside the consent order (that had been made by Norris J in claim number CR-2017-000140) for material non-disclosure. In the witness statement supporting the application, Mr Millinder maintained that Earth Energy had a cross-claim against Middlesbrough to recover the £530,000 allegedly owed by Middlesbrough to Empowering Wind MFC. This obviously included a claim for £330,000 that Mr Millinder now acknowledges had not been assigned to Earth Energy.

41. On 5th February 2018, Nugee J dismissed the application by Earth Energy dated 30th January 2018 seeking to set aside the consent order for material non-disclosure and ordered Earth Energy to pay £10,000 by way of costs to Middlesbrough. He did, however, seem to accept that Middlesbrough ought not to have told Arnold J that there was no force majeure clause in the Lease, and ought to have disclosed to Arnold J the Minutes (of 29th June 2015) evidencing the alleged assignment. Nugee J did not, however, think that such disclosure would have made any difference to Arnold J's decision, nor did he think that the alleged non-disclosure was relevant to the consent order that had been agreed on paper on 16th January 2017 before Norris J. Nugee J concluded that, after Arnold J's order on 9th January 2017, Earth Energy had to choose between relying on the non-disclosure to try to set aside the order restraining presentation of a petition, or accepting that there was a *bona fide* dispute and agreeing that the injunction should continue. Nugee J decided, as Mr Millinder had told him, that he (Mr Millinder) had accepted on behalf of Earth Energy, that the injunction should continue. Whilst Mr Millinder had submitted to Nugee J that he had not agreed to the costs order against Earth Energy, Nugee J did not accept that as a reason for setting the consent order aside. Accordingly, as from 5th February 2018, the alleged non-disclosure issue had been determined, the injunction remained in full force and effect, and none of the orders made by Arnold J, Norris J or Nugee J was the subject of an appeal by Earth Energy to the Court of Appeal.

42. Mr Millinder submits that Nugee J ought to have regarded the Minutes as good evidence of the alleged assignment (which he did not), and ought to have concluded that, if they had been shown to Arnold J, he would have refused the injunction, because Earth Energy had a good arguable case for a claim for £200,000 against Middlesbrough, that claim having been assigned to it by Empowering Wind MFC. On that basis, the consent order ought to have been set aside.

43. On 12th February 2018, Middlesbrough presented a petition to wind up Earth Energy (petition number CR-2018-001137) based on the costs debt of £25,000 contained in the consent order.

44. On 1st March 2018, Earth Energy issued another application in claim number CR-2017-000140 to set aside the consent order of 16th January 2017 for significant non-disclosure and to set aside the order of Nugee J of 5th February 2018. This was the first application in time that HHJ Pelling eventually decided to have been totally without merit. I shall, therefore, call it the "first application". As will appear, HHJ Pelling's judgment held that the first application was totally without merit essentially for the reasons given by Nugee J in his judgment of 5th February 2018. HHJ Pelling rejected the argument that the consent order had not been agreed in the absence of new evidence having been adduced, and held that the new pieces of evidence (namely the Minutes and the December 2016 email) would have fortified his view that there was no realistically arguable cross claim available to Earth Energy that provided a proper basis for setting aside the consent order (see paragraphs 11-14 of HHJ Pelling's judgment).

45. Running ahead somewhat, it is useful to note at this stage that Mr Millinder challenged this latter finding in oral argument before me. His case was, again at this stage, that both Nugee J and HHJ Pelling had been wrong to think that there had been no alleged assignment of Empowering Wind MFC's claim to recover the lease premium of £200,000 from Middlesbrough to Earth Energy.

46. On 21st March 2018, Nugee J refused Middlesbrough's written application to dismiss the first application without an oral hearing, and directed that the first application should be listed for hearing in the usual way. Middlesbrough apparently made that application without notice to Mr Millinder. Mr Millinder sought to rely upon Nugee J's direction as evidence that the first application was fairly arguable.

47. On 26th March 2018, ICCJ Jones dismissed Earth Energy's application in Empowering Wind MFC's winding up (petition number CR-2017-008690) (a) asking the court to reject Middlesbrough's proof of debt in the sum of £256,269.89, on the ground that the claim was false and/or fraudulent, and (b) seeking the appointment of Mr Parkman in place of the Official Receiver (Mr Hannon) to pursue Empowering Wind MFC's claims against Middlesbrough. ICCJ Jones also refused to recuse himself and held at paragraph 26 of his judgment that the application seeking recusal was totally without merit.

48. ICCJ Jones rejected Mr Millinder's argument that Insolvency Rule 14.11 applied to Mr Hannon's acceptance of Middlesbrough's claim for the purpose of voting at a creditors' meeting. He held that Insolvency Rule 14.11 applied only to proofs for the purposes of seeking a dividend as opposed to claims that were marked "objected to" but could nonetheless count for voting purposes (see Insolvency Rule 15.33(3)). Secondly, ICCJ Jones dealt in his judgment with the substantive arguments that Mr Millinder raised as to why Middlesbrough did not have any claim against Empowering Wind MFC because of Middlesbrough's alleged fraud. It was said that Middlesbrough knew that it was responsible for the lack of a connection agreement, so knew that it had no valid claims at all. ICCJ Jones alluded to the need to find a way of having the underlying dispute determined. He concluded, however, that Mr

Millinder had, despite being given the opportunity to demonstrate that he could fund the litigation, deliberately "decided that he [would] not inform the court of any funding that is available". ICCJ Jones, therefore, declined to appoint Mr Millinder's preferred liquidator (Mr Parkman), because in essence there were no proposals put forward as to how the litigation could in practice be brought by a new liquidator.

49. ICCJ Jones did not, however, certify the proof application as totally without merit. Mr Millinder alleges that either or both of Chief ICCJ Briggs and ICCJ Jones failed to deal with the part of this application concerning the disclaimer of the ESA, thereby negating his false misrepresentation claim for over £4 million (see paragraphs 87 and 88 of Mr Millinder's skeleton). He also alleges that ICCJ Jones was biased in that he had pre-determined the application against him. Nonetheless, none of ICCJ Jones' determinations have been appealed, and Mr Millinder seems not to understand that it was not open to ICCJ Jones to decide the substantive contractual issues that arose as between Empowering Wind MFC and Middlesbrough (see paragraph 59 of ICCJ Jones' judgment).

50. On 28th March 2018, ICC Judge Barber refused Earth Energy's application to adjourn Middlesbrough's petition, and made a compulsory winding up order against Earth Energy based on the costs debt of £25,000 in the consent order. There was no appeal against that order. This order was in fact made in Mr Millinder's absence. He did not attend court as he was unwell, as appears from page 1 of the transcript of the hearing. Mr Millinder makes a number of allegations about Mr Staunton's misconduct and non-disclosure at this hearing. I need not set out those allegations at length, though they are elaborated in paragraphs 70-74 of his first skeleton. In reality, once Norris J had continued the injunction obtained by Middlesbrough implying that there was no undisputed debt owed by Middlesbrough to Earth Energy, and Nugee J had declined to set that consent order aside, the compulsory winding up ordered by ICCJ Barber was inevitable, unless Mr Millinder could satisfy any court that Earth Energy had a genuine cross-claim based on substantial grounds.

51. On 29th March 2018, Earth Energy made an application to rescind the winding up order made by ICCJ Barber in petition number CR-2017-001137. This application was ultimately dismissed by HHJ Pelling on 7th June 2018, but he decided on the same day that it could not be described as having been totally without merit, essentially because it was the first such application that Mr Millinder had made to that effect (see paragraph 10 of HHJ Pelling's judgment).

52. On 30th March 2018, Earth Energy made an application in petition number CR-2017-000140 for an interim costs order against Middlesbrough "based on [Earth Energy's] quantum of claim to compensate in the interim for loss and damages to [Earth Energy] as a result of winding up its sole purpose company [Empowering Wind MFC]". This was based on the alleged claim for £550,000 against Middlesbrough. This was the second application in time, which HHJ Pelling decided to have been totally without merit. I will, therefore, call it the "second application". HHJ Pelling essentially decided that the second application was totally without merit for the same reasons as Snowden J gave when he dismissed it on 16th May 2018, namely that Mr Millinder had no standing to bring the second application on behalf of Earth Energy, because it had been placed into compulsory liquidation before the application was made, and because it was an application for costs or damages to be paid to Earth Energy, when

no normal CPR Part 7 claim had been made (see paragraphs 7-9 of HHJ Pelling's judgment dated 28th June 2018). Mr Millinder accepted in the course of oral argument before me that he should not have made the second application, that it had been "a silly thing to do", and that it had tried, as he put it, to "jump the queue" (as Snowden J had said in his 16th May 2018 judgment at paragraph 8).

53. On 11th April 2018, Chief ICCJ Briggs adjourned the 29th March 2018 application to rescind the winding up order against Earth Energy to be heard together with the first application (which was dated 1st March 2018, and was an application to set aside *inter alia* the consent order of 16th January 2017 on the grounds of significant non-disclosure). Mr Millinder makes a number of allegations about this hearing and Mr Staunton's conduct in relation to it. I need not set out those allegations in detail, though they are made at length in paragraphs 75-82 of his first skeleton. They proceed on the basis of an assumption that there was a conspiracy against Mr Millinder by judges, lawyers and the Official Receiver.

54. Mr Hannon, by now the liquidator of both Earth Energy and Empowering Wind MFC, did not wish to pursue Earth Energy's alleged claim against Middlesbrough and contended that no such claim was assigned by Empowering Wind MFC to Earth Energy under the alleged assignment or at all. This is evidenced by a letter from Mr Hannon to the Court dated 15th May 2018 in respect of a hearing before Snowden J on 16th May 2018.

55. On 16th May 2018, Snowden J delivered judgment refusing the second application made on 30th March 2018, in the interim applications court, for an interim costs order against Middlesbrough "based on [Earth Energy's] quantum of claim to compensate in the interim for loss and damages to [Earth Energy] as a result of winding up [Empowering Wind MFC]". He refused the application for interim relief on the basis that (a) Earth Energy had been wound up and Mr Millinder was not, and could not be, authorised to issue or pursue any application on its behalf, and (b) a claim by Earth Energy for any interim damages or costs could not succeed when no claim for compensation had been issued by it in an appropriate form under CPR Part 7. Snowden J stood the matter of whether the second application had been totally without merit over for hearing by the judge determining the application to set aside the consent order. HHJ Pelling decided, as I have said, that it had been totally without merit for the same reasons as Snowden J had given on 16th May 2018.

56. On 7th June 2018, HHJ Pelling heard and dismissed two substantive applications: (1) Earth Energy's applications dated 1st March 2018 (the first application) to set aside the consent order of 16th January 2017 and Nugee J's order of 5th February 2018, and (2) the application dated 29th March 2018 to set aside the winding up order of 28th March 2018. In substantive terms, HHJ Pelling agreed with Nugee J's decision as to the consent order and as to the validity of the alleged assignment. He pointed out at paragraph 7 of his judgment that Earth Energy's solicitors had told Middlesbrough's solicitors in writing that they had instructions to agree to pay £25,000 in costs. HHJ Pelling did not separately consider the application to set aside the winding up order on the basis that he had held in paragraph 1 of the judgment that the "winding up order depends on [Earth Energy] being liable to [Middlesbrough] for £25,000 under the [consent order]". He did, however, make an order refusing to set aside the winding up order. HHJ Pelling adjourned the costs issues arising from these applications and the

question of whether the applications had been totally without merit to a further hearing on 28th June 2018.

57. On 23rd June 2018, Earth Energy made an application to set aside the order dated 26th March 2018 made by ICCJ Jones refusing, amongst other things, to set aside proofs lodged by Middlesbrough with Mr Hannon, as the initial liquidator of Earth Energy. This was the third application in time, which HHJ Pelling decided to have been totally without merit. I will, therefore, call it the "third application". HHJ Pelling essentially decided that the third application was totally without merit because Mr Millinder had no standing to bring it on behalf of Earth Energy, the only proper challenge to ICCJ Jones' order would have been by way of appeal, and that the application was in any event premature as no formal proofs had been lodged in Empowering Wind MFC's winding up (see paragraphs 15-18 of HHJ Pelling's judgment).

58. On 28th June 2018, HHJ Pelling delivered judgment determining that each of the applications dated 1st March 2018 (the first application), 30th March 2018 (the second application) and 23rd June 2018 (the third application) had been totally without merit, and made an extended civil restraint order ("ECRO") against Mr Millinder until 28th June 2020. He ordered Mr Millinder to make various payments of costs in respect of these applications to Middlesbrough. Arnold and Norris JJ were the judges specified in HHJ Pelling's order.

59. Mr Millinder submitted to me that the ECRO was "entirely unlawful", a false instrument within section 3 of the Forgery and Counterfeiting Act 1981, an abuse of process that has been used to disguise fraud and serious misconduct by lawyers and insolvency practitioners. More controversially, Mr Millinder submitted that the ECRO was made "with dishonest intent on the part of [HHJ Pelling] who must have known he was not empowered to make the ECRO, yet he sought, along with [Middlesbrough] to lead [Mr Millinder] to believe the ECRO was a genuine article as an attempt to violate [his] rights to a fair hearing in this Court, predominantly … to cover fraud and [the] criminal misconduct of Mr Hannon and [Middlesbrough]".

60. On 24th July 2018, Arnold J dismissed as totally without merit applications by Mr Millinder (a) for damages on the cross-undertaking given by Middlesbrough to Arnold J on 9th January 2017, (b) to set aside ICCJ Jones's order of 26th March 2018, and (c) to set aside the order by ICCJ Barber dated 28th March 2018 winding up Earth Energy.

61. On 30th September 2018, Mr Millinder made the Application to set aside the ECRO. As I have said, the Application also asks the court to set aside orders made by ICCJ Jones on 26th March 2018, the winding up order made against Earth Energy on 28th March 2018, and to determine that none of Mr Millinder or his companies ever owed any monies to Middlesbrough.

62. On 1st November 2018, Mr Millinder issued a claim form against Middlesbrough and against Gibson O'Neil Company Ltd. claiming £18,561,115.28 in damages (the "new claim"). The new claim alleged repudiatory breach and wrongful forfeiture of the Lease and associated contracts (to none of which, I might interpose, was Mr Millinder a party). The new claim was, however, said to be founded on alleged fraud and the "malicious winding up" of Mr Millinder's wind turbine single purpose vehicles, Earth

Energy and Empowering Wind MFC. Mr Millinder submitted that he intended that the new claim should be heard in conjunction with the Application "as the arguments presented and actions of [Middlesbrough] in this associated litigation are to a great extent … inextricably linked to that claim and the relief sought in an award of compensation in aggravated damages".

63. The new claim was, however, automatically struck out pursuant to paragraph 3.3(1) of CPR Practice Direction 3C, because it had been brought without the permission of a judge nominated in the ECRO. Arnold J made this clear in his clerk's email dated 15th November 2018.

64. Since 15th November 2018, Mr Millinder has sought to pursue criminal proceedings in the Kirklees Magistrates' Court against Mr Hannon and Mr Staunton, has applied to the Solicitors Disciplinary Tribunal to have Mr Bloom and other solicitors involved on behalf of Middlesbrough struck off, and has sought to procure the arrest or prosecution of several of the judicial office holders I have mentioned for alleged fraud against him and his companies. I do not intend to set out the details of these unsuccessful attempts. He has sought, however, widely to publicise his allegations, and has repeatedly sent intemperate letters and emails to courts and judges, civil servants, and government representatives and officials.

65. On 26th November 2018, Mr Millinder put forward an application for disclosure of certain proofs of debt against Mr Hannon and Middlesbrough's solicitors. Arnold J decided that the application had been automatically struck out under the ECRO on the ground that Mr Millinder had not first sought or obtained permission to make it. Mr Millinder responded in a hostile manner to this outcome and has continued to send intemperate emails and threats to court staff including Arnold J's clerk. As Arnold J wrote in giving his reasons for refusing permission to appeal, the application was automatically struck out under paragraph 3.3(1) of Practice Direction 3C (see below). I have, moreover, read all Mr Millinder's correspondence and documentation up to 4th February 2019, none of which, in my judgment, affects the decisions that I am making in this judgment.

HHJ Pelling's Judgment (28th June 2018)

66. HHJ Pelling's judgment dealt with the sole question of whether it was appropriate to make an ECRO against Mr Millinder. He explained (correctly) at paragraph 3 that he had to be satisfied that at least three claims or applications had been brought by the party against whom an ECRO was sought, which were totally without merit and that, if that jurisdictional hurdle were passed, in the exercise of his discretion, it was, in all the circumstances, appropriate to make an ECRO. At paragraph 4, HHJ Pelling explained that the ECRO was sought against Mr Millinder personally although the previous applications had been issued in the name of companies that he had controlled. HHJ Pelling said that the court had the power to make such an order, as explained by Newey J in *CFC 26 Ltd v. Brown Shipley and Co Ltd and Others* [2017] EWHC 1594 (Ch), and that that point had not been in dispute.

67. HHJ Pelling then dealt with each of 4 applications that Mr Millinder had made that were alleged to have been totally without merit. He determined, for the reasons I have already summarised, that the first, second and third applications had each been totally

without merit so that the necessary jurisdictional hurdle for an ECRO to be made was crossed. Mr Millinder submitted in his skeletons that none of these applications was totally without merit and that the making of the ECRO was motivated as a form of gagging order to prevent Mr Millinder from having a fair hearing. Orally, Mr Millinder accepted that the second application was without merit, but not to be characterised as totally without merit, since it was, in effect, an honest error.

68. HHJ Pelling then (in paragraph 20) considered the evidence that was said to support the proposition that Mr Millinder had behaved in a way that showed the classic signs of being a vexatious litigant, by refusing to take "no" for an answer and going over the same ground again and again. It was said that Mr Millinder had bombarded a wide variety of different people, including counsel, solicitors, and officials and directors of Middlesbrough, court officials and judges with correspondence which strayed "very far from what [was] appropriate even in hard fought litigation". Moreover, the judge considered whether Mr Millinder had thereby exposed Middlesbrough to avoidable legal costs, and unnecessarily used scarce court resources.

69. HHJ Pelling then set out extracts from Mr Millinder's emails and correspondence, which had been said by Middlesbrough to "show a very unsatisfactory approach to litigation particularly when looked at in the light of" the three unmeritorious applications. The judge said that it was "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 or Empowering Wind MFC,] which, if only it could be commenced and adjudicated upon, would result in substantial damages being awarded against" Middlesbrough.

70. I shall not recite the correspondence that HHJ Pelling referred to at paragraphs 22-31 of his judgment, but it included threats by Mr Millinder against lawyers, judges, court officials and the Official Receiver to have them arrested and prosecuted for fraud, blackmail and corruption. I can say at once that this correspondence was, as HHJ Pelling said, and put at its lowest, entirely unnecessary and, I would say, wholly inappropriate.

71. HHJ Pelling explained Mr Millinder's complaint, as it was then expressed, at paragraphs 34-36. I set out these paragraphs at some length to demonstrate that HHJ Pelling also seems to have identified the corporate personality problem that Mr Milliner faced (and to which I shall refer again in due course):-

> "34. Mr. Millinder maintains that there is a claim available to the subsidiary by reference to the fact that the Club [Middlesbrough] 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 believes is available, he 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] who can be relied upon to bring a claim against the Club, which is why he commenced the proceedings determined by ICC Judge Jones."

72. HHJ Pelling concluded by saying that he accepted the submissions Middlesbrough had made (paragraph 37-38). He said that Mr Millinder had disclosed no insight into the vexatious nature of this activity, but had, on the contrary, in the course of his submissions said that he intended to continue as he had in the past. He, therefore, made the ECRO.

The power to make an ECRO

73. The power to order an ECRO is conferred by CPR Part 3.11 and Practice Direction 3C.

74. CPR Part 3.11 provides as follows:-

> "A practice direction may set out—
>
> (a) the circumstances in which the court has the power to make a civil restraint order against a party to proceedings;
>
> (b) the procedure where a party applies for a civil restraint order against another party; and
>
> (c) the consequences of the court making a civil restraint order."

75. Practice Direction 3C deals with ECROs at paragraph 3 as follows:-

> "3.1 An extended civil restraint order may be made by—

(1) a judge of the Court of Appeal;

(2) a judge of the High Court; or

(3) a Designated Civil Judge or their appointed deputy in the County Court,

where a party has persistently issued claims or made applications which are totally without merit.

3.2 Unless the court otherwise orders, where the court makes an extended civil restraint order, the party against whom the order is made—

(1) will be restrained from issuing claims or making applications in—

(a) any court if the order has been made by a judge of the Court of Appeal

(b) the High Court or the County Court if the order has been made by a judge of the High Court; or

(c) the County Court if the order has been made by a Designated Civil Judge or their appointed deputy,

concerning any matter involving or relating to or touching upon or leading to the proceedings in which the order is made without first obtaining the permission of a judge identified in the order;

(2) may apply for amendment or discharge of the order provided he has first obtained the permission of a judge identified in the order; and

(3) may apply for permission to appeal the order and if permission is granted, may appeal the order.

3.3 Where a party who is subject to an extended civil restraint order—

(1) issues a claim or makes an application in a court identified in the order concerning any matter involving or relating to or touching upon or leading to the proceedings in which the order is made without first obtaining the permission of a judge identified in the order, the claim or application will automatically be struck out or dismissed—

(a) without the judge having to make any further order; and

(b) without need for the other party to respond to it;

(2) repeatedly makes applications for permission pursuant to that order which are totally without merit, the court may direct that if the party makes any further application for permission which is totally without merit, the decision to dismiss the application will be final and there will be no right of appeal, unless the judge who refused permission grants permission to appeal.

…

3.7 An order under paragraph 3.3(2) may only be made by—

(1) a Court of Appeal judge;

(2) a High Court judge; or

(3) a Designated Civil Judge or their appointed deputy."

(emphasis added)

76. Mr Millinder's Application (dated 30th September 2018) could be regarded as an application to discharge the ECRO made under paragraph 3.2(2) of Practice Direction 3C. Whilst Arnold J has not expressly granted permission for the application to be heard, I gave directions on 3rd October 2018 that I should hear Mr Millinder's substantive application to discharge the ECRO, having consulted Arnold J. In its latest skeleton, Middlesbrough had contended for the first time, I think, that the court has no jurisdiction to hear such an application, absent an appeal. I will deal with this point in due course, but ultimately it may be of no importance, because the court did "otherwise order" under Practice Direction 3C that Mr Millinder's application should be heard. It should be said that, in oral argument, Mr Staunton submitted, not that I did not have jurisdiction to decide the Application, but that I should conclude that the ECRO should not be discharged in the absence of the most exceptional circumstances, because it was a final order.

77. The hearing of the Application has had to be adjourned on two separate occasions, but ultimately came on for a substantive hearing on 22nd January 2019. I should record my gratitude to Mr Millinder for having made his oral submissions in an entirely courteous and restrained manner.

Issues

78. In these circumstances, it seems to me that it is necessary for me to consider the following 3 issues:-

i) Did HHJ Pelling have jurisdiction to make the ECRO against Mr Millinder?

ii) Does this Court have jurisdiction to set aside or vary the ECRO made against Mr Millinder, and, if so, on what basis should it exercise that jurisdiction?

iii) Should the ECRO be set aside on the grounds either that there has been a material change of circumstances since the order was made, or that the facts on which the original decision was made were mis-stated, or on some other basis?

79. I shall deal first with the question of whether HHJ Pelling had jurisdiction, as a deputy High Court Judge, to make an ECRO, since it seemed at the outset (but not in oral submissions) to underlie much of Mr Millinder's thinking and much of his discontentment about what has occurred.

Did HHJ Pelling have jurisdiction to make the ECRO?

80. Mr Millinder originally submitted that only a salaried High Court Judge has jurisdiction to make an ECRO, and that HHJ Pelling, as a senior circuit judge and deputy judge of the High Court authorised under section 9(1) of the Senior Courts Act 1981, had no such jurisdiction. To be fair, Mr Millinder did not pursue the point orally, but it is as well to make the position clear.

81. It is necessary to consider the meaning of the term "High Court Judge" as it is used in CPR Part 3.3 and Practice Direction 3C of the CPR. A person authorised to act as a deputy High Court Judge under section 9(1) has almost all the powers of a salaried High Court Judge, including the power to grant an ECRO. The ambit and limitations of such a judge's jurisdiction are explained in section 9(5)-(6A) of the Senior Courts Act 1981 as follows:-

> "(5) Every person while acting under this section shall, subject to subsections (6) and (6A), be treated for all purposes as, and accordingly may perform any of the functions of, a judge of the court in which he is acting.
>
> (6) A person shall not by virtue of subsection (5)—
>
> (a) be treated as a judge of the court in which he is acting for the purposes of section 98(2) or of any statutory provision relating to—
>
> (i) the appointment, retirement, removal or disqualification of judges of that court;
>
> (ii) the tenure of office and oaths to be taken by such judges; or
>
> (iii) the remuneration, allowances or pensions of such judges; or
>
> (b) subject to section 27 of the Judicial Pensions and Retirement Act 1993, be treated as having been a judge of a court in which he has acted only under this section.
>
> (6A) A Circuit judge, Recorder or person within subsection (1ZB) shall not by virtue of subsection (5) exercise any of the powers conferred on a single judge by sections 31, 31B, 31C and 44 of the Criminal Appeal Act 1968 (powers of single judge in connection with appeals to the Court of Appeal and appeals from the Court of Appeal to the Supreme Court)."

82. Section 9(5) makes it clear that a judge authorised to sit in the High Court (like HHJ Pelling) is to be treated, subject to some irrelevant exceptions, for all purposes as a judge of the High Court. Accordingly, the term "High Court Judge" in CPR Part 3.3 and Practice Direction 3C is to be construed as including judges authorised under section 9(1) to sit in the High Court. For that reason, HHJ Pelling did indeed have the jurisdiction to the make the ECRO against Mr Millinder. The next question is how this court should exercise the jurisdiction under paragraph 3.2(2) of Practice Direction 3C.

Does this Court have jurisdiction to set aside or vary the ECRO, and, if so, how should it exercise that jurisdiction?

83. Middlesbrough submitted that the ECRO is a final order so that the Court only has power under CPR Part 3.1(7) or under paragraph 3.2(2) of Practice Direction 3C to set aside or vary it in exceptional circumstances, none of which exist in this case.

84. I have already set out paragraph 3.2 of Practice Direction 3C above. CPR Part 3.1(7) provides as follows:-

> "(7) A power of the court under these Rules to make an order includes a power to vary or revoke the order."

85. Before dealing with Middlesbrough's submission, it is useful to cite some of the most recent authorities on CPR Part 3.1(7). The parties have been unable to direct me to any authority on the ambit of the specific power in paragraph 3.2 of Practice Direction 3C. I should, however, undoubtedly consider that issue in the light of the authorities on CPR Part 3.1(7) which provides a more general power to vary or revoke at least procedural orders.

86. The first important authority is the Court of Appeal's decision in *Roult v. North West Strategic Health Authority* [2010] 1 W.L.R. 487, where Hughes LJ (with whom Carnwath and Smith LJJ agreed) said the following:-

> "15. There is scant authority upon rule 3.1(7) but such as exists is unanimous in holding that it cannot constitute a power in a judge to hear an appeal from himself in respect of a final order. Neuberger J said as much in Customs and Excise Comrs v Anchor Foods (No 2) The Times, 28 September 1999. So did Patten J in Lloyds Investment (Scandinavia) Ltd v Ager-Hanssen [2003] EWHC 1740 (Ch). His general approach was approved by this court, in the context of case management decisions, in Collier v Williams [2006] 1 WLR 1945. I agree that in its terms the rule is not expressly confined to procedural orders. Like Patten J in the Ager-Hanssen case [2003] EWHC 1740 I would not attempt any exhaustive classification of the circumstances in which it may be proper to invoke it. I am however in no doubt that CPR r 3.1(7) cannot bear the weight which Mr Grime's argument seeks to place upon it. If it could, it would come close to permitting any party to ask any judge to review his own decision and, in effect, to hear an appeal from himself, on the basis of some subsequent event. It would certainly permit any party to ask the judge to review his own decision when it is not suggested that he made any error. It may well be that, in the context of essentially case management decisions, the grounds for invoking the rule will generally fall into one or other of the two categories of (i) erroneous information at the time of the original order or (ii) subsequent event destroying the basis on which it was made. The exigencies of case management may well call for a variation in planning from time to time in the light of developments. There may possibly be examples of non-procedural but continuing orders which may call for revocation or variation as they continue — an interlocutory injunction may be one. But it does not follow that wherever one or other of the two

> assertions mentioned (erroneous information and subsequent event) can be made, then any party can return to the trial judge and ask him to reopen any decision. In particular, it does not follow, I have no doubt, where the judge's order is a final one disposing of the case, whether in whole or in part. And it especially does not apply where the order is founded upon a settlement agreed between the parties after the most detailed and highly skilled advice. The interests of justice, and of litigants generally, require that a final order remains such unless proper grounds for appeal exist."

87. In *Kojima v HSBC Bank Plc* [2011] EWHC 611 (Ch), Briggs J said the following:-

> "29. My conclusions are as follows. First, although Mr Stone has in his favour the description in its headnote of the Court of Appeal's decision in Roult as one about jurisdiction, I do not read the judgment of Hughes LJ … as going quite that far. Nonetheless it does in the passage which I have quoted, clearly establish that, to the extent that there exists any jurisdiction in the court to review its own final order, that is not to be justified on the alternative grounds first enunciated by Patten J, and approved in Collier v. Williams, in the context of procedural or other non-final orders.
>
> 30. In my judgment once the court has finally determined a case, or part of a case, considerations of the type first identified by Patten J in Lloyds v. Ager-Hanssen will generally be displaced by the much larger, if not indeed overriding, public interest in finality, subject of course to the dissatisfied party's qualified right of appeal."

88. Middlesbrough submitted, in the alternative, that the jurisdiction to vary or discharge an ECRO cannot be wider than the jurisdiction under CPR 3.1(7) in respect of interim orders. Consequently, this Court should be bound by the judgment of Rix LJ in the Court of Appeal, in *Tibbles v SIG plc* [2012] EWCA Civ 518 in respect of interim orders, as follows:-

> "39. In my judgment, this jurisprudence permits the following conclusions to be drawn:
>
> (i) Despite occasional references to a possible distinction between jurisdiction and discretion in the operation of CPR 3.1(7), there is in all probability no line to be drawn between the two. The rule is apparently broad and unfettered, but considerations of finality, the undesirability of allowing litigants to have two bites at the cherry, and the need to avoid undermining the concept of appeal, all push towards a principled curtailment of an otherwise apparently open discretion. Whether that curtailment goes even further in the case of a final order does not arise in this appeal.
>
> (ii) The cases all warn against an attempt at an exhaustive definition of the circumstances in which a principled exercise of the discretion may arise. Subject to that, however, the jurisprudence has laid down firm guidance as to the primary circumstances in which the discretion may, as a matter of principle, be appropriately exercised, namely normally only (a) where there has been a material change of circumstances since the order was made, or (b) where the facts

on which the original decision was made were (innocently or otherwise) misstated.

(iii) It would be dangerous to treat the statement of these primary circumstances, originating with Patten J and approved in this court, as though it were a statute. That is not how jurisprudence operates, especially where there is a warning against the attempt at exhaustive definition.

(iv) Thus there is room for debate in any particular case as to whether and to what extent, in the context of principle (b) in (ii) above, misstatement may include omission as well as positive misstatement, or concern argument as distinct from facts. In my judgment, this debate is likely ultimately to be a matter for the exercise of discretion in the circumstances of each case.

(v) Similarly, questions may arise as to whether the misstatement (or omission) is conscious or unconscious; and whether the facts (or arguments) were known or unknown, knowable or unknowable. These, as it seems to me, are also factors going to discretion: but where the facts or arguments are known or ought to have been known as at the time of the original order, it is unlikely that the order can be revisited, and that must be still more strongly the case where the decision not to mention them is conscious or deliberate.

(vi) Edwards v. Golding is an example of the operation of the rule in a rather different circumstance, namely that of a manifest mistake on the part of the judge in the formulation of his order. It was plain in that case from the master's judgment itself that he was seeking a disposition which would preserve the limitation point for future debate, but he did not realise that the form which his order took would not permit the realisation of his adjudicated and manifest intention.

(vii) The cases considered above suggest that the successful invocation of the rule is rare. Exceptional is a dangerous and sometimes misleading word: however, such is the interest of justice in the finality of a court's orders that it ought normally to take something out of the ordinary to lead to variation or revocation of an order, especially in the absence of a change of circumstances in an interlocutory situation."

89. The Court of Appeal very recently considered these cases in *Terry v. BCS Corporate Acceptances Ltd and others* [2018] EWCA Civ 2422, where Hamblen LJ (with whom I and Henry Carr J agreed) summarised the position under CPR Part 3.1(7) as follows:-

"75. In summary, the circumstances in which CPR 3.1(7) can be relied upon to vary or revoke an interim order are limited. Normally, it will require a material change of circumstances since the order was made, or the facts on which the original decision was made being misstated. General considerations such as these will not, however, justify varying or revoking a final order. The circumstances in which that will be done are likely to be very rare given the importance of finality. An example is provided by cases involving possession orders made when the defendant did not attend the hearing where CPR 39.3 may be relied upon by analogy – see *Hackney London Borough Council v Findlay* [2011] EWCA Civ 8,

> [2011] HLR 15. Another example is the use of powers akin to CPR 3.1(7) to vary or revoke financial orders made in family proceedings in relation to which there is a duty of full and frank disclosure and the court retains jurisdiction – see, for example, *Sharland v Sharland* [2015] UKSC 60, [2016] AC 871 and *Gohil v Gohil (No 2)* [2015] UKSC 61, [2016] AC 849."

90. In my judgment, it is clear that there is no general power to set aside an ECRO without mounting an appeal. The cases correctly emphasise the vital importance of finality in judicial decisions.

91. There must, however, be some purpose allocated to the express power contained in paragraph 3.2(2) of Practice Direction 3C to the effect that a person against whom a (final) order in respect of an ECRO has been made may, with permission, apply for amendment or discharge of the order. I have no doubt that such an application can be made in the circumstances adumbrated in the cases concerned with CPR Part 3.1(7), namely where there has been either a material change of circumstances since the order was made, or where the facts on which the original decision was made were mis-stated. I would not want to rule out that an application under paragraph 3.2(2) of Practice Direction 3C to discharge or vary the ECRO might be appropriately made in other "out of the ordinary" circumstances (to adopt Rix LJ's terminology).

92. I do not, as it seems to me, need to deal in further detail with this knotty topic, because I asked the parties at the outset of the case to assume (a) that I did indeed have power to set aside the order on these grounds, and (b) that I had, in effect, given Mr Millinder permission to apply to the court to discharge the ECRO under paragraph 3.2(2) of Practice Direction 3C. That reflected the reality of how the application came before me. As will appear, it also means that we were able to avoid lengthy argument on an interesting point, but one that is ultimately not raised by the circumstances of this application.

<u>The substantive issue: Should the ECRO be set aside on the grounds either that there has been a material change of circumstances since the order was made, or that the facts on which the original decision was made were mis-stated, or on some other basis?</u>

93. Mr Millinder has made some wide-ranging submissions as I have already explained. In essence, his submissions fall into three main categories as follows:-

i) The submission that Empowering Wind MFC never owed Middlesbrough anything, and conversely that Middlesbrough was liable to repay Empowering Wind MFC its lease premium of £200,000 and other damages. Accordingly, neither Empowering Wind MFC nor its alleged assignee, Earth Energy, should ever have been wound up, and no proofs by Middlesbrough should ever have been allowed by Mr Hannon. All this is based on the proposition that Empowering Wind MFC's failure to build the wind turbine or to supply the agreed electricity to Middlesbrough was excused by (a) misrepresentations by Middlesbrough in relation to, and/or implied terms requiring Middlesbrough to agree, its entry into a connection agreement with Northern Powergrid and/or its taking ownership of two sub-stations at the Property, which it failed to do, and/or (b) the force majeure clauses in the Lease and the ESA. If Mr Millinder's companies never owed Middlesbrough anything, they should never

have been wound up, and none of the applications that Mr Millinder has made, and that have founded the ECRO, would have been necessary. All Mr Millinder contends that he has been doing is trying to defend his human rights and to vindicate the legitimate claims that his companies have against Middlesbrough (the "contractual submissions").

ii) The submission that the first, second and third applications that HHJ Pelling held to have been totally without merit were not in fact unmeritorious, so that the ECRO ought not have been made (the "TWM submissions").

iii) The submission that Middlesbrough failed fraudulently to disclose certain documents to Arnold J when he granted a without notice injunction to restrain Earth Energy from presenting a winding up petition against Middlesbrough on 9th January 2017 (the "non-disclosure submissions").

94. In addition to these three core areas, Mr Millinder has made, in writing but not orally, a series of lavish accusations against many of the judges, lawyers and officials that he has come into contact with in seeking to advance his case. He has alleged fraud, conspiracy, blackmail, bias and more. It seems to me, however, that if I deal first with the substance of Mr Millinder's complaints, it will become apparent whether it is necessary to deal with these more extravagant assertions.

The contractual submissions

95. I have summarised in the briefest possible form Mr Millinder's contractual submissions above. They are intimately related to the TWM submissions, but I will deal with the contractual submissions first.

96. I have analysed the chronology in some detail above, explaining Mr Millinder's position as I went along, so that the history can be broken down into its component parts and Mr Millinder can see precisely what opportunities were available to him or his companies to change the course of events. What Mr Millinder sought and even now still seeks to achieve is a court determination of whether it is right to say either that Middlesbrough (a) violated the contractual arrangements by failing to agree to a connection agreement or to take ownership of the two sub-stations, and/or (b) had no claim against his companies as a result of the force majeure clauses. The main question is, in reality, whether or not the time when such a determination could have been made has been allowed to pass.

Three misunderstandings

97. This raises the first central problem that faces Mr Millinder. Mr Millinder has at times undoubtedly failed to understand that the claims that he has sought to advance and resist on behalf of his companies could only be pursued or resisted whilst he remained in control of those companies. Once the companies had been wound up, all he could do was challenge the windings up. Once that route had been exhausted, all he could do was to place the existing (or a new) liquidator in funds to pursue his companies' claims against Middlesbrough. If he was unable to do that, his routes of possible challenge were exhausted. These are some of the most important consequences of availing oneself, as an individual, of the benefits of trading through limited liability companies in the first place. In short, Mr Millinder is not and was

never one and the same legal entity as either Empowering Wind MFC or Earth Energy. His actions lead me to believe that this may have been one of his central misunderstandings.

98. The new claim epitomises this problem. Mr Millinder has issued in his own name a claim for damages that can only be brought by either Empowering Wind MFC or Earth Energy. He cannot now claim to represent either of those companies, since they are both in compulsory winding up and are legally represented only by their liquidators. His attempt to replace that liquidator has failed and has not been appealed.

99. That brings me to the second of Mr Millinder's apparent misunderstandings. Mr Millinder's conduct leads me to believe that he has thought all along that it is or was open to him or his companies, as an alternative to appealing orders of the court, to apply (sometimes repeatedly) to different judges in the same court that made those orders, to set them aside. I asked him about this in oral argument, and he said that he had never appealed the orders because the court had not addressed "the preliminary considerations, so there was really nothing much to appeal".

100. As I have already made clear, the circumstances in which a court can set aside or even investigate, the correctness of orders, save in the context of properly constituted appeals, are very strictly limited. Our courts rightly set great store by the finality of the orders that are made after argument. The option for taking two bites at the cherry are limited indeed.

101. This second misunderstanding may, I suspect, have given rise to some of Mr Millinder's more extravagant fraud and conspiracy allegations, on the basis, as he sees it, that fraud unravels all (see *Lazarus Estates v. Beasley* [1956] 1 Q.B. 702 per Lord Denning MR). But, as I explained to Mr Millinder in the course of oral argument, fraud needs to be strictly proved in these courts. It cannot simply be assumed because it has been asserted. Mr Millinder's repeated practice has been to allege fraud against Middlesbrough and others, on the basis of what he perceives they knew or ought to have realised. But that is not an approach that the court can accept. Fraud can only be established after a detailed consideration of oral and written evidence at a trial at which those accused of fraud have the opportunity fairly to present their case.

102. That leads directly to what I see as Mr Millinder's third fundamental misunderstanding. That is that one can or properly should make allegations of fraud or conspiracy against anyone, let alone professionals, civil servants and judicial office holders, without a sound evidential basis for those allegations. I would want to emphasise that, however tempting it may seem to do so, the practice of making wild allegations of dishonesty against everyone involved in a case, as Mr Millinder has done here, is much to be deprecated. Mr Millinder seemed to accept in oral argument that he may have overplayed his hand.

103. I can say at once that I have been through all the papers in this case in meticulous detail, and I have seen no evidence of any kind for any of the allegations of fraud, conspiracy or misdealing that Mr Millinder has made. He has made these allegations when he became frustrated by his seeming inability to find a forum in which he would vindicate what he saw as his companies' irrebuttable claims. He should not have

done so, nor should he have threatened any of these professionals or public servants as he has sought to do. I hope that, once he has read and digested this judgment, he will understand why this behaviour has been inappropriate. I hope also that it will hereafter cease.

A critical examination of the chronological events

104. With that introduction, I intend to go once again through the chronology of events to make a critical examination of what occurred and the opportunities that arose from time to time. That will also enable me to evaluate whether any of the grounds I have adumbrated for setting aside the ECRO are made out.

105. On 25th June 2015, Middlesbrough invoiced Empowering Wind MFC for a quantified claim for rent in the sum of £256,269.89 and threatened forfeiture of the Lease and termination of the ESA. Mr Millinder could at that stage, on behalf of Empowering Wind MFC, if he had grounds to do so, immediately have challenged those claims. He could have sought an injunction to restrain the presentation of a winding up petition, or initiated a civil claim to determine whether or not the monies claimed were due on the basis of the force majeure clauses or otherwise. At the same time, Mr Millinder could have advanced Empowering Wind MFC's alleged cross claims for misrepresentation and breaches of the Lease and the ESA. He did not, however, do so.

106. Instead, Mr Millinder submits that, on 29th June 2015, Empowering Wind MFC assigned to Earth Energy the alleged debt due from Middlesbrough in respect of the £200,000 that Empowering Wind MFC had paid to Middlesbrough. Successive judges have held that there is no satisfactory evidence of the alleged assignment, and that what evidence there is, does not support the existence of an assignment, even of an alleged claim by Empowering Wind MFC for the return of the Lease premium of £200,000. HHJ Pelling in his 7th June 2018 judgment refused to accept that that was what was referred to in the Minutes.

107. I should say at once that Mr Millinder cannot ask me now to decide whether Nugee J and HHJ Pelling were mistaken about the validity of the alleged assignment. That could only have been done on appeal from those decisions, which are now out of time.

108. I can understand Mr Millinder's argument that the alleged assignment (a) referred to the alleged £200,000 claim, and (b) was sufficiently clear to amount to valid assignment under section 136 of the Law of Property Act 1925. The words in the Minutes "[w]e [the directors of Empowering Wind MFC] agree to tidy up loose ends on … the £200k that we paid from other accounts so that [Earth Energy], as [parent of Empowering Wind MFC] is assigned those investments, representing what we put into the project" could be construed as Mr Millinder would like them to be. But successive judges have held against him. The invalidity of the alleged assignment was supported by the extrinsic evidence, namely the 15th December 2016 email and the legal advice from Prospect Law dated 27th February 2017 (referring to the need to secure a valid legal assignment), and by Mr Millinder's own repeated assertions that a claim for £550,000 was assigned, when he now accepts that, at best, only the £200,000 Lease premium claim was assigned.

109. Whilst understanding Mr Millinder's arguments, I cannot undo what has already been decided absent properly constituted appeals, which have not been brought. Moreover, as it seems to me the judges were entirely justified in what they decided. The Minutes themselves are, at best, ambiguous, and the certainty of an intended assignment is called into question by the wording at the end of the Minutes saying: "[w]e agreed to discuss with various solicitors and get another legal opinion on the case" and "[w]e agreed to get further legal advice and come up with a plan to recover the losses". Even if the words in the 15th December 2016 email "progress[ing] the claim that [Mr Millinder] shall assign to [Earth Energy]" could be taken to refer, as Mr Millinder submits, to a claim to general damages rather than the liquidated claim to the return of the £200,000, that does not make the alleged assignment any more certain. The fact is that a claim for the £200,000 against Middlesbrough is not expressly mentioned in the Minutes, and there is no reason why the inferences Mr Millinder makes should be made. It is simply not obvious precisely what was being assigned or what notice of the assignment was given to Middlesbrough.

110. To conclude then on the alleged assignment, for good reasons expressed most cogently by HHJ Pelling in paragraphs 11-15 of his 7th June 2018 judgment, Mr Millinder failed to convince judges deciding the issue that he could rely upon it, and he cannot now appeal those determinations. As will appear, however, a determination of this issue would not anyway affect the validity of the ECRO.

111. After the alleged assignment, Mr Millinder received the 25th July 2015 notices of non-payment, and the 19th August 2015 notices of forfeiture and termination. He started a lengthy correspondence but allowed the clock to tick against his companies by failing to challenge these claims immediately or to bring cross claims. Matters became serious when HMRC presented its petition against Empowering Wind MFC on 2nd June 2016, and Middlesbrough supported that petition. It was already almost too late when Empowering Wind MFC was dissolved on 23rd August 2016.

112. Mr Millinder made much in written submissions of what happened before Chief Registrar Baister on 19th September 2016, when Empowering Wind MFC was restored to the register and wound up. In truth, Mr Millinder had already failed to articulate Empowering Wind MFC's claims in court proceedings so the winding up order was inevitable. Mr Millinder cannot invoke Article 6 of the ECHR either at this stage or at all. The fault was entirely his own. Had he wanted to vindicate Empowering Wind MFC's alleged rights, he had to bring them forward in a coherent form so as to persuade the Chief Registrar that there was a fairly arguable defence and/or cross claim available to Empowering Wind MFC. He failed to do so. Thereafter, he compounded that error by failing to appeal the Chief Registrar's order in time or at all.

113. Instead, Mr Millinder let matters lie for three months until he issued a statutory demand in the name of Earth Energy on 6th January 2017. The claims in that statutory demand were not the kind of claims that routinely found a valid statutory demand, because they were obviously, at best, only arguable and had not been vindicated by a court judgment. Crucially, they depended on a valid assignment from Empowering Wind MFC to Earth Energy which, as I have explained, Mr Millinder could not establish. Middlesbrough predictably sought from Arnold J on 9th January 2017 an injunction to prevent presentation of a petition on those bases. Arnold J was not

shown the Minutes, but it cannot be seriously doubted that he was right to grant the injunction on the ground that the alleged debt due from Middlesbrough was known to be disputed.

114. Mr Millinder accepts that he agreed on 16th January 2017 to Norris J continuing the injunction that Arnold J had granted against Earth Energy by making the consent order. He still contends that he did not agree that Earth Energy should pay the £25,000 in costs, relying on the 11th January 2017 solicitors' letter as evidence that he had resisted it. But Mr Millinder cannot deny that the consent order was made agreeing to pay that sum. Earth Energy's solicitors obviously signed the consent order, having written that they had instructions to do so. Had they not done so, the order would not have been drawn up. Mr Millinder cannot challenge the agreement to pay £25,000 in costs on the grounds expressed carefully by HHJ Pelling at paragraphs 16-18 of his 7th June 2018 judgment. In these circumstances, Mr Millinder and Earth Energy ought to have realised that, if that sum were not paid, it would result in the demise of Earth Energy as it duly did.

115. Mr Millinder's reaction was not to deal with that problem, but rather to issue some months later on 16th November 2017, in the name of Earth Energy, the proof application in Empowering Wind MFC's winding up, which came first before ICCJ Jones on 21st December 2017. I have seen the entire transcript of this hearing. ICCJ Jones was not, as Mr Millinder suggests, biased against him. Rather, he tried very hard to explain to Mr Millinder the consequences of Empowering Wind MFC having been wound up, and the fact that, for a claim to be pursued by Empowering Wind MFC against Middlesbrough, he (Mr Millinder) would need to fund it. He adjourned the hearing so that Mr Millinder could demonstrate he could do that, but he did not do so when the matter returned to ICCJ Jones on 26th March 2018.

116. Whilst pursuing the proof application before ICCJ Jones, Mr Millinder issued his application dated 30th January 2018 in the name of Earth Energy to set aside the consent order on the grounds of material non-disclosure, relying on the alleged assignment and Earth Energy's alleged cross-claim. This came before Nugee J on 5th February 2018. It was a critical hearing, because if Mr Millinder had succeeded in setting aside the consent order, Earth Energy might not have been wound up. Nugee J accepted that Middlesbrough ought to have disclosed the Minutes to Arnold J as they supported an alleged claim available to Earth Energy against Middlesbrough, but he decided that that disclosure would have made no difference.

117. Nugee J took the view, as I have said, that the alleged assignment had not been made good. But, even if he had taken a different view, it would have made no difference. First, despite Mr Millinder's protestations that Earth Energy's claims are bound to succeed as they demonstrate an obvious fraud by Middlesbrough, that does not reflect the true legal position. The legal position is that, even if Empowering Wind MFC validly assigned a debt due from Middlesbrough to Earth Energy, the claim that was assigned was, at best, a hotly disputed one. Accordingly, it could never have been sufficient to support a winding up petition by Earth Energy against Middlesbrough. Middlesbrough was, therefore, entitled to the injunction it obtained from Arnold J on 9th January 2017. The second reason is even more critical. The true reason that Nugee J dismissed the application to set aside the consent order was that he rightly thought that Earth Energy had already compromised its position. As he explained in

his judgment, Earth Energy had to choose before Norris J on 16th January 2017 between relying on the non-disclosure to try to set aside the order restraining presentation of a petition, or accepting that there was a *bona fide* dispute and agreeing that the injunction should continue. Earth Energy chose the latter course. It could not later rely on the same non-disclosure to set aside the consent order to which it had agreed knowing about the non-disclosure. Moreover, even if Earth Energy had chosen to resist the consent order, the result would probably have been much the same, because even if Norris J had decided that the non-disclosure warranted the setting aside of Arnold J's order, he would have had a discretion nonetheless to reimpose the injunction on the basis that Earth Energy's debt was disputed. Even if he had refused to do that, Earth Energy would have been unable to succeed on any petition it presented against Middlesbrough because it would have been founded on a genuinely disputed debt.

118. To recap, the key step that Mr Millinder took that prevented him later challenging the consent order was accepting that the injunction should continue, and thereby conceding (as was inevitable) that Earth Energy had, at best, only a disputed debt.

119. Nugee J also refused to accept that Earth Energy had not agreed to pay Middlesbrough's costs in the sum of £25,000. Once Earth Energy's solicitors had signed a consent order to that effect, that too could no longer be challenged.

120. Having succeeded before Nugee J, Middlesbrough was entitled to present a petition to wind up Earth Energy based on the unpaid costs debt of £25,000. Mr Millinder's response was to issue the first application, in the name of Earth Energy, on 1st March 2018, by which he sought once again to set aside the consent order of 16th January 2018 for non-disclosure before Arnold J. Earth Energy relied on the same points that had been made before Nugee J, and HHJ Pelling ultimately dismissed the first application on 7th June 2018, and decided that it had been totally without merit on 28th June 2018, each for the same reasons as given by Nugee J and the fact that no new evidence had been adduced. I will return to the question of whether the first application was totally without merit.

121. Thereafter, the proof application before ICCJ Jones resumed on 26th March 2018. It will be recalled that this was an application in Empowering Wind MFC's winding up for orders that (a) Middlesbrough's proof of debt against Empowering Wind MFC be rejected, (b) the ESA should be disclaimed as an onerous contract, (c) to assign Empowering Wind MFC's rights of action for breach of the Lease and the ESA against Middlesbrough to Earth Energy, and (d) to appoint Mr Parkman as liquidator of Empowering Wind MFC in place of Mr Hannon. As ICCJ Jones had identified on 19th December 2017, none of these applications had any prospect of success unless Mr Millinder could show that he was able to fund a liquidator to pursue the disputed claims against Middlesbrough, which he made no attempt to do.

122. ICCJ Jones dealt first with an unmeritorious application that he should recuse himself. The suggestion that he was biased was without foundation. Also, on a technical level, ICCJ Jones was right to reject Mr Millinder's application in relation to Middlesbrough's claims against Empowering Wind MFC. Mr Millinder had confused the Insolvency Rules that concerned voting at a creditors' meeting (including Rule 14.11) with those that concerned the acceptance of proofs with a view to dividend

(including Rule 15.33). Middlesbrough had yet to lodge a proof for dividend. Mr Hannon had noted on its claim for voting purposes that it was "objected to". Middlesbrough was nonetheless under the express terms of Insolvency Rule 15.33(2), entitled to vote.

123. The nub of the proof application was really the attempt to litigate the substantive claims and cross-claims as between Empowering Wind MFC and Middlesbrough. That could never validly be the subject of an Insolvency Act application. ICCJ Jones could not hold a trial of such issues. Instead, he correctly tried once again to explain to Mr Millinder that Empowering Wind MFC's claims and Middlesbrough's cross-claims could only be determined in substantive proceedings brought by the liquidator of Empowering Wind MFC. For that purpose, the liquidator, whether Mr Hannon or Mr Parkman, would have to be put in funds. Accordingly, ICCJ Jones was, in my judgment, correct to reject the application for substantive determinations on the contractual issues (e.g. the disclaimer of the ESA or the assignment to Earth Energy that was sought), and to refuse to appoint another liquidator, when there was no evidence that he would be funded to pursue proceedings that Mr Hannon was disinclined to do. Mr Millinder again decided not to appeal ICCJ Jones' decisions.

124. Two days later, ICCJ Barber had no real choice but to wind up Earth Energy on 28th March 2018 based on the costs debt of £25,000. Mr Millinder had failed, on behalf of Earth Energy, to enunciate the claim that it sought to make against Middlesbrough. There was an indisputable unpaid costs judgment against Earth Energy, and, at best, an unarticulated disputed claim asserted by Earth Energy against Middlesbrough. Mr Millinder had had more than a year to start proceedings in the name of Earth Energy to seek to vindicate the alleged claim for the return of the Lease premium, but he had not done so. More than that, Mr Millinder had never explained precisely how that claim arose as a legal claim. He certainly did not do so to ICCJ Barber. I understand now that Mr Millinder might have argued that a term should be implied into the Lease and/or the ESA requiring Middlesbrough to cooperate with the completion of a draft connection agreement and to take ownership of the two sub-stations, and that Middlesbrough had broken that obligation, giving Empowering Wind MFC a possible right to reclaim the Lease premium of £200,000. But that claim was never pleaded or explained by Mr Millinder to any court at the time. Even if it had been, it would have been likely to be regarded as doubly speculative, as Mr Millinder could not point either to a clear claim in Empowering Wind MFC or to a valid assignment to Earth Energy. This was, if I may say so, all Mr Millinder's own fault. There had been nothing stopping him (subject to the Insolvency Act 1986), up to Empowering Wind MFC's winding up, assigning Empowering Wind MFC's claims clearly and validly to Earth Energy, but he did not do so. Instead he relied on ambiguous Minutes. There had been nothing stopping Mr Millinder formulating a clear claim for the return of the Lease premium of £200,000, but he never did so. Had he done both things, successive courts might have been enabled fairly to evaluate his claims. But they were never able to do so, as he repeatedly asserted as facts claims that were no more than speculative possibilities. HHJ Pelling's judgment explained the problem at paragraph 35 when he said that "[t]he detail of how, in law, that is likely to work has never been fully explained".

125. In my judgment, as I have already made clear, any attempt to set aside the winding up of Earth Energy was always doomed to fail, because it depended on an invalid alleged

assignment and a cross claim that had never been shown to be genuine, serious or founded on substantial grounds. Moreover, the winding up of Earth Energy and the applications to set aside that order do not impact directly on the correctness of the ECRO.

126. In reality, once Norris J had continued the injunction obtained by Middlesbrough implying that there was no undisputed debt owed by Middlesbrough to Earth Energy, and Nugee J had declined to set that consent order aside, the compulsory winding up ordered by ICCJ Barber was inevitable. Mr Millinder could only have resisted that winding up by demonstrating that Earth Energy had a cross claim, greater than the costs judgment, founded on substantial grounds. He never did so, because he could never point to a valid assignment to Earth Energy, and he never articulated how Empowering Wind MFC had a genuine cross-claim on substantial grounds. Instead, he made a series of unsubstantiated allegations against counsel, and issued 3 further applications. The first on 29th March 2018 was to set aside the winding up order, but that application was never soundly based for the reasons I have given. The second application on 30th March 2018 was what is now admitted to be a misconceived application seeking to argue Empowering Wind MFC's right to damages against Middlesbrough. Mr Millinder had no standing to bring this second application on behalf of Earth Energy, as Snowden J and HHJ Pelling correctly held. Moreover, it was completely the wrong procedural approach to raising Empowering Wind MFC's claims. I will return to whether this second application was, as HHJ Pelling held, totally without merit. The third application was made on 23rd June 2018, in Earth Energy's name, to set aside ICCJ Jones's order of 26th March 2018. Again, as HHJ Pelling held, Mr Millinder had no standing to make this third application. I will return also to whether this third application was totally without merit in due course.

127. There followed two substantive hearings before Snowden J on 16th May 2018 and before HHJ Pelling on 7th June 2018 at which Mr Millinder's various substantive applications were dismissed for the reasons I have given. Mr Millinder had no standing to make applications on behalf of Earth Energy after it was wound up on 28th March 2018. Even if he was entitled to try to set aside the winding up order, there was, as HHJ Pelling held on 7th June 2018, no basis to do so, unless the consent order or Nugee J's order could be validly challenged, which they could not. Even at this stage, Mr Millinder failed to enunciate a clear claim for the return of the Lease premium; there was nothing for HHJ Pelling seriously to consider in that regard.

128. This chronology demonstrates, I think, that Mr Millinder's prospects of vindicating his companies' claims began to fade after he had agreed to the continuation of the injunction on 16th January 2017 and after the winding up of Earth Energy on 28th March 2018. In short, Mr Millinder's objectives were inevitably going to be thwarted without each of (1) a valid assignment to Earth Energy of Empowering Wind MFC's claims against Middlesbrough, (2) the ability to demonstrate a genuine cross claim, founded on substantial grounds, by Empowering Wind MFC against Middlesbrough, and (3) the ability to fund the companies or their liquidators to vindicate the companies' claims against Middlesbrough. Mr Millinder failed on each count.

Conclusions on Mr Millinder's contractual submissions

129. I return then to Mr Millinder's core submission that Empowering Wind MFC never owed Middlesbrough anything, and that Middlesbrough was liable to repay Empowering Wind MFC its Lease premium of £200,000 and other damages. This dispute between Empowering Wind MFC and Middlesbrough could not be determined summarily without a trial in properly constituted proceedings. Mr Millinder never started any such proceedings. It was never open to Mr Millinder to allege that his companies' claims, whether in contract or fraud, were open and shut, as he seems to have thought. The windings up of Empowering Wind MFC and Earth Energy were not the product of any conspiracy or fraud as Mr Millinder repeatedly alleges. They were simply the inevitable result of non-payment of established debts, and the failure to take a valid assignment or to enunciate clearly any substantial cross claim in Earth Energy.

130. It is not possible for me, any more than any of the other judges that have considered it, to determine whether Empowering Wind MFC's non-payment of rent was excused either by misrepresentation, some implied term requiring Middlesbrough to agree a connection agreement or to take ownership of the two sub-stations, or by the force majeure clauses in the Lease and the ESA. Such determinations could only have been made after hearing evidence in a normal CPR Part 7 action. The time for bringing such an action has passed now that both Mr Millinder's companies have been wound up. He could have funded such claims before the windings up or he could have tried to fund the liquidator to bring such claims, but he failed to do so, even when it was explained to him that such a course was available. All this has nothing to do with human rights as Mr Millinder suggests. It is a function of his repeatedly missing opportunities to take the appropriate legal steps as I have explained.

The TWM submissions

131. I turn now to the critical question of whether the first, second and third applications were indeed, as HHJ Pelling decided, totally without merit. I understand that that is not the correct legal question for the reasons I have given above. But it is useful to consider that question first.

132. The first application of 1st March 2018 was, as will be recalled, a further application to set aside the consent order and Nugee J's order, after Nugee J had declined to do so, and his order had not been appealed. As I have already explained, Nugee J was amply justified in refusing to set aside the consent order. Mr Millinder had chosen to accept that Earth Energy's claims were genuinely disputed in agreeing to the continuation of the injunction. He did so in the full knowledge of the non-disclosure he was alleging. Once he had done that, Earth Energy could no longer assert the non-disclosure as a reason to set aside the consent order to which it had agreed. Accordingly, I agree that Mr Millinder's first application was doomed to fail and was totally without merit for the reasons given by HHJ Pelling, relying in turn on Nugee J's reasons. The fact that, on 21st March 2018, Nugee J refused to dismiss the first application without an oral hearing, does not affect what I have said. All he was saying was that Earth Energy's arguments should be heard. When they were heard, it turned out he had no new evidence to rely upon.

133. Mr Millinder now accepts that the second application of 30th March 2018 was misconceived. It was a claim for interim damages allegedly due to Earth Energy as a result of the winding up of Empowering Wind MFC. Mr Millinder had no standing to bring this second application on behalf of Earth Energy, as Snowden J and HHJ Pelling correctly held. Mr Millinder failed to understand that Mr Hannon was by that time the person empowered to decide on claims that each of his (former) companies might make. Mr Millinder's concession that the second application was a silly thing to do is, I think, telling. The fact was that the second application was hopeless, if only because Mr Millinder could not make any claim in the name of Earth Energy, which was in compulsory winding up. I have no doubt that second application was correctly characterised as totally without merit.

134. The third application was an attempt to set aside ICCJ Jones's order of 26th March 2018, which had not been appealed. It was an application made on behalf of Earth Energy after its compulsory winding up. Accordingly, Mr Millinder had no standing to make it. He suggested in oral argument that, if he had succeeded in setting aside the winding up order against Earth Energy, it would have been a feasible application. The problem with that argument is that Mr Millinder never had any basis to set aside the winding up order against Earth Energy as I have explained. Accordingly, in my judgment, HHJ Pelling was entirely right to decide that the third application had been totally without merit.

The non-disclosure submissions

135. It will be apparent from what I have already said that there is no substance in Mr Millinder's claim that any of the orders of which he complains were vitiated by material non-disclosure by Middlesbrough. This is because, even assuming in Mr Millinder's favour that the materials mentioned in his solicitors' letter dated 11th January 2017 ought to have been disclosed to Arnold J, Mr Millinder and Earth Energy compromised that claim when they agreed to the injunction continuing on 16th January 2017, knowing of the non-disclosure.

The ECRO

136. I come now to the ECRO itself. The formal legal question is, as I have said, whether the ECRO should be set aside on the grounds either that there has been a material change of circumstances since the order was made, or that the facts on which the original decision was made were mis-stated. In fact, Mr Millinder has not adduced any new evidence or any suggestion that there has been a material change of circumstances as a ground for setting aside the ECRO. He has confined himself to challenging the decisions that underlie it.

137. As I have already indicated, HHJ Pelling was right to hold that each of the first, second and third applications was totally without merit. Accordingly, the jurisdiction for an ECRO existed. Incidentally, I also have no doubt that the application alleging bias and seeking recusal of ICCJ Jones was also correctly characterised as totally without merit.

138. I also have no doubt that HHJ Pelling was right to exercise his discretion to grant the ECRO for the reasons he gave. I accept that that is not the legal question that I have to answer, but if I am satisfied that the ECRO was correctly granted, it seems unlikely

that the facts on which the original decision was made were mis-stated. Indeed, I am entirely satisfied that nothing was mis-stated to HHJ Pelling. For the reasons I have given, HHJ Pelling's decision to grant the ECRO was wholly justified and appropriate. There are, therefore, no exceptional circumstances justifying it being discharged.

139. Mr Millinder's suggestions that the ECRO was an unlawful false instrument and an abuse of process used to conceal fraud and misconduct are, to put the matter plainly, unfounded nonsense. Other judges might be tempted to use less temperate language. I can say that I have considered not only the conduct recited by HHJ Pelling, but all the materials evidencing Mr Millinder's conduct in relation to professional lawyers, officials and judges. Mr Millinder has behaved in a threatening and belligerent manner to many people, and his conduct has been inexcusable. The ECRO was, in my judgment, amply justified on the evidence.

140. As a postscript to my decision on the ECRO, it is worth mentioning that Mr Millinder has continued to make unmeritorious applications to Arnold J. His applications of 24th July 2018 for damages on the cross-undertaking given by Middlesbrough to Arnold J on 9th January 2017, to set aside (yet again) ICCJ Jones's order of 26th March 2018, and to set aside the winding up order against Earth Energy, were each totally unmeritorious re-runs of previously unsuccessful applications for the reasons I have given. Mr Millinder's new claim against Middlesbrough was equally misconceived, since it purported to advance claims that lay in Empowering Wind MFC or Earth Energy, if they existed at all. As I have explained, Mr Millinder had and has no standing to advance claims on behalf of those companies.

Conclusions

141. I regret to say in conclusion that this case provides a classic example of a litigant in person getting the problems he faces out of proportion. Mr Millinder always thought, perhaps still does, that he was right and everyone else was wrong. Instead of bringing straightforward court proceedings to try to establish his companies' claims or appealing orders he wanted to challenge, he made a series of ever more unmeritorious applications, wasting the time of the court, of judges, of civil servants, of lawyers and others.

142. HHJ Pelling was right to hold that Mr Millinder's unreasonable conduct had to be stopped. That was the entirely justifiable purpose of the ECRO. Mr Millinder has adduced no evidence to suggest that there are any new circumstances or that there is any new evidence of misstatement or fraud that calls into doubt the validity or sustainability of the order imposing the ECRO, nor indeed of the unappealed orders that preceded it.

143. The ECRO will therefore remain in place and Mr Millinder's application of 30th September 2018 will be dismissed.