



Neutral Citation Number: [2023] EWHC 1506 (KB)

Case No: QB-2020-002644

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 June 2023

Before:

GERAINT WEBB KC

sitting as a Deputy High Court Judge

Between:

HILDEN DEVELOPMENTS LIMITED

Claimant

- and -

(1) PHILLIPS AUCTIONEERS LIMITED
(2) ROBERT TIBBLES

Defendants

- and -

(3) NIGEL TIBBLES (Deceased)
(4) SEBASTIAN TIBBLES

Defendants
(costs only)

Jonathan Chew (instructed by **Stewarts Law LLP**) for the **Second Defendant/Applicant**

Bobby Friedman (instructed by **Charles Russell Speechlys LLP**) for the **Fourth Defendant/Respondent**

Hearing date: 17 May 2023

Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on Wednesday 21 June.

Geraint Webb KC sitting as a Deputy High Court Judge:

A. Overview

1. This judgment concerns an application by the Second Defendant, Mr Robert Tibbles, for a non-party costs order against his twin brother, Mr Sebastian Tibbles.
2. Hilden Developments Limited (“**HDL**”), the claimant to the original litigation, was incorporated in the British Virgin Islands (“**BVI**”) in December 1990 by Mr Nigel Tibbles, then a solicitor. HDL is one of several companies which Nigel Tibbles incorporated for family-related purposes. Other such companies include Jimson International Limited (“**Jimson**”) and French companies referred to as “SCI Roc” and “SCI Roc ii”.
3. Nigel Tibbles had four sons, Oliver, James, and twins Sebastian and Robert.
4. Robert Tibbles, the Second Defendant, established a significant collection of contemporary art between the mid-1980s and about 2020.
5. The litigation concerned title to a painting by Damien Hirst entitled “*beautiful tropical, jungle painting (with pink snot)*” (“**the Painting**”).
6. On 13 February 2020 the First Defendant auction house (“**Phillips**”) sold approximately 40 works of art, including the Painting, which had been consigned to it by Robert Tibbles (“**the Auction**”). The sales totalled several million pounds. The Painting sold for £350,000 inclusive of buyer’s premium.
7. HDL intervened to stop the release of the Painting following the Auction and commenced proceedings against Phillips and Robert Tibbles, seeking a declaration that it had legal title to the Painting and claiming damages.
8. Following a three-day trial in January 2022 I found that Robert Tibbles was the legal owner of the Painting and that HDL’s claim failed: [2022] EWHC 541 (QB) (“**the Judgment**”). Phillips played no part in the trial as the claim against it had been stayed pursuant to a consent order.
9. The litigation concerning the Painting was one of multiple proceedings involving a combination of family members and various companies set up by Nigel Tibbles. In the Judgment, at [12], I said this:

“The claim is part of a much larger ongoing dispute between members of the Tibbles family. According to HDL’s Reply there have been multiple claims issued in various courts (including in France, Monaco and England) between Robert Tibbles on the one hand and other family members and/or companies operated by those family members. Most of those other claims have concerned a property in the south of France (“**the French villa**”). The multiple legal disputes were described as a “family feud” by Mr Brier, HDL’s counsel, and as “litigation warfare” by Mr Chew, Robert Tibbles’s counsel; both descriptions appear to be accurate.”

10. The details of the original claim are set out in the Judgment. For present purposes it is sufficient to summarise the following background facts and matters:
- (1) HDL was originally incorporated for the purpose of holding land in Kent, extending to about 30 acres, in close proximity to the Tibbles's family home. Nigel Tibbles's evidence was that HDL was set up to hold the land and to minimise any capital gains tax in the event of a future sale of the land.
 - (2) Mr Oliver Tibbles was appointed as HDL's first Director and sole shareholder. A minute dated 6 February 1991 recorded that Oliver Tibbles resolved to purchase the land in Kent for £45,000 [24] and the land was duly acquired. Leaving aside its claim to own the Painting, HDL owned no other assets.
 - (3) HDL has never had a bank account and appears not to have produced any accounts at any material time.
 - (4) As to the purchase of the Painting, a deposit of £10,000 against the sale price of £68,000 was initially paid to the selling gallery, White Cube, to secure the Painting in October 1998; both Nigel Tibbles and Robert Tibbles claimed to have paid this deposit. It was common ground that Jimson then paid the balance of £58,000 to the gallery in February 1999. It was also common ground that Robert Tibbles paid Jimson £40,000 immediately before Jimson paid the gallery. It was common ground that the invoice for the Painting was addressed to HDL at its BVI address.
 - (5) Nigel Tibbles gave evidence on behalf of HDL and claimed that he instructed Robert Tibbles to buy the Painting for him as an investment and because he "liked the painting" and/or because he intended to hang it at the French villa in which he lived ("**the French villa**"). He claimed to have paid the £10,000 deposit personally, with Jimson paying the balance and re-paying him for the deposit. He claimed that he subsequently decided not to hang the Painting in the French villa and allowed Robert Tibbles to hang it in his London flat. There was no convincing explanation provided for the four-month delay between the payment of the deposit in October 1998 and the payment of the balance in February 1999.
 - (6) Robert Tibbles's position was that he paid the £10,000 deposit and that his father assisted with funding the balance via Jimson. He claimed that the invoice was addressed to HDL at its BVI address as he said that he had been informed that the gallery did not have to charge VAT if the invoice was to an address outside the UK. He said he had acquired some other works of art in a similar manner with the invoice addressed to an individual or company overseas. Robert's Tibbles's position was that he transferred £40,000 to Jimson and received a loan of £18,000 from his father, via Jimson, to help fund the purchase. The delay between the payment of the deposit in October 1998 and the payment of the balance in February 1999 was explained by the fact that he tended to negotiate the purchase of a new artwork in the autumn and then wait until the payment of his bonus in the new year to pay the balance; he gave examples of other purchases structured in this way. On this occasion he was £18,000 short of the balance and so sought assistance from his father. He said

that he had received other loans from his father, via Jimson, from time to time to assist with property purchases.

- (7) It was common ground that the Painting was delivered to Robert Tibbles and was hung in his London flat together with his significant and growing contemporary art collection.
 - (8) Unlike the position in relation to the purchase of land in Kent, HDL had no internal documents recording any resolution to purchase the Painting, nor recording the fact that the Painting had been purchased by HDL, nor recording that it was an asset of the company.
 - (9) In May 2014 Oliver Tibbles resigned as director and transferred his share to Sebastian Tibbles and Sebastian Tibbles took over as sole director of HDL.
 - (10) Sebastian Tibbles also gave evidence at trial on behalf of HDL. He had no involvement in the purchase of the Painting.
11. In summary, I found (Judgment, [186]) that Robert Tibbles's account of the facts surrounding the purchase was substantially correct. Following the Judgment, a hearing of consequential matters took place in May 2022. HDL was ordered to pay Robert Tibbles's costs on a standard basis up to 15 October 2021 (being the date of a relevant Part 36 offer by Robert Tibbles) and on an indemnity basis thereafter. HDL was ordered to make a payment on account of costs of approximately £170,000 by 9 June 2022. HDL did not make that payment on account of costs or any other sum.
 12. Robert Tibbles's application for a non-party costs order was issued on 22 August 2022 against Nigel Tibbles and Sebastian Tibbles. By order dated 5 December 2022 both respondents were joined as parties for the purposes of costs only pursuant to CPR r 46.2(1)(a) and directions were made for the service of further evidence and for the hearing of the substantive application. At that stage neither Nigel Tibbles nor Sebastian Tibbles was legally represented.
 13. On 19 December 2022 I was forwarded an email which James Tibbles had sent to the Court concerning the deteriorating health of Nigel Tibbles, who was 92 years of age, and raising issues in respect of his capacity to act in the litigation. I made an order of the court's own motion on the same day staying the proceedings against Nigel Tibbles until further order. Mr Nigel Tibbles sadly passed away on 11 January 2023.
 14. By the time of the substantive hearing, which took place on 17 May 2023, Sebastian Tibbles had confirmed that his understanding, as an executor, is that Nigel Tibbles's estate has no substantial value following inheritance tax planning measures, although probate had not yet been completed. In the circumstances, no application was made to lift the stay and the hearing was therefore limited to the application against Sebastian Tibbles alone.
 15. Sebastian Tibbles has confirmed that HDL disposed of the Kent land to a Singapore company in 2014 and that HDL has no assets. He has also confirmed that he personally funded the legal costs of the proceedings on behalf of HDL.

16. Robert Tibbles’s position, in summary, is that (i) HDL no genuine interest of its own in the litigation in circumstances in which it did not trade (whether in art or otherwise), had no other assets and had no accounts or other records recording that it owned the Painting; (ii) the proceedings were funded and controlled by Sebastian Tibbles; (iii) the claim was commenced and maintained for Sebastian Tibbles’s own benefit both in terms of any recovery by HDL (in circumstances in which Sebastian Tibbles was the sole director and shareholder and HDL did not trade) and in terms of advancing his interests in respect of the wider family litigation against Robert Tibbles; and (iv) in all the circumstances, Sebastian Tibbles, acting joint and severally in concert with Nigel Tibbles, was the “true party” to the litigation. Mr Chew, on behalf of Robert Tibbles, confirmed in oral submissions that impropriety or bad faith on the part of Sebastian Tibbles were not alleged.
17. It is Sebastian Tibbles’s position, in summary, that (i) it was his father who had the ultimate say in relation to matters concerning HDL and his father who decided to pursue the litigation; (ii) the decision to bring the claim was cogent having regard to the available evidence and Nigel Tibbles’s evidence as to the acquisition (as to which Sebastian Tibbles had no independent knowledge); (iii) he acted in accordance with legal advice; (iv) he did not have day to day conduct of the litigation; (v) he acted in the best interests of the company in pursuing the claim in accordance with his duties as a director of HDL; and (vi) he did not stand to receive any personal benefit from the claim.

B. Legal principles

18. The jurisdiction to make a non-party costs order arises under (a) section 51(1) of the Senior Courts Act 1981 which provides that “Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in... the High Court... shall be in the discretion of the court” and (b) section 51(3) which provides that: “The court shall have full power to determine by whom and to what extent the costs are to be paid.” The existence of that jurisdiction was confirmed by the House of Lords in *Interbulk Ltd v Aiden Shipping Co Ltd (The Vimeira) (No 2)* [1986] AC 965. CPR r 46.2 now provides the procedural rules governing such applications.
19. Many of the authorities provide warnings against over-citation of authorities in respect of applications for non-party costs orders given that the exercise is a matter of broad discretion. Nevertheless, the discretion falls to be exercised in accordance with the guidance established in the caselaw and the guidance is of particular importance in cases concerning applications for a non-party costs order against directors and shareholders of small and/or insolvent companies. In such cases the principle of limited liability may be undermined if a director were to be made personally liable for costs in a situation in which he/she is properly acting to discharge a duty to act in the interests of the company by causing the company to bring or defend the litigation.
20. In *Metalloy Supplies Ltd v MA (UK) Ltd* [1997] 1 WLR 1613, Millett LJ provided the following guidance, at p 1619:

“an order ... may be made in a wide variety of circumstances where the third party is considered to be the real party interested in the outcome of the suit. It may also be made where the third party has been responsible for

bringing the proceedings and they have been brought in bad faith or for an ulterior purpose or there is some other conduct on his part which makes it just and reasonable to make the order against him. It is not, however, sufficient to render a director liable for costs that he was a director of the company and caused it to bring or defend proceedings which he funded and which ultimately failed. Where such proceedings are brought bona fide and for the benefit of the company, the company is the real plaintiff. If in such a case an order for costs could be made against a director in the absence of some impropriety or bad faith on his part, the doctrine of the separate liability of the company would be eroded and the principle that such orders should be exceptional would be nullified.”

21. In *In re North West Holdings plc (In Liquidation) (Costs)* [2001] EWCA Civ 67; [2002] BCC 441, Aldous LJ said the following, at [34] and [35]:

“[34] A crucial question is whether the relevant directors (or director) hold a bona fide belief that (i) the company has an arguable defence, and (ii) it is in the interests of the company for it to advance that defence. If they do then, (in the absence of special circumstances) to make them pay costs of proceedings in which they are not a party would constitute an unlawful inroad into the principle of limited liability.”

[35] I cannot accept [the respondent’s] submissions that the defence to the petitions was conducted in a belief that it was in the interest of the companies. Despite the judge accepting that [the director] had been advised that there was a reasonable chance of defending the petitions, the judge held that [the director] did not give any serious consideration as to what was in the interests of the companies and their creditors. The costs were expended for [the director’s] personal interests ...”

22. One of the leading cases on non-party costs orders is the Privy Council’s decision in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (Associated Industrial Finance Pty Ltd, Third Party)* [2004] UKPC 39; [2004] 1 WLR 2807. Lord Brown of Eaton-under-Heywood, summarised the position as follows, at [25]:

“(1) Although costs orders against non-parties are to be regarded as ‘exceptional’, exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such ‘exceptional’ case is whether in all the circumstances it is just to make the order. It must be recognised that this is inevitably to some extent a fact-specific jurisdiction and that there will often be a number of different considerations in play, some militating in favour of an order, some against.

(2) Generally speaking the discretion will not be exercised against “pure funder”, described in para 40 of *Hamilton v Al Fayed (No2)* [2003] QB 1175, 1194 as “those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course”. ...

(3) Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is 'the real party' to the litigation, a concept repeatedly invoked throughout the jurisprudence ... see, for example, the judgments of the *High Court of Australia in Knight* and Millett LJ's judgment in *Metalloy Supplies Ltd (in liquidation) v MA (UK) Ltd* [1997] 1 WLR 1613 . Consistently with this approach, Phillips LJ described the non-party underwriters in *TGA Chapman Ltd v Christopher* [1998] 1 WLR 12 as "the defendants in all but name". Nor, indeed, is it necessary that the non-party be "the only real party" to the litigation in the sense explained in *Knight* , provided that he is "a real party in ... very important and critical respects" — see *Arundel Chiropractic Centre Pty Ltd v Deputy Commissioner of Taxation* (2001) 179 ALR 406 , referred to in *Kebaro* at pp 32–3, 35 and 37. Some reflection of this concept of "the real party" is to be found in CPR 25.13 (1) (f) which allows a security for costs order to be made where "the claimant is acting as a nominal claimant".

(4) Perhaps the most difficult cases are those in which non-parties fund receivers or liquidators (or, indeed, financially insecure companies generally) in litigation designed to advance the funder's own financial interests...."

23. Lord Brown considered various Commonwealth authorities including *Carborundum Abrasives Ltd v. Bank of New Zealand (No 2)* [1992] 3 NZLR 757 in which he noted the following passage from Tompkins J's judgment at p765:

"Where proceedings are initiated by and controlled by a person who, although not a party to the proceedings, has a direct personal financial interest in their result, such as a receiver or manager appointed by a secure creditor, a substantial unsecured creditor or a substantial shareholder, it would rarely be just for such a person pursuing his own interests, to be able to do so with no risk to himself should the proceedings fail or be discontinued. That will be so whether or not the person is acting improperly or fraudulently. In many cases a major consideration will be the reason for the non-party causing a party, normally but not always an insolvent company, to bring or defend the proceedings. If a non-party does so for his own financial benefit, either to gain the fruits of the litigation or to preserve assets in which the person has an interest, it may, depending upon the circumstances, be appropriate to make an order for costs against that person. The relevant factors will include the financial position of the party through whom these proceedings are brought or defended and the likelihood of it being able to meet any order of costs, the degree of possible benefit to the non-party and whether, in all the circumstances, the bringing or defending of the claim — although in the end unsuccessful — was a reasonable course to adopt. The directors of a company may frequently be in a position different from other non-parties with a direct financial interest in promoting

or defending proceedings. ...Other creditors and shareholders are entitled to expect that those responsible for the management of the company will use all proper endeavours to ensure that their financial interests are protected or that there is a fund out of which such creditors can be paid ...”

24. In *Goodwood Recoveries Ltd v Breen* (CA) [2005] EWCA Civ 414; [2006] 1 WLR 2723 Rix LJ considered the above and other authorities and then noted the following at [59]:

“...Where a non-party director can be described as the “real party”, seeking his own benefit, controlling and/or funding the litigation, then even where he has acted in good faith or without any impropriety, justice may well demand that he be liable in costs on a fact-sensitive and objective assessment of the circumstances. It may also be noted that in Lord Brown's comments at para 33 of his opinion “the pursuit of speculative litigation” is put into the same category as “impropriety”...”

25. Rix LJ then went on, at [60] to [66] to consider the authorities relating to the issue of causation.
26. The nature of the non-party costs jurisdiction, and the application of that jurisdiction in the context of applications against directors and shareholders, was considered by the Court of Appeal in *Goknur Gida Maddeleri Enerji Imalet Ithalat Ihracat Tiracet ve Sanayi AS v Aytaceli* [2021] EWCA Civ 1037, [2021] 4 WLR 101. The judgment of Coulson LJ, with which Dingemans LJ and Lewison LJ agreed, summarised relevant authorities at [26] to [38]. I shall not repeat those summaries here. Then, at [40] Coulson LJ provided the following guidance (I have added the full citation of those cases which I have not referred to above):

“Summary as to Directors and Shareholders

40 Without in any way suggesting that these authorities give rise to a sort of mandatory checklist applicable to a company director or shareholder against whom a section 51 order is sought, I consider that the relevant guidance can usefully be summarised in this way:

(a) An order against a non-party is exceptional and it will only be made if it is just to do so in all the circumstances of the case (*Gardiner v FX Music Limited*, unreported, 27 March 2000), *Dymocks*, *Threlfall v ECD Insight Limited (Costs)* [2013] EWCA Civ 1444; [2014] 2 Costs LO 129).

(b) The touchstone is whether, despite not being a party to the litigation, the director can fairly be described as “the real party to the litigation” (*Dymocks*, *Goodwood*, *Threlfall*).

(c) In the case of an insolvent company involved in litigation which has resulted in a costs liability that the company cannot pay, a director of that company may be made the subject of such an order. Although such instances will necessarily be rare (*Taylor v Pace Developments Ltd* [1991]

BCC 406), section 51 orders may be made to avoid the injustice of an individual director hiding behind a corporate identity, so as to engage in risk-free litigation for his own purposes (*North West Holdings*). Such an order does not impinge on the principle of limited liability (*Dymocks, Goodwood, Threlfall*).

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

(e) In this way, matters such as the control and/or funding of the litigation, and particularly the alleged personal benefit to the director of so doing, are helpful indicia as to whether or not a section 51 order would be just. But they remain merely elements of the guidance given by the authorities, not a checklist that needs to be completed in every case (*SystemCare (UK) Ltd v Service Design Technology* [2011] EWCA Civ 546; [2011] 4 Costs LR 666).

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

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

41 Therefore, without being in any way prescriptive, the reality in practice is that, in order to persuade a court to make a non-party costs order against a controlling/funding director, the applicant will usually need to establish, *either* that the director was seeking to benefit personally from the company's pursuit of or stance in the litigation, *or* that he or she was guilty of impropriety or bad faith. Without one or the other in a case involving a director, it will be very difficult to persuade the court that a section 51 order is just. Mr Benson identified no authority in which a section 51 order was made against the director of a company in the absence of either personal benefit or bad faith/impropriety. Conversely, there is no practice or principle that requires *both* individual benefit and bad faith/impropriety on the part of

the director in order to justify a non-party costs order. Depending on the facts, as the authorities show, one or the other will often suffice.”

27. In addition, at [51] it was noted that the applicant had contended that even if the relevant company was the “real party” to the litigation, so too was the respondent. Coulson LJ did not accept that on the facts. He then said this:

“...in my view, the concept of their being two “real parties”, one the company and the other the relevant director or shareholder, introduces a level of complication and granularity which finds no reflection in any of the authorities. It would be well-nigh impossible to apply the concept in practice because, necessarily, a benefit to any small company is also a benefit to the director of and/or shareholder in that company. I also consider that such a concept may distract the court, when faced with an application under section 51, from looking at the matter in the round and deciding whether the director or shareholder in question can properly be termed “the real party”...”

28. I was also referred to the decision of John Kimbell KC (sitting as a Deputy High Court Judge) in *Paper Mache Tiger Limited v Lee Mathews Workroom Pty Ltd* [2023] EWHC 338. At [9] of that judgment he set out ten additional points which had been identified by Patricia Robertson KC, sitting as a Deputy High Court Judge, in *Asprey Capital Limited v Rediresi* [2023] EWHC 28 (Comm) and which he adopted. Drawing on those ten points, I summarise the additional points of relevance to the present application as follows:

- (1) The guidance provided in *Goknur* is a helpful starting point for the exercise of the court’s discretion, but this is not a checklist exercise; ultimately the jurisdiction to order a non-party to pay costs is highly fact-sensitive. As the Court of Appeal put it in *Deutsche Bank v Sebastian Holdings* [2016] EWCS Civ 23 at [62]: “...the only immutable principle is that the discretion must be exercised justly.”
- (2) Where the order is sought to be made against the director or shareholder of an insolvent company, there must be some factor that makes it just to make the order, notwithstanding the principle of limited liability. The decided cases offer examples but are not exhaustive of the factors that might be relevant, or the ways in which these might combine in a given case to tip the balance.
- (3) Funding, by itself, may be consistent with the director pursuing the proceedings for the benefit of the company. Equally, however, the absence of funding will not preclude the making of an order if the proceedings were being run for the personal benefit of the director, rather than in the interests of the company. Impropriety in the conduct of the proceedings, where serious, may justify an order even where the element of personal benefit is lacking. However, it does not follow that some lesser degree of impropriety is irrelevant in a case where there are also other factors in favour of making an order. Something that would not be sufficient by itself may be the feather that tips the scale when it is viewed cumulatively with other features of the case.

- (4) The absence of a warning that a party intended to seek an NPCO, given whilst the litigation was still in progress, is capable of being a relevant factor pointing against making an order, if an earlier warning might have altered the way the non-party conducted themselves in ways relevant to the exercise of discretion. If, however, the non-party is, objectively, “the real party” to the litigation, “the absence of a warning may be of little consequence” *Deutsche Bank* at [32] and [37].
- (5) The jurisdiction is summary in nature, but that needs to be understood properly. The court does not approach disputes of fact on the same basis as an application for summary judgment: *Greco Air Inc v Tokoph* [2009] EWHC 115 (QB) at [45] per Burton J. The Court must balance considerations of proportionality and justice, bearing in mind that this is a form of satellite litigation which should not be allowed to expand beyond reasonable bounds. Whilst the Court has power to allow cross examination on disputed issues in a s.51 application where it considers this to be both proportionate and fair, this will be exceptional: *Greco Air* at [47]. In most cases, justice is adequately served by the Court doing the best it can to resolve disputed matters on the documents.

C. The issues

Issues for determination

29. The issue for determination is whether, in all the circumstances, it is in the interests of justice to make a non-party costs order against Sebastian Tibbles. Having regard to the guidance provided by the caselaw, I shall approach that overarching issue in two stages:
 - (1) Issue 1: Can Sebastian Tibbles fairly be described as “the real party to the litigation”? This requires consideration of the relevant circumstances, including whether Sebastian Tibbles controlled (as well as funded) HDL’s pursuit of the litigation and whether the litigation was prosecuted for Sebastian Tibbles’s own benefit, rather than for the benefit of HDL.
 - (2) Issue 2: If Sebastian Tibbles was the “real party”, is it in the interests of justice to make an order against Sebastian Tibbles, a non-party, in all the circumstances of this case and, if so, in what terms should any such order be made?

D. The evidence served for the application

30. The evidence in support of the application included a statement from Geoffrey Kertesz, solicitor for Robert Tibbles, dated 22 August 2022 and a second statement from Robert Tibbles dated 12 April 2023 in response to Sebastian Tibbles’s third statement.
31. Sebastian Tibbles served two statements, his third and fourth statements. His third statement, dated 14 March 2023, was served whilst he was unrepresented. Much of that statement consists of arguments, submissions, and attacks on Robert Tibbles’s character and on the Judgment, rather than evidence. The statement contained various assertions in respect of the wider family litigation. Sebastian Tibbles’s fourth witness statement dated 4 May 2023 was written at a time when he was represented by solicitors and is in more temperate terms. No evidence was served in response to Sebastian Tibbles’s fourth statement.

32. Much of the relevant factual background relied upon by the parties is set out in the Judgment. The statements served in respect of the application contain some limited further evidence, interwoven with submissions. Much of the focus of the statements concerned two issues, namely the wider family litigation and the role played by Sebastian Tibbles in HDL generally and in respect of the litigation in particular.

The wider family litigation

33. The witness statements of both Sebastian and Robert Tibbles contain information about the wider family litigation.
34. HDL's skeleton for the trial described the proceedings as follows "this dispute is a small part of a complex family feud whereby since around 2014, [Robert Tibbles] had spectacularly fallen-out with his father NT and his brothers OT [Oliver] and ST [Sebastian] and James Tibbles". The ownership structure of the French villa appears to be at the heart of the wider "complex family feud".
35. In his third statement Sebastian Tibbles suggested that Robert Tibbles had commenced "12+" claims against other members of the family and family companies in a range of courts in France and Monaco.
36. In his second statement Robert Tibbles states that he seeks to provide a neutral and accurate summary of the other claims. According to Robert Tibbles, there are five "live" sets of proceedings in France and Monaco. Two of those claims were brought by him and three of the claims were brought against him. The claims are said to involve Robert Tibbles on the one hand and a combination of Nigel Tibbles, Sebastian Tibbles and Oliver Tibbles as well as various family vehicles, including Jimson and SCI Roc and SCI Roc ii, being family-controlled companies involved in the ownership structure of the French villa. Those claims included an injunction obtained by Robert Tibbles to stop the sale of the French villa and, on his case, the dissipation of the sale proceeds to Jimson. Robert Tibbles also says that he had previously brought two unsuccessful claims seeking a court appointed administrator to run SCI Roc ii and to allow the bankruptcy of that company.

The role played by Sebastian Tibbles in relation to HDL and the litigation

37. Sebastian Tibbles was not a director of HDL at the time of the acquisition of the Painting by HDL. He says that he was not involved in that acquisition and the information about the transaction was provided to him by his father after the auction.
38. Although he was the sole director and shareholder of HDL from 2014 onwards, Sebastian Tibbles contends that it was his father who controlled HDL (and the other family companies). He says that HDL was a vehicle to pursue his father's interests and was one of several companies incorporated by his father for family purposes, forming part of a "family office type structure". He says "it was my father who would ultimately make decisions in relation to HDL and Jimson, not me".
39. The Judgment records, at [30], that "it was said in the Claimant's skeleton [for the trial] that Nigel Tibbles had continuing authority to act on behalf of both HDL and Jimson and was 'the person who ran the businesses' albeit that during the material period he was not a director of either company".

40. Sebastian Tibbles says that he assisted in managing the family office activities due to his background in investment banking and his non-resident status, assisting his father with his IHT planning. He says his involvement in the family companies has been for the benefit of the family rather than for personal gain.

41. Sebastian Tibbles's fourth statement says this (emphasis added):

“[Nigel] therefore asked me to pursue proceedings against Robert on behalf of HDL with the intention of recovering the painting. Conversely, had my father told me not to bring the claim on behalf of HDL then I would not have done so. I would speak regularly with my father to discuss matters with him, including the progress with this dispute. However, it was my father who would ultimately make decisions in relation to HDL and Jimson, not me. As with all companies within the family structure, father would direct and his sons would implement. It was for that reason that **it was my father's ultimate decision** to pursue the litigation, not mine”.

42. However, he then also states (at paragraph 17) (emphasis added) that “HDL took advice and, without waiving privilege, having considered that advice, **I took the decision as director of HDL** to issue proceedings, in accordance with my duties as director”. Then (at paragraph 23) he states “it was ultimately my father's decision that the Claim be pursued, which I thought it appropriate to implement in accordance with my duties as director. It was my father who therefore caused the Claim to be brought”.

43. There are, to my mind, obvious tensions between the statements set out above. I consider these further at [62] below.

44. As to the conduct of the litigation, Sebastian Tibbles says:

“It is also not correct that I was the predominant person driving the litigation on a day to day basis. I note that as a result of my living in Singapore and the difficulties with the time zones, that I was not initially involved in the instructing of the law firms appointed to act for HDL. In particular, my brother, Oliver Tibbles, dealt with CMS and my other brother, James Tibbles, also instructed and dealt with Clyde & Co, Mishcon de Reya, and Cripps. Indeed, I did not have day to day conduct of the litigation as I was in Singapore since 2006. The progressing of the claim was certainly not a concerted sole effort on my part to pursue a personal agenda”.

45. The statement of Mr Kertesz in support of the application and the submissions on behalf of Robert Tibbles place emphasis on the contemporaneous correspondence from Sebastian Tibbles as evidence of the nature and extent of the role which he played. The communications include emails directly to his twin brother, Robert Tibbles, as well as numerous emails to Phillips and to the solicitors for Robert Tibbles and for Phillips. Many examples are referenced in the Judgment. It seems to me that the correspondence is of relevance in considering the evidence now advanced by Sebastian Tibbles in respect of the control of HDL and his role in the litigation. I therefore set out a

summary of relevant correspondence below, as well as some of the parallel correspondence between the solicitors acting for the parties to which Sebastian Tibbles's communications relate.

46. The communications from Sebastian Tibbles are largely one sided as Robert Tibbles refrained from entering into direct communication with Sebastian Tibbles and left correspondence in the hands of his solicitors; further, the solicitors acting for Robert Tibbles and for Phillips made several attempts to discourage direct communications from Sebastian Tibbles in circumstances in which HDL had instructed solicitors.
47. The fact of the forthcoming auction came to Sebastian Tibbles's attention in December 2019 and he emailed Robert Tibbles on 19 December 2019 referring to the auction and stating "we will of course take all necessary measures to prevent you from dispersing the proceeds of any significant asset sales, before the various claims against you have been paid or settled" [78]. The email was written in the context of the litigation in France and Monaco and notified Robert Tibbles that "last week we approved the issuance of a new writ against you, in Nice, separate from and in addition to the previous Jimson claims. The new writ claims damages from you...". The email asks Robert Tibbles to return the shares in both SCI Roc and SCI Roc ii registered to him and ends with: "If you take that step, within the next 15 days, we are prepared to put action concerning the auction process and the new claim on hold, for up to 30 days, during which time a permanent settlement can be worked out". The email was not written on behalf of HDL and made no reference to HDL. At this stage Sebastian Tibbles did not know that his father considered that the Painting belonged to HDL.
48. CMS Cameron McKenna Nabarro Olswang LLP ("CMS") then wrote to Robert Tibbles on 3 February 2020 on behalf of Jimson in connection with claims concerning SCI Roc, SCo Roc ii and the French villa. The letter ends with the forthcoming auction and the alleged risk of dissipation of assets and sought confirmation that Robert Tibbles would provide a written undertaking to pay £4 million, including the proceeds of the sale from the auction, into an account and make no withdrawal from it; in the absence of such an undertaking it was said that Jimson would take all necessary steps to protect its position by applying to the High Court for injunctive relief and/or by way of service of a statutory demand and petitioning for bankruptcy and/or contacting Phillips to alert them to Jimson's entitlement to take enforcement steps. The letter appears to be consistent with the threat of action in respect of the auction contained in Sebastian Tibbles's email of 19 December 2019.
49. Sebastian Tibbles's evidence was that he was with his father in the French villa on 18 February 2020 and loaded the auction results on his iPad. When his father saw Lot 20 (the Painting) he said: "But that's mine, I paid for it, I have the invoice in my desk". Sebastian Tibbles's first statement then says this: "I then agreed with my father that I would email Robert and bring this fact to his attention". Sebastian Tibbles emailed Robert Tibbles the same evening, with the subject heading being "Lot 20 – Damien Hirst Spin – Was Not yours to Sell!!", and stated: "I am at the house and have just seen the original invoice from White Cube to Hilden Developments Ltd dated 5th Feb 1999. The picture was not yours to sell!! I have asked CMS to take the matter up immediately with Phillips and to ensure that the sale proceeds are not released to you."
50. In his witness statement for trial Sebastian Tibbles asserted that he had sent this email

from his father's PC in his study at the French villa. In his oral evidence he accepted that he could not recall whether he had emailed from his father's PC or his own iPad. He was asked in cross-examination why he had included a clear statement about emailing from his father's PC if he did not know this to be true; his answer was "*Colour, I suppose*".

51. On 3 March 2020 Sebastian emailed Robert (Judgment, [81]) in the following terms:

"Subject: So now it is Art Theft, Fraud and More Lies".

Having been caught "red handed" trying to steal another £350,000 from your nearly 90 year old father/the family, having produced absolutely no evidence to support the claim, I fully expect that you will soon start claiming, as is now usual... that "Daddy gave me the money to by the Spin"...

This time, as before, your position (that somehow the Spin belongs to you) is in clear contradiction to, not only NCT's [Nigel Tibbles] version of events (the truth) but, also, as before, the supporting documentation. It is worth pointing out that neither you, nor Phillips, nor White Cube (whom I have also contacted) have produced a single piece of written evidence, to support your claim.

NCT, OCT [Oliver Tibbles] and I therefore consider this simply to be an extension of/the latest chapter in the campaign of lies, deceit and harassment that you have subjected us to over the last 6 years. You are a well documented, proven, serial liar, cheat and abuser of the elderly. Now, yet again, you have proved that your signature and assurances are absolutely worthless. You should be thoroughly assumed of yourself. Mother would be appalled, that you could sink so low.

Since you have chosen to carry-out your latest attack on us in London, I have decided to report your selling the picture without the true owners (HDL) authority as Theft and your deliberate misrepresentations to Phillips concerning the provenance of the picture as Fraud to the Metropolitan Police in London. These are very serious criminal offences. NCT [Nigel Tibbles] has already prepared his statement of the Met, should it be needed.

Unless you have withdrawn all your claims to the picture/sale proceeds and have given Phillips the release permission they have requested, to pay the entire sales proceeds to HDL by 5.00pm tomorrow... I will be reporting the entire matter to the relevant units at the Metropolitan Police – including Art & Antiques, without further delay. I'm sure that the Met and probably HMRC will also be showing White Cube, some very unwelcome attention. Your recent behaviour will have ruined your name in the art market.

Based on my understanding, the penalty for theft in the UK is up to 7 years imprisonment and an unlimited fine, for fraud, it is up to 10 year's imprisonment and unlimited fine... I have absolutely no problem raising your totally unacceptable behaviour with third parties.

It is now entirely your choice, if I will have to do so again!
As with the warning about the SD [statutory demand] notice etc, I have instructed CMS to confirm the HDL position on this matter to you in writing...”

52. Sebastian Tibbles emailed Robert Tibbles on 8 March 2020 (Judgment, [86]) with the subject heading “Stolen Spin – Met Police Report” to state:

“Since you have refused to co-operate, I have now reported the picture, to the metropolitan police, as stolen and sold on by you, assisted by Phillips, without the authority of the owner (HDL). If you do not want this matter to escalate further, please confirm ... that you are immediately withdrawing your claim to ownership of the picture and have instructed Phillips to release it to HDL”.
53. Some 90 minutes later Sebastian Tibbles emailed Robert Tibbles again with the subject heading “Met Crime Reference No” to state “FYI The Met have just emailed me, they seem to agree, that what you and Phillips have done, should be investigated as a crime!” (Judgment, [87]).
54. The following day, 9 March 2020 Sebastian Tibbles emailed Robert Tibbles again, with the subject heading “Stolen Spin” and forwarding email correspondence with the police about the crime report which Sebastian Tibbles had made to the police. He emailed again, later that day, with the subject heading “Letter to Phillips – Criminal Consequences ...” to say that a letter had been sent to Phillips and stating “Is the sale of a stolen painting really so important to you and Westphal [an individual at Phillips], that you are both prepared to risk criminal records and prison time?” (Judgment, [88]).
55. There were then further emails in April 2020 from Sebastian Tibbles to Phillips demanding that Phillips deliver up the Painting. By the end of May 2020 Clyde & Co LLP (“**Clydes**”) had been instructed by HDL. For a while, Sebastian Tibbles ceased to communicate by direct email with the parties.
56. On 9 December 2020 Sebastian Tibbles emailed Phillips, copying Clydes, to say that he wrote “in my capacity as the owner of HDL....., the owner of Jimson... and Robert’s elder brother...” and stating, amongst other things that “I have instructed my lawyers to compile a complete file on these matters and pass it to the Met & HMRC”.
57. For the sake of completeness, I note that there are other examples of similar correspondence in the original trial bundle (including an email drafted by Sebastian Tibbles to the Metropolitan Police, which he requests that James Tibbles forwards to the various solicitors, and which James Tibbles duly did on 10 December 2020); the examples referred to by Mr Kertesz in his statement are therefore not the only examples of correspondence from Sebastian Tibbles personally to various parties relating to the dispute. As noted in the Judgment, ([88]), he continued to send direct emails until December 2021 to Robert Tibbles and to Phillips and to their legal representatives, notwithstanding that they were all legally represented, including emails containing allegations of “Art Fraud”, VAT fraud, and assertions as to “the potential personal liability of those involved in criminal activity”.

58. Stewarts Law, on behalf of Robert Tibbles, wrote a “without prejudice save as to costs” letter on 24 September 2021 to HDL’s solicitors which proposed that the parties agreed a declaration that Robert Tibbles had a 50/68 beneficial interest in the Painting and a declaration that either Jimson or HDL had a 18/68 beneficial interest in the Painting; this reflected a recognition that Jimson may have paid £18,000 of the purchase price. They sent a further Part 36 offer dated 4 November 2021, which improved the previous offer by proposing a declaration that Robert Tibbles held a 40/68 beneficial interest in the Painting and that Jimson or HDL held a 28/68 beneficial interest. That reflected the uncertainty on the evidence as to who paid the initial £10,000 deposit for the Painting and gave HDL/Jimson the benefit of the doubt on that issue. It also proposed that Robert Tibbles would be liable for Phillips’ costs.
59. The initial response to that second offer came directly from Sebastian Tibbles, rather than HDL’s solicitors, in a long email to Robert Tibbles on 7 November 2021 with the subject heading: “It’s Time for You to Settle Everything or Deal with the Consequences”. It contained the familiar allegations and threats in relation to loss of reputation and criminal prosecution. It offered that Robert Tibbles be credited with 50% of the value of the Painting “against the various other claims that are running against you” and required Robert Tibbles to reach “full and final settlement” on all other issues relating to the French and Monaco proceedings and set out proposals in relation to those proceedings. It also required Robert Tibbles to pay £250,000 in respect of costs for the proceedings. In return, it was said that “no further action will be taken in respect of the criminal issues”. In the absence of agreement, it threatened new actions, including in respect of alleged contempt of court proceedings. Correspondence then subsequently followed from HDL’s solicitors rejecting the Part 36 offer and putting forward alternative counteroffers.

E. Analysis

Issue 1: Was Sebastian Tibbles, rather than HDL, the real party to the litigation?

The context of the wider family litigation

60. I accept the overall summary of the wider family litigation provided by Robert Tibbles in his second statement (see [36] above), the accuracy of which was not contradicted in Sebastian Tibbles’s fourth statement.

Role played by Sebastian Tibbles in respect of HDL and the litigation

61. **Control of HDL for the purposes of the litigation and direction of the litigation:** In oral submissions Mr Friedman, for Sebastian Tibbles, suggested that Nigel Tibbles was acting in way which was “tantamount to” a shadow director of HDL and was truly controlling HDL in respect of the litigation. The evidence before me was not specifically addressed to the issue of whether Nigel Tibbles was a shadow director of HDL, nor, if he had been a shadow director at any stage, whether he continued to act in such a capacity during the material period when decisions to commence and continue the litigation on behalf of HDL were taken.

62. As noted at [43] above, there is a tension in Sebastian Tibbles's own evidence on the issue of control and the decision to commence proceedings. He suggests that it was his father's "ultimate decision" to pursue the litigation, which he thought it appropriate to implement in accordance with his duties as a director, but he also expressly accepts that "I took the decision as director of HDL to issue proceedings, in accordance with my duties as director". I also note that he disavows any suggestion that Nigel Tibbles was a director of HDL. In his third statement he said this: "NCT [Nigel Tibbles] was never a director or shareholder of HDL, he simply organised the finance of the picture purchase, which RET [Robert Tibbles] wanted but could not afford".
63. The correspondence indicates that as early as December 2019 Sebastian Tibbles saw the forthcoming auction as an opportunity to try to obtain proceeds of the sale as part of the "litigation warfare" and "family feud". His email of 19 December 2019 ([47] above) indicates, to my mind, that Sebastian Tibbles was keenly involved in framing the strategic decisions concerning the wider litigation with Robert Tibbles and was looking for a means of preventing Robert Tibbles having access to the proceeds of the auction for the purpose of gaining an advantage in the context of that wider litigation. This was at a time when Sebastian Tibbles had no knowledge of any potential claim by HDL on any painting and the email was written without any reference to HDL.
64. It is notable that it was Sebastian Tibbles who first emailed Robert Tibbles about the Painting and that he stated, in his email of 18 February 2020, that he had instructed CMS to take up the matter with Phillips ([49] above).
65. Sebastian Tibbles's email of 3 March 2020 ([51] above) similarly states that he had "instructed CMS" to write in respect of HDL's position as he said he had done previously in respect of the threat of the statutory demand contained in his email of 19 December 2019. That email also states that he was personally contacting the third parties in respect of the dispute, including the White Cube gallery. He was not leaving this to solicitors, but was personally involving himself in the investigation of the claim and the attempt to collate evidence. This is also consistent with his first witness statement in which, at paragraphs 26 to 29, Sebastian Tibbles made clear that he personally contacted Phillips directly "on several occasions" and liaised directly with the gallery. It was also Sebastian Tibbles who, according to his first statement, liaised directly with the relevant banks namely, UBS (Jimson's bank) and Lloyds (his father's bank), to try to obtain bank statements from the relevant period.
66. He was also threatening in this email to report the matter to the Metropolitan Police personally. The email, in my view, demonstrates that Sebastian Tibbles was personally committing his time and energies to this new dispute concerning the Painting and was personally instructing CMS. It demonstrates, in my judgment, Sebastian Tibbles's commitment to take whatever action he could think of to damage Robert Tibbles's reputation in the art market with Phillips and White Cube and to use the dispute as leverage in respect of the wider family disputes with Robert Tibbles, including by way of threatening Robert Tibbles with criminal prosecution and imprisonment.
67. It is clear from his emails of 8 and 9 March 2020 (paragraphs [52] to [54] above) that Sebastian Tibbles was driving the attempts to engage the interest of the Metropolitan police in his allegations that Robert Tibbles had stolen the Painting and using this, and the threat of "prison time", as a means of trying to put pressure on Robert Tibbles.

68. Clydes was instructed in about May 2020. From about May 2020 until about December 2020 Sebastian Tibbles refrained from sending personal emails. It may be that James Tibbles was more closely involved with liaising with solicitors at this stage because James Tibbles had “good relations” with Clydes, as Sebastian Tibbles suggests in his first statement, at paragraph 30.
69. By December 2020 (see [56] above) Sebastian Tibbles was again emailing parties directly and was stating that he was personally instructing solicitors (“*my lawyers*”) to compile a file and pass it to the Metropolitan police and HMRC. It is clear, having regard to the repeated contents of his communications, that Sebastian Tibbles was taking the lead in respect of the litigation strategy generally and the decision to try to draw in prosecuting authorities.
70. Similarly, it is notable that as late as December 2021 Sebastian Tibbles was still personally intervening to respond directly to the Part 36 offer made by Robert Tibbles’s solicitors, rather than waiting for HDL’s solicitors to respond (see [59] above).
71. Most importantly, however, it is the nature and tone of the emails from Sebastian Tibbles which, to my mind, is most telling. The emails are not those of a person being directed by another (whether his father or otherwise) to take a particular course or to pursue litigation. The emails are those of a person who is deeply and personally committed to pursuing claims, and advancing allegations, against Robert Tibbles in any way possible. Time and again Sebastian Tibbles is attempting to intervene personally in the ongoing “feud” by writing directly to Robert Tibbles and to the solicitors for the parties, rather than leaving matters in the hands of the solicitors engaged. He tries, repeatedly, to threaten and provoke Robert Tibbles. In contrast, Robert Tibbles refuses to be drawn into direct correspondence and leaves all correspondence to his lawyers.
72. By the time of this litigation, it seems clear, from his own contemporaneous correspondence, that Sebastian Tibbles was taking the leading role in relation to the strategic direction of the family litigation against Robert Tibbles. He was attempting to put pressure on Robert Tibbles and attempting to obtain access to the proceeds of the auction, even before being aware that HDL might have any interest in any painting in the auction. He then presented himself in his emails as taking the lead role in respect of the commencement and maintenance of the litigation on behalf of HDL in relation to the Painting. On three occasions his emails refer to him personally instructing CMS (see [49], [51] and [56] above).
73. In summary, on the evidence before me I cannot accept that part of Sebastian Tibbles’s evidence which suggests that he only commenced these proceedings on behalf of HDL because his father wished him to do so or instructed him to do so and/or that his father took the ultimate decision in this regard. Whilst he was clearly consulting and liaising with Nigel, Oliver Tibbles and James Tibbles, his correspondence demonstrates, to my mind, that it was Sebastian Tibbles who was taking the lead role at this time in advancing allegations against his twin brother, Robert Tibbles, including by commencing and maintaining the claim in respect of the Painting.
74. **Instruction of solicitors:** HDL has not waived privilege and has not disclosed correspondence with its solicitors. Nevertheless, as noted above, the contemporaneous

correspondence from Sebastian Tibbles provides some assistance in terms of his role in instructing solicitors.

75. As noted at [47] above, his email of 19 December 2019 threatens further legal action (not on behalf of HDL) against Robert Tibbles in respect of the forthcoming auction. His email of 18 February 2020 is clear in stating that he, Sebastian, initially instructed CMS in respect of the dispute concerning the Painting (see [49] above). The terms of Sebastian Tibbles's first witness statement are to similar effect; he states "I also emailed lawyers CMS ...in London and instructed them to immediately take the matter up with Phillips and to ensure that none of the sale proceeds were distributed to Robert". His email of 3 March 2020 then similarly states that he personally instructed CMS to confirm HDL's position in writing (see [51] above). His email of 9 December 2020 then states that he has instructed "his lawyers" to compile a file on alleged criminal activities (see [56] above). On the evidence before me I conclude that it is more likely than not that Sebastian Tibbles directly instructed CMS or, at the very least, that he instructed others to do so on his behalf at the outset of the dispute.
76. Similarly, it appears clear from the contemporaneous correspondence as a whole that Sebastian Tibbles was directing the strategy of the litigation and that he continued to instruct (whether directly or via an intermediary) the solicitors acting for HDL. Whilst he may have left some "day to day" correspondence with solicitors to his brothers James Tibbles (particularly in dealing with Clydes after May 2020) and Oliver Tibbles, the contemporaneous correspondence consistently shows Sebastian Tibbles to be taking the lead in this regard, including up to his email of 7 November 2021 responding to the Part 36 offer directly.
77. **Funding of HDL's claim:** Sebastian Tibbles elected to fund HDL's claim at his own personal expense. He said that he did so because he was in a position to do so and others in the family were not and that he felt a strong obligation to his father and the wider family to ensure that Robert Tibbles did not benefit from the sale of an asset which his father was adamant was an asset of HDL.
78. By itself, a decision by a director to fund a company's litigation costs will not necessarily be indicative of whether the director is the "true party" to the claim. The relevance of Sebastian Tibbles's commitment personally to fund the litigation falls to be considered in the context of the personal communications quoted above.
79. In my judgment, having regard to Sebastian Tibbles's contemporaneous correspondence, it seems to me that Sebastian Tibbles's decision to fund this litigation on behalf of HDL is consistent with, and reflects, the extent of his personal commitment to pursue allegations and claims against Robert Tibbles.

Cogency of the claim and reliance on Nigel Tibbles's recollection and legal advice

80. Sebastian Tibbles states that HDL took legal advice. It is said that that legal advice was provided orally in conference and he has no written record of it. He also says: "Very plainly had the advice that HDL received been that the claim had no (or even minimal) prospects of success, and so should not be pursued, then I would have relayed that advice to my father with a view to seeing how he wished to proceed".

81. Sebastian Tibbles relies on his statutory duties as a director of HDL and his duty to act in good faith in what he believed to be the best interest of the company, pursuant to s.120 of the BVI Business Companies Act 2004. He had no involvement with the purchase of the Painting and he says that he was reliant on Nigel Tibbles in this regard. He argues that he was provided with cogent evidence by his father that HDL owned a valuable asset and he believed that he was required to act accordingly. He states that any director of HDL would have done likewise on the evidence provided. He says that there was no other person or entity which could bring the claim as the invoice was addressed to HDL.
82. Mr Friedman, for Sebastian Tibbles, also submits that Nigel Tibbles was not found to have been deliberately misleading the court; rather, that, in certain respects, he had convinced himself to believe a version of events based on a reconstruction of events from a review of documents (Judgment, [95]). It is said that Sebastian Tibbles acted reasonably in relying on Nigel Tibbles's evidence.
83. Mr Chew, on behalf of Robert Tibbles, accepted that there was a cogent basis for considering that HDL may have a claim of some sort; in my view, that was an appropriate concession to make.
84. Whilst there were aspects of Nigel Tibbles's evidence which, it seemed to me, he had convinced himself to believe from a reconstruction of events based on his reading of the documents, there were also important aspects of his evidence which did not ring true and which I rejected as not plausible. For example, I rejected (Judgment, [122]) Nigel Tibbles's evidence that he intended to purchase the seven-foot diameter Painting to hang in the French villa in which he lived notwithstanding that he had no particular interest in contemporary art and had not even seen the Painting. Similarly, I rejected (Judgment, [123]) the suggestion that Nigel Tibbles would have decided to buy the Painting on behalf of HDL as an investment without involving, or even informing, Oliver Tibbles, the sole director of HDL at that time and without the transaction being recorded in any fashion in the company's records.
85. Thus, the basis of HDL's claim as to the purported reasons why Nigel Tibbles might have wanted to acquire the Painting, via HDL, did not ring true. Nor was any reasoned explanation provided as to why HDL's records contained no reference to the decision to purchase the Painting or to the Painting being an asset of HDL.
86. Further, HDL did not put forward any cogent explanation for the fact that Robert Tibbles paid at least £40,000 to Jimson on 16 February 1999, immediately prior to the payment by Jimson of £58,000 to the gallery (Judgment, [174]). Nigel Tibbles's position was that this was a repayment of an unrelated previous loan, but he was unable to provide any details whatsoever as to when or for what purpose any such previous loan had been made (Judgment, [175]).
87. When documentary evidence came to light which cast doubt on Nigel Tibbles's account and case advanced by HDL, the response of Sebastian Tibbles and Nigel Tibbles was to allege that relevant documents had been forged and to maintain this position through the trial. Much of Sebastian Tibbles's witness evidence for trial was devoted to allegations that Robert Tibbles was relying on forged documents. I rejected the

allegations of forgery advanced by Nigel and Sebastian against Robert, at [117], in the following terms:

“In my view these allegations of forgery, advanced primarily via the witness statements of Nigel and Sebastian Tibbles, provide an illustration of a wider approach of attempting to reconstruct events from selected documents and then seeking to discredit evidence which is inconsistent with that reconstruction. The allegations also illustrate the extent to which HDL’s claim has been influenced by their complete loss of trust and confidence in Robert Tibbles.”

88. It is not clear from Sebastian Tibbles’s evidence whether the legal advice he received was that HDL had a strong claim in respect of title to the Painting, or whether the advice supported a more modest and confined claim. Nor do I know what advice was given to Sebastian Tibbles in respect of compromise and making offers, nor in respect of the offers made on behalf of Robert Tibbles (see [58] and [59] above).
89. Doing the best I can on the evidence, and without having sight of the legal advice said to have been provided, I can accept that on an objective analysis a director acting in accordance with the interests of HDL might reasonably have considered that Jimson and/or HDL had some basis for a claim for either a part share in the Painting (most obviously being for an interest equating to 18/68 or, at most, to 28/68) or for a repayment of a loan (of £18,000, or at most £28,000) in respect of the Painting. However, I find it difficult to understand (certainly by the time of disclosure of the relevant documents) on what objective basis it could reasonably have been considered that HDL would be able to maintain its denial that Robert Tibbles paid at least £40,000 to Jimson (as evidenced by Jimson’s bank statements) in respect of the £68,000 purchase price.

Benefit of the litigation and conclusion on “real party”

90. On behalf of Robert Tibbles, it was submitted that HDL was a family company which did not trade, filed no accounts, had no bank account and no assets (save for the claim to the Painting) and no record of the Painting being an asset of the company. It was submitted that, in those circumstances, it had no real interest of its own to pursue in respect of the Painting. Emphasis was also placed on the apparent tensions within Sebastian Tibbles’s evidence in respect of whose interest he was purporting to act; it was submitted that his evidence claimed that he was acting variously in HDL’s interests, his father’s interests, and the wider family interests as he saw them. As the sole shareholder and director, only Sebastian Tibbles stood to benefit from the litigation; it was his sole election either to take the full benefit of the litigation personally or to direct it to others. The main force of the submissions, however, was to contend that Sebastian Tibbles pursued the litigation for his personal benefit to advance his own interests in the wider family feud and the French and Monégasque litigation against Robert Tibbles.
91. Sebastian Tibbles contended that he would not have benefitted personally from the litigation if it had been successful as any damages recovered would have been passed to Jimson as the main family company (HDL did not have a bank account) and, further, that, on Nigel Tibbles’s death Jimson’s funds would pass to Nigel Tibbles’s

grandchildren and not to any of his four children in accordance with his wishes. He exhibits a note, dated 10 March 2019, which he says was made by his father of a meeting with Robert Tibbles explaining his wishes in this regard. He claims to have acted in HDL's interests and in the wider interests of the family and in accordance with Nigel Tibbles's directions.

92. Sebastian Tibbles says that he assisted in IHT planning for Nigel Tibbles and I do not understand it to be suggested by Sebastian Tibbles that Nigel Tibbles could do more than indicate whom he would have wished any assets held by any of the family companies to benefit. Ultimately, it was Sebastian Tibbles, as sole director and shareholder, who held the power to decide where to direct any benefit obtained by HDL, whatever the wishes (or will) of Nigel Tibbles.
93. The mere fact that Sebastian Tibbles might have stood to benefit from the litigation brought by HDL in terms of any recovery of damages is only one factor to take into account. As noted in *Goknur* at [51] (see [27] above) a benefit to a small company may often amount to a benefit for the sole director and/or shareholder of that company. The court must therefore be astute in such cases to ensure that the important principle of limited liability is not undermined by holding the director liable for costs where the company is, properly analysed, the real party to the litigation and the litigation was pursued and maintained in the interests of the company.
94. Standing back, it is clear, in my judgment, that the totality of the evidence before me (albeit without the benefit of seeing the legal advice provided to HDL) points strongly to the conclusion that Sebastian Tibbles was seeking to pursue and maintain these proceedings for his own benefit, rather than pursuant to his duties as a director of HDL to protect HDL's interests.
95. In particular, as noted at [71] above, the nature, tone and content of Sebastian Tibbles's contemporaneous correspondence, summarised at [47] to [59] above, is particularly telling. The emails are those of a person who is deeply and personally committed to pursuing claims, and advancing allegations, against Robert Tibbles in any way possible. There was no need for Sebastian Tibbles to be involved in direct correspondence with Robert Tibbles or with the solicitors for the defendants at all. Ordinarily, a company director would leave correspondence to the lawyers representing the company. But Sebastian Tibbles appears to have been unable to refrain from repeated personal interventions designed to try to put pressure on Robert Tibbles by direct correspondence both in respect of the dispute concerning the Painting and more generally.
96. Further, as noted above, the nature of the claim advanced and maintained by HDL for title to the Painting is also a relevant factor pointing to this conclusion. Sebastian Tibbles, as director of HDL, appears to have insisted on pursuing the claim for title rather than attempting to confine the claim to one which recognised Robert Tibbles's contribution (of at least £40,000 of the £68,000, see [89] above) to the purchase price.
97. The potential benefit to Sebastian Tibbles in pursuing the litigation in the manner in which he did is also obvious from Sebastian Tibbles's contemporaneous correspondence. That correspondence reveals, in my judgment, the extent to which Sebastian Tibbles was personally invested in a campaign to put pressure on his brother

for his own purposes; this litigation was only one of the means by which he furthered this objective. He took action personally to attempt to damage Robert Tibbles's reputation and standing in the art world via his direct correspondence with the gallery and with Phillips (see, for example, [55] and [56] above). He went to some lengths to try to bring about a criminal prosecution of his brother (see, for example, [52], [53] and [56] above). Further, the emails from Sebastian Tibbles show that he was driven to a very significant extent by his personal animus towards his twin brother; his correspondence drips with vitriol. His election to fund HDL personally to pursue the litigation against Robert Tibbles falls to be considered in this context.

98. Sebastian Tibbles' evidence at trial was a continuation of many of the issues which he had repeatedly been attempting to raise in direct correspondence prior to trial, including wide ranging attacks on his brother's character and integrity (contending, for example, that Robert Tibbles has "proved himself to be a well documented serial liar"), together with his emphasis on the allegations of forgery. I said this about his evidence in the Judgment, at [96]:

"Sebastian Tibbles had no direct knowledge about the purchase of the Painting. The purpose of his second witness statement was said to be to "*highlight numerous untrue statements made by my brother*". It then proceeds to make what are, in effect, submissions in respect of disclosed documents and the evidence of Robert Tibbles concerning the purchase of the Painting, about which Sebastian Tibbles had no direct knowledge. His allegations that his twin brother is relying on forged documents are based on his reading of those documents, rather than any direct knowledge of the underlying facts. Mr Chew submitted in closing that he was "*an advocate not a witness*". I agree that parts of his written statements and of his oral evidence strayed into the realms of submission and attempts to reconstruct events from a selection of documents. I formed the view that his evidence was heavily influenced by the wider "family feud" and his loss of trust and confidence in his brother."

99. Sebastian Tibbles did not act alone in commencing and maintaining this litigation. To some extent he acted in concert with his father and with his brothers, Oliver Tibbles and James Tibbles. It is apparent from his email communications, however, that he took the lead in respect of directing this litigation, and the strategy behind it, as well as personally funding the litigation. He may have intended to share any financial benefit obtained from the litigation with other family members, but ultimately this would have been his election to make as sole director and shareholder of HDL if it had benefited financially from the litigation. In directing, funding and maintaining this litigation, however, he was not narrowly concerned with the potential financial benefit which might potentially be recovered by HDL by way of damages. Rather, he was concerned with the wider benefits, as he saw it, which this dispute might generate in terms of putting pressure on Robert Tibbles generally, including by damaging his reputation, as well as putting pressure on him in respect of the litigation in France and Monaco in particular. Those were key potential benefits of this dispute as far as Sebastian Tibbles was concerned and, if successful, would have been benefits to him personally.

Conclusion on "real party"

100. The mere fact that litigation may be commenced or continued for wider strategic purposes does not necessarily mean that there has been any impropriety or bad faith on the part of those controlling the litigation. Mr Chew, on behalf of Robert Tibbles, did not seek to advance a case of bad faith or impropriety on the part of Sebastian Tibbles; he put his case on the basis that Sebastian Tibbles was the “real party” to the litigation, seeking to benefit personally from the litigation in a number of ways.
101. This case cannot, in my judgment, be regarded as a case in which a director of a small company is acting merely to discharge his duties to that company by commencing and maintaining litigation which it is in the interests of the company/its shareholders to pursue. For the reasons set out above, the totality of the evidence leads me to conclude that Sebastian Tibbles (a) was both personally directing the litigation and the strategy being pursued and funding the litigation; and (b) was seeking to benefit personally by commencing, maintaining and funding this litigation in the name of HDL. In all the circumstances, I am satisfied that he should properly be described as the “real party” to the litigation.

Issue 2: Is it in the interests of justice to make an order against Sebastian Tibbles, a non-party, in all the circumstances of this case?

102. Mr Friedman, on behalf of Sebastian Tibbles, raises two issues in relation to the interests of justice. First, he says that VAT improprieties should be taken into account. Second, he says that there was an inadequate warning in respect of the risk of a non-party costs order. I deal with each in turn.

Alleged VAT fraud

103. Mr Friedman submits by way of his skeleton argument and in oral submissions that substantial confusion had been caused about the ownership of the Painting because Robert Tibbles perpetrated what he described as a VAT fraud by using HDL’s BVI address and pretending that the Painting was to be shipped outside of the EU so as to avoid payment of VAT. He says that Sebastian Tibbles did not explain why this was not tax evasion rather than tax avoidance. It was said that documents such as the invoice led Nigel Tibbles to reconstruct events in the way he did, thereby misleading Sebastian Tibbles. It would be unjust, it is said, for Sebastian to be liable for costs as a result of Robert Tibbles’s wrongful behaviour.
104. Issues concerning VAT and CGT were raised at trial, but were not addressed in any detail by either side (see, for example, Judgment at [160]). This may reflect the fact that Nigel Tibbles claimed that he had liaised directly with the gallery in February 1999 about addressing the invoice to HDL (Judgment, at [170]) and knew that the Painting had never been shipped abroad. In any event, both parties avoided going into details about VAT or CGT issues. By way of a note at the end of the Judgment, at [205] to [208], I expressed my concern in relation to issues of non-payment of VAT in respect of the acquisition of the Painting. I noted that in circumstances in which no allegations of VAT fraud were raised on the pleadings and no case was advanced as to tainting by illegality, issues concerning VAT had only touched on at trial in a peripheral manner. I also noted that the events took place some 24 years ago. Sebastian Tibbles claimed to

have reported the issues of alleged fraud to the Metropolitan Police and I noted that I did not consider it appropriate to comment further on those allegations.

105. Although allegations of VAT fraud were made in both Sebastian Tibbles's third and fourth witness statements, the purported relevance of alleged VAT fraud to this application was only made clear by way of skeleton argument served shortly before the hearing. As a result, no notice of the details of the alleged offence(s) were set out and no proper notice was provided so that Robert Tibbles could be afforded an opportunity to respond and to serve further evidence if he elected to do so. The relevant VAT provisions applicable at the time were not put before me, nor was any attempt made to identify which provisions are alleged to have been breached, let alone what defences, if any, might be applicable.
106. As noted in *Asprey Capital*, at [64], the court has to do the best it can, given the policy to keep s.51 applications within proper bounds, and it is appropriate to limit matters to those issues which are properly capable of resolution within this summary procedure. I agree with Mr Chew that allegations of VAT fraud relating to the purchase of the Painting some 24 years ago cannot properly be dealt with when raised in this manner.
107. Nevertheless, whatever the position in relation to alleged offences, I do take into account the wider point made by Mr Friedman in respect of the difficulties and confusion which may have been caused to any director of HDL in trying to establish the true nature of the funding arrangements made by Nigel Tibbles and Robert Tibbles in late 1998 or early 1999 in respect of the Painting and which led to the gallery addressing the invoice to HDL. I return to this further at [118] to [120] below.

The alleged absence of a fair warning of a s.51 application

108. The importance of the third party being warned that he is at risk of being ordered to pay the costs of the litigation will vary from case to case and may depend on the extent to which it would have affected the course of the proceedings; see, *Dymocks*, at [31], and *Deutsche Bank*, at [32].
109. By a letter dated 18 March 2020 Robert Tibbles's then solicitors wrote to HDL's then solicitors to state:

“In respect of any claims you bring, our client will seek protection in respect of costs. Such measures include not only security for costs against your client (who is based out of the jurisdiction) but also claims against Nigel and/or Sebastian Tibbles and/or other directors, shadow directors, or those directing this false claim against our client, under section 51 of the Senior Courts Act 1981”.
110. The possibility of an application under s.51 was not raised again until the skeleton argument on behalf of Robert Tibbles for the hearing of consequential matters following Judgment.
111. Sebastian Tibbles's position is that the letter of 18 March 2020 did not provide fair warning of the possibility of a s.51 application. He says that no application for security for costs was made and that he did not treat the “threat” of a non-party costs order

seriously and thought that that suggestion had been “dropped”. He says that had he been given fair warning he would have taken proper advice on the point “and may well have approached the proceedings differently, for example by obtaining a more formal advice as to the prospects on which I could now rely”.

112. Mr Chew’s position was that there would be very little prospect of an application for security for costs being successful against a company like HDL. It seems to me that that is not a point which I need to determine; no such application was made, for whatever reason.
113. In my view the letter of 18 March 2020 provided appropriate warning of the possibility of a s.51 application. I see no reason why, in this case, any repeated warning should be deemed necessary. Indeed, it might reasonably be said that repeated warnings might be perceived to be intimidatory.
114. Sebastian Tibbles knew that HDL had no assets (leaving aside its claim to have title to the Painting) and no bank account. He also knew that he himself was personally funding the litigation. In the circumstances, I struggle to understand why Sebastian Tibbles would have considered that the possibility of an application for a non-party costs order against him was merely a threat and/or that it had been dropped. In my view a reasonable director in the position of Sebastian Tibbles, looking at the position objectively, should have had proper regard to that warning and would not have considered that it was an issue which had been “dropped”.

The interests of justice and the terms of any order

115. The ultimate issue for determination is whether, having regard to all the relevant circumstances, it is in the interests of justice to make a non-party costs order against Sebastian Tibbles.
116. For the reasons set out in respect of issue (i) above, I am satisfied that Sebastian Tibbles was “the real party” to this litigation from the outset and throughout the litigation, albeit that he was not acting alone in pursuing the litigation (see [99] above). I am also satisfied, standing back and looking at all the relevant circumstances, that it is in the interests of justice for a non-party costs order to be made against Sebastian Tibbles in respect of at least part of the costs which HDL has been ordered to pay and has failed to pay.
117. Mr Friedman submitted that Nigel Tibbles was originally the primary target of the application and that if Sebastian Tibbles were ordered to pay costs then, as a matter of discretion, the court should not make him liable on a joint and several basis for all the costs. Rather, he should only be liable for some part of those costs and that it was in the discretion of the court (see *Merchantbridge & Co Ltd v Safron General Partner 1 Ltd* [2011] EWHC 1524 (Comm) at [44]) to make an order for less than 100% of the costs. Mr Chew accepted that the court had a discretion in this regard, but contended that the circumstances of the case justified an order that all costs should be paid by Sebastian Tibbles.
118. Leaving aside the approach in relation to the commencement and conduct of the litigation which Sebastian Tibbles in fact elected to adopt for his own benefit, I am persuaded that, on an objective assessment, any director of HDL, acting reasonably,

might have been placed in some difficulty, at least prior to the completion of disclosure, by reason of the confusion caused as a result of the funding arrangements entered into by Robert Tibbles and Nigel Tibbles in respect of the invoicing of the Painting to HDL. Those arrangements were, at least in part, made unduly complex as a result of Robert Tibbles's desire to have an overseas address on the invoice for VAT purposes (Judgment, [62]). Indeed, Robert Tibbles was himself unable to recall important aspects of the details of the arrangement as a result of its complexities and the lapse of time and the full extent of the true picture emerged relatively slowly with some delay in the completion of disclosure.

119. Further, a director of HDL acting reasonably in accordance with his/her duties as a director would, in my view, have had rational grounds, on the limited evidence available, for considering that HDL might have some form of claim against Robert Tibbles, whether for repayment of a loan of £18,000 (or, at most, £28,000) or, possibly, for some beneficial share in the Painting (e.g. on a 18/68 or 26/68 basis, see [89] above), as opposed to the claim which was in fact advanced for full title to the Painting.
120. In all the circumstances of this unusual case, I consider that it is appropriate to take into account the factors set out at [118] and [119] above when considering the appropriate order to be made against Sebastian Tibbles in the interests of justice. On the basis of the evidence before me, I consider that the fair and appropriate order to make in the interests of justice is that Sebastian Tibbles should be made personally liable to pay 100% of the costs that HDL was ordered to pay from 15 October 2021 onwards and 50% of those costs prior to that date.
121. The date for 15 October 2021 reflects the date from which HDL was ordered to pay Robert Tibbles's costs on an indemnity basis as a result of failing to beat the "without prejudice save as to costs offer" of 25 September 2021. That offer proposed, amongst other matters, a settlement on the basis of a beneficial share in the Painting of 18/68 for HDL and 50/68 for Robert Tibbles (see [58] above). That Sebastian Tibbles did not accept that offer (or the more generous subsequent Part 36 offer) on behalf of HDL is, to my mind, consistent with the ongoing approach adopted by Sebastian Tibbles to use his control of the litigation, as director of HDL, to place maximum possible pressure on Robert Tibbles via this litigation for his own benefit in respect of the wider family feud (see [99] above).

F. Conclusion

122. For the reasons set out above, I am satisfied that Sebastian Tibbles was the real party to this litigation and that it is in the interests of justice to make a non-party costs order against Sebastian Tibbles. The application therefore succeeds. I am also satisfied, on the evidence before me and having regard to the relevant circumstances, that the appropriate order to make in the interests of justice is that Sebastian Tibbles should be liable to pay 50% of the costs ordered to be paid by HDL up to 15 October 2021 and 100% thereafter.
123. I invite the parties to seek to agree the terms of the order, including in respect of consequential matters.

124. I am grateful to both counsel for their helpful written and oral submissions.