Neutral Citation Number: [2023] EWHC 338 (Comm)

CLAIM No: LM-2020-000154

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (KBD)

Date: 17/02/23

Before :

John Kimbell KC
(sitting as a Deputy High Court Judge)

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Between :

PAPER MACHE TIGER LIMITED	**Claimant/ Applicant**
- and –	
LEE MATHEWS WORKROOM PTY LTD (in Liquidation)	**Defendant**
-and -	
LEE MATHEWS	**Respondent**

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- -

Stephen Bailey (instructed by **Withers LLP**) for the **Claimant/Applicant**
Imran Benson (instructed by **Martin Shepherd Solicitors LLP**) for the **Respondent**

Hearing date: 24 January 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 17th February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives
(see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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John Kimbell KC sitting as a Deputy High Court Judge:

Introduction

1. This is an application under s.51 of the Senior Courts Act 1981 for a costs order against a non-party ('**NPCO**'). The Applicant is Paper Mache Tiger Ltd ('**PMT**'). PMT is a fashion sales, public relations and communications agency based in Islington, North London. PMT was founded in 2008 by its current director, Kyle Robinson.

2. On 1 November 2021, PMT obtained judgment ('**the Judgment'**) in the sum of £718,790 against Lee Mathews Workroom PTY Limited ('**LMW**'). PMT was also awarded £280,000 on account of its costs.

3. LMW was incorporated in New South Wales Australia which manufactured and sold clothes for women designed by the Respondent ('**Ms Mathews**'). It is now in liquidation.

4. LMW started trading in 2004. It ceased trading in January 2021 and on 14 October 2021 Katherine Barnet and Damien Hodgkinson ('**the Liquidators**') were appointed as liquidators under the Australian Corporations Act 2001 ('**the Liquidation**'). PMT has submitted a proof of debt in the liquidation for sums due under the Judgment.

5. Ms Mathews was the sole director and shareholder of LMW. LMW sold its assets and business as a going concern to another company owned and controlled by Ms Mathews, Lee Mathews Australia PTY Limited ('**LMA**') on the terms of an asset sale agreement dated 30 June 2020 (the '**ASA**').

6. PMT's application for costs was issued on 14 April 2022. It is supported by a witness statement of Lesley Timms ('**Ms Timms**') a partner at Withers LLP ('**Withers**') who represent PMT. A witness statement in response to the application was served by Ms Mathews dated 7 June 2022. I am told that there were difficulties obtaining a listing for this hearing which meant that the application could not be heard until 24 January 2023 when it came before me.

7. PMT was represented by Stephen Bailey of counsel and Ms Mathews was represented by Mr Benson of counsel. Both produced helpful skeleton arguments. A comprehensive and neutral chronology of events was also submitted.

The applicable legal principles

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

> "a) An order against a non-party is exceptional and it will only be made if it is just to do so in all the circumstances of the case (*Gardiner v FX Music Limited* (2000) WL 33116500 (27 March 2000, unreported), *Dymocks Franchise Systems (NSW) Pty Limited v Todd and others* [2004] UKPC 39, [2004] WLR

2807, *Threlfall v ECD Insight Limited and Anr*. [2015] EWCA Civ 144; [2014] 2 Costs LO 129).

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

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

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

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

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

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

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

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

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

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

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

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

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

    g. Whereas the trial judge may be able to deal with a s51 application very swiftly, that may not be as true where the application has to be dealt with by a judge other than the trial judge. It does not follow, however, that the application must proceed as if it were a mini-trial. The Court can in principle limit the length of the hearing, limit (or indeed not permit) cross examination, limit the parties to the "big 5 points" and, where appropriate, decide the matter on the basis of witness statements alone, so as "to ensure that the application is dealt with as speedily and inexpensively as is consistent with fairness to both sides": *Robertson Research International Limited v ABG Exploration BV and Others* at [16] and [40] (13 October 1999, Unreported, Mr Justice Laddie).

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

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

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

10. Neither party suggested that there be any cross-examination in this case. In accordance with point (i) in the list above, the parties were content that I did my best on the documentary evidence available to me. The factual background section below is based to a large extent on the very helpful chronology supplied by PMT.

Factual background

11. Ms Mathews was originally a fashion illustrator at Vogue magazine. In 1998 she started making and selling clothes designed by her. She opened a small store in Newport, New South Wales. At this time, she conducted business as a sole trader. Over the next 17 years, she opened a number of stores in Australia. Her clothes have been described as "easy separates, elegant dresses and chic outerwear made from high quality fabrics including silk, linen, wool and cashmere". LMW was incorporated in 2004 as a private limited company.

12. In 2010, LMW's production was moved from Australia to China and India. In 2016, LMW sublet a part of PMT's building in Paris. At this time LMW did their own sales and marketing, including to international retailers.

13. In May 2017, when the sublet in Paris expired, LMW entered into an agency agreement with PMT ('**the Agency Agreement'**). Under the agreement PMT undertook to promote the sale of LMW's products, worldwide, in return for a 12.5% commission. The Agency Agreement was subject to English law and jurisdiction. The Commercial Agents (Council Directive) Regulations 1993 ('**the Agency Regulations**') applied to the Agency Agreement. The initial period of the Agency Agreement was 12 months. The Agreement commenced on 24 May 2017.

14. In June 2018, Mr Stephen Rae joined LMW. His job title was "principal". He seems to have acted as a general manager and strategic adviser. He arranged for LMW to obtain export finance and suggested a minimum order value.

15. By the summer of 2018, PMT and LMW had very different perspectives on how well the Agency Agreement had worked. PMT regarded it as a success because they had secured a high level of orders for LMW. Ms Mathews felt that PMT had been insensitive in a number of respects to how she saw the business and had created unnecessary stress. In an email sent on 10 August 2018, she said "I want to go".

16. The parties discussed potential amendments to the Agency Agreement but ultimately no agreement could be reached. On 25 October 2018, LMW served notice to terminate the Agency Agreement. This meant that the Agency Agreement expired on 31 December 2018.

17. In May 2019, LMW made two payments in a total sum of US$70,460 pursuant to clause 12.3 of the Agency Agreement. Clause 12.3 provided a contractual compensation mechanism in the event of termination of the Agency Agreement

18. On 1 July 2019, PMT sent a notice electing to receive compensation under the Regulations rather than pursuant to the contractual mechanism. PMT accepted that it would give credit for the May payments in any claim under the Agency Regulations.

19. On 8 August 2019, Withers sent a Pre-Action Letter in which a claim was asserted under Regulation 8 (usually referred to as 'pipeline commission') for commission relating to customers introduced during the period of the Agency Agreement as well as a claim for compensation under Regulation 17 for loss of the agency. The compensation claims were estimated at US$629,000. A claim for damages for breach of contract was also asserted.

20. LMW instructed Bentley & Co Solicitors ('**Bentleys**') to respond to the letter. Bentleys initially sent a holding letter on 29 August 2019. This was followed by a substantive response in which it was revealed that LMW had taken advice from a QC. The letter suggested that there was nothing due under Regulation 8 and any claim under Regulation 17 would be a modest sum which was highly unlikely to be more than US$70,460 already paid by way of contractual compensation. However, in the introductory part of the letter, Bentleys made the following point:

> "LMW is a small company with effectively no assets. There are first and second charges over the business held by Westpac Australia and Export Finance Australia respectively. …If PMT issues proceedings, not only will they be misconceived in fact and law, they will also represent a futile attempt to secure further money from a legal person unable to pay that money. The significant costs PMT will incur will be theirs to bear".

21. Withers responded by letter sent on 7 October 2019. They dismissed the suggestion that the litigation was pointless in a robust fashion:

> "Our client has considered carefully whether these are claims it wishes to pursue, given the cost of litigation and the ultimate risk of recovery. In that respect, we note your comments regarding your client's inability to pay further money to our client (whilst at the same time funding the cost of advice on how to avoid doing so from both your firm and senior Leading Counsel). As an agent, our client builds brands and creates customers for its Principals. Most Principals will continue to

> reap the benefits of our client's efforts for many years afterwards. In the case of LMW, our client introduced almost 100% of its customers many of which LMW continues to sell to. The Regulations are designed to prevent a Principal from putting an agent to task and then cutting the agent loose with no compensation while himself continuing to derive the benefits of the agent's hard work for many years to come. Our client cannot and will not be seen to allow its Principals to do that"

22. By 9 March 2020, Withers informed Bentleys that they had obtained an expert report, had a draft Particulars of Claim prepared and were ready to issue proceedings.

23. Proceedings were issued on 21 August 2020. Service was acknowledged promptly by new solicitors instructed by LMW, Martin Shepherd Solicitors LLP ('**MSS**'). The value of the claim was said to be in excess of £700,000. The claims were the same as intimated in pre-action correspondence referred to above. The Particulars of Claim were amended in November 2020 and an Amended Defence was filed on 30 November 2020. LMW consented to the amendments.

24. Paragraph 24 of the Amended Particulars of Claim said:

> "Pursuant to reg. 8 of the Regulations, PMTL seeks and is entitled to commission plus interest on any such commission at the rate stipulated in the contract (see clause 6.7 of the Agency Agreement) on all commercial transactions:
>
> 24.1 concluded after the termination of the Agency Agreement that are mainly attributable to PMTL's efforts during the period of the Agency Agreement and entered into with in a reasonable period after termination; or
>
> 24.2 Where the order of the third party reached either PMTL or LMW before termination

25. Paragraphs 26 and 27 of the Amended Particulars of Claim contained the claim for compensation under Regulation 17 of the Agency Regulations, which is the amount which a hypothetical purchaser would be willing to pay for the agency as at the date of termination. This was said to be US$888,000, based on expert evidence. LMW's response to the claim under Regulation 17 was to agree the test and to say that the appropriate amount will be subject to expert valuation evidence to be served in due course.

26. LMW's Amended Defence responded to the pipeline compensation claim as follows:

> "23. As to paragraphs 24 and 25 it is admitted that Regulation 8 applies. The Claimant is required to provide details of which sales were mainly attributable to its efforts. The Defendant will provide all relevant disclosure at the appropriate stage of the proceedings, however it is the Defendant's position that there have been no such sales"

27. I have quoted paragraph 23 because the last part of it referring to the "Defendant's position" was relied upon by PMT as part of its misconduct case.

28. No Reply was filed by PMT. Both the Particulars of Claim and Defence were accompanied by Initial Disclosure Lists. The parties exchanged details of counsel and co-operated in the fixing of a CCMC.

29. Withers and MSS exchanged entirely appropriate correspondence in relation to disclosure models and documents pursuant to CPR PD51U. On 8 December 2020, MSS agreed the list of issues for disclosure proposed by Withers. The parties subsequently agreed a Disclosure Review Document for use at the CCMC.

30. In a letter sent on 22 December 2020, MSS clarified LMW's position in relation to the claim under Regulation 8:

> "The issue between the parties under Regulation 8 is what is a reasonable period for your client being paid commissions following the termination of the contract … Our client is in the process of preparing a spreadsheet-based documents confirming the sales made to its customers introduced by your client in accordance with its obligations under Regulation 12 which we hope to have with you in the new year."

31. The spreadsheet referred to by MSS ('**the Sales Spreadsheet'**) was provided on 7 January 2021. The following day, PMT made a Part 36 offer of £500,000.

32. On 12 January 2021, MSS served a Precedent H costs budget. The CCMC was fixed for 19 February 2021.

33. On 18 January 2021, it is common ground that a phone call was made to the case handler at Withers, who was informed by MSS that LMW was "about to go into liquidation" and that "a new company had been set up and trading for some months already". Documents submitted subsequently to the Liquidators, confirmed that LMW had ceased trading on 13 January 2021 and that the business and all assets had been sold to LMA in June 2020 under the ASA referred to above.

34. In response Withers asked for further information about the new company and the "insolvency situation".

35. In their response (in an email sent on 3 February 2021), MSS wrote:

> "I can confirm that the company known as [LMW] is in the process of being wound up due to the insolvent nature of the company."

36. A balance sheet (prepared by LMW's accountants) was enclosed with the letter which showed bank assets in the sum of AUS$61,131 and rental bond assets in the sum of AUS$ 151,000. The total liabilities meant an overall negative equity of AUS$21,607.

37. The email continued (with emphasis added):

> "I have personally spoken to the accountant dealing with this matter who has advised that one option is for the company to go into liquidation immediately. This would result in a liquidator having greater powers to deal with the rental bonds, however there would be a cost associated with the appointment of a

> liquidator. My client's preferred method would be for the company to be wound up in an orderly fashion and for the benefit of the limited amount of creditors listed."

38. On a fair reading of this email, it seems to me to be clear that MSS was not saying that LMW was insolvent in the sense that it was unable to pay its debts as they fell due. What was being communicated was that LMW was balance sheet insolvent and that with no further funds due to LMW, the intention was to wind up LMW up for the benefit of the known creditors in the near future. As to the potential impact on the litigation, MSS said this:

> "As you know, the reason for contacting you was to minimise any further costs being expended in the claim and to avoid further Court time being taken up by this matter in a situation where my client is impecunious. As far as the CCMC is concerned, I would have no specific objection to the claim being stayed pending your client receiving confirmation that my client company has been wound up. Alternatively, your client may wish to discontinue proceedings at this stage."

39. In an email dated 1 February 2021, Withers again asked for details of the new company. As to the invitation to discontinue, PMT's response was:

> "Your client's professed impecuniosity is all too convenient in the context of these proceedings. In the absence of any evidence to the contrary, this restructuring appears to be another contrived attempt to avoid the enforcement of a judgment debt that will inevitably crystallise before the end of this year. On that basis, therefore, our client is not prepared to discontinue these proceedings"

40. Withers understandably sought confirmation as to whether MSS had instructions to continue with the CCMC. In a follow up e-mail Withers suggested CMC directions be agreed to avoid the need for a hearing.

41. On 9 February 2021, MSS wrote: "Our client has ceased trading but has not yet entered liquidation. It is anticipated that liquidation will follow shortly".

42. On 12 February 2021, MSS confirmed that the draft CCMC directions were agreed.

43. The agreed directions were submitted to the Court and a directions order was made by HHJ Pelling QC on 19 February 2021 without a hearing. The order provided for disclosure to be provided by 26 March 2021, witness statements to be exchanged on 26 April 2021 and for expert valuation evidence to be served by 9 May 2021.

44. On 3 March 2021, MSS were asked about the forthcoming deadline of 26 March 2021 for extended disclosure and about fixing a trial date. The response from MSS was:

> "Our client anticipates that the Liquidator will have been appointed by 26 March 2021. We will have another update within the next week. For the above reasons, we have nothing to add about trial listing and we are not instructing counsel for the trial"

45. Following a chaser sent on 15 March 2021, MSS responded on 17 March as follows:

> "Our client has received further advice and it will take slightly longer than previously anticipated for our client to enter liquidation. Our client will not be entering liquidation before 26 March 2021… We have previously suggested a stay in view of our client's position but our client is prepared to exchange disclosure if your client wishes. If so, our client proposes the parties agree a short extension to 4 pm on 31 March 2021"

46. Withers rejected the proposed extension of time. The parties exchanged certificates and links to the disclosure the date provided for disclosure in the 19 February order.

47. In the meantime, PMT had instructed an Australian firm, Lipman Karas ('**LK**') to investigate. LK wrote to Lee Mathews personally. Amongst other things, that letter raised concerns about the validity of the transfer of assets by LMW to LMA under the ASA. It was suggested that it might have been a "creditor defeating disposition". LK ended their letter:

> "Unless PMT receives payment in full by 26 March 2021 we are instructed to report your phoenixing activities to [the Australian Securities & Investments Commission] and PMT will proceed with the English Proceedings to obtain judgment against LMW without further delay"

48. On 26 April 2021, MSS wrote to say this:

> "We refer to previous correspondence. Our client has received further advice and our client's situation has changed. Our client is not insolvent. Our client is now preparing to participate in the proceedings, and has instructed us accordingly."

49. The letter proposed extensions to the timetable set down in the 19 February CCMC Order.

50. In a response sent by email on 26 April, Withers pointed out that the proposed extensions to the timetable exceeded the limits which parties could simply agree. The letter also asked for clarification as to whether LMW had ceased trading or not and was insolvent or not.

51. The following day MSS filed an application seeking an extension of time for the remaining steps to trial. Withers consented to the extensions sought by e-mail dated 28 April 2021. However, in the same email, Withers expressed trenchant criticism of the failure on the part of LMW and MSS to explain the apparent sudden change in the position of LMW:

> "At paragraphs 4 and 16 of your Witness Statement, contrary to all the assertions described above since January 2021, you now state that your client is 'not insolvent' and intends to participate in the proceedings. However, the Application provides absolutely no evidence of this or why your client claimed to be entering liquidation

> only to suddenly declare otherwise hours before a major deadline in the directions of these proceedings. Please now explain and provide evidence as follows:
>
> 1. Has your client ceased trading? If not, why did your firm claim it had?
>
> 2. Is your client in the process of being wound up due to the insolvent nature of the company? If not, why did your firm claim otherwise?
>
> 3. Why did your client and your firm invite our client on multiple occasions to discontinue proceedings on the basis of LMW's insolvency if this was not the case?
>
> Given the total lack of documentary evidence to the contrary it seems to us that your client has deliberately misled this firm and our client in an attempt to persuade it to discontinue these proceedings on false pretences or to otherwise deliberately manipulate the court process."

52. MSS did not respond to any of these questions. MSS simply informed the Court that the proposed adjustment to the timetable had been agreed. Both parties then proceeded to work to the adjusted pre-trial timetable.

53. The parties proceeded to prepare witness statements for the trial. These were exchanged on 21 June 2021. PMT served one witness statement by Mr Robinson (which I have not seen). LMW served two: one by Ms Mathews and one by Mr Rae. I have read both. Withers complained that the statements served by LMW did not comply with the requirements of PD57A. MSS accepted this and agreed to re-serve them. Subject to that accepted criticism both statements were clearly intended to be deployed at trial. They both contained an account of the trading relationship between PMT and LMW and their perspective of what had gone wrong.

54. Withers then sought an extension to the deadline for exchange of expert reports which was agreed by MSS. These were exchanged on 5 July 2021. The expert instructed on behalf of PMT valued the agency for the purposes of the Regulation 17 claim at US$742,577. LMW's expert valuation for the purposes of Regulation 17 was US$142,924.

55. The dispute between the parties in relation to the Regulation 8 claim had narrowed. LMW accepted that PMT was entitled to pipeline commission of US$263,447 based on 9 months being the 'reasonable period' and the application of a discount across multiple seasons. PMT claimed commission for 12 months and claimed that the discount be limited to one season. Ultimately at the trial (which was not attended by LMW) HHJ Pelling QC awarded PMT US$298,552 pipeline commission under Regulation 8 and US$684,363 in compensation under Regulation 17.

56. On 16 August 2021 MSS suggested that LMW's two witnesses ought to give evidence remotely because New South Wales was in full lockdown. Two weeks later MSS confirmed that LMW's counsel approved the trial timetable proposed by PMT's counsel and formally invited PMT to consent to witness evidence being given remotely. PMT suggested that an application be made to court. MSS filed an application on 2 September 2021. Withers consented to the application as made.

57. On 19 August 2021 a joint meeting of the experts was held. Withers reported that the meeting had gone "well" and there were several areas on which the experts views were aligned.

58. On 26 August 2021, PMT made a without prejudice save as to costs offer. I have not seen the email containing that offer.

59. In September 2021, MSS continued to make arrangements for remote participation of LMW's witnesses for the trial fixed to start on 1 November 2021.

60. On 23 September 2021, MSS provided further detailed comments on the Sales Spreadsheet. These comments were initially provided on a without prejudice basis but six days later, privilege was waived. The effect of the comments was that LW accepted that the vast majority of the sales in the Sales Spreadsheet were to clients introduced by PMT.

61. On 1 October 2021 MSS served the order of HHJ Pelling QC approving remote participation for LMW's witnesses. Withers provided a draft trial bundle and wrote a detailed letter to MSS seeking to agree the contents of the Sales Spreadsheet.

62. Withers did not receive any response to their questions on the trial bundle or the Spreadsheet. However, on 7 October 2021, in response to questions posed by them Withers were informed that the offer made on 26 August was dependant on funding being received from Ms Mathews and that "Ms Mathews is currently funding [LMW]". MSS extended the deadline for acceptance of LMT's offer to 5 pm on 11 October 2021. It was no doubt clear to Withers that what MSS was saying was that LMW was running out of money.

63. PMT's offer was not accepted by the 11 October 2021 deadline.

64. On 13 October 2021, MSS informed Withers that they were no longer instructed and would be arranging to come off the record. Notice of change was filed the following day. On 14 October 2021, MSS informed Withers that LMW had gone into liquidation. This was confirmed by an email from the Liquidators themselves the following day. PMT was sent a proof of debt form. The Liquidators suggested in the same email that the proceedings were automatically stayed under the Australian Corporations Act 2001.

65. Withers pointed out to the Liquidators that the Corporations Act 2001 did not have extra-territorial effect.

66. On 28 October 2021, Norton Rose Fulbright ('**NRF**') confirmed that they represented the Liquidators and that LMW would not be participating in the trial.

67. PMT elected to continue with the trial. They were represented by counsel who submitted a skeleton. HHJ Pelling QC gave an ex tempore judgment awarding the sums referred to above. He ordered costs to be assessed on the standard basis until 29 January 2021 being 21 days after the date of PMT's Part 36 Offer and on an indemnity basis thereafter pursuant to CPR r. 36.17(4)(b).

68. On 24 December 2021, the Liquidators published their statutory report. The report states that Ms Mathews' explanation for the liquidation was that LMW ceased trading on 13 January 2021 following a sale of the business and assets to LMA in June 2020. A copy of the ASA was sent to the Liquidators. The report indicated that on 13 October 2021 there was AUS$30,621 in LMW's bank account. Two proofs of debt were submitted AUS$98,7000 (by LMA) and AUS$2.2 million (by PMT). These were identified in the report as the two unsecured liabilities of LMW.

69. Ms Mathews and Export Finance Australia were identified as secured creditors of LMW. The Liquidators also said this

> "Our investigations indicate that the sale of the business was due to a claim brought against the Company in the London Commercial Circuit Court in London UK for the breach of an agency agreement"

70. Creditors were informed that if they wished the Liquidators to carry out further investigations, these would have to be funded. I have not seen any further correspondence between Withers or LK on behalf of PMT and NR on behalf of the Liquidators and do not know what if any further investigations have been carried out by the Liquidators.

Submissions

71. Mr Bailey submitted in writing that a NPCO ought to be made because: (a) Ms Mathews was the real party to the claim and (b) through her direction of LMW, Ms Mathews was responsible for improper, deliberately obstructive conduct, calculated to obstruct the just disposal of the proceedings.

72. In relation to the real party point, Mr Bailey relied on the the following:

    a. LMW was run entirely in her interest.

    b. Ms Mathews used her own money to fund at least part of the defence of the claim.

    c. Ms Mathews was in complete control of LMW and of its defence to the underlying claim.

    d. Ms Mathews arranged for a transfer of LMW's assets to the newly incorporated LMA in order that the Claimant would be denied a remedy in respect of its claim, while her own interests were preferred. Ms Mathews is also the sole director and shareholder of LMA.

73. In relation to the second misconduct limb of his argument, he relied on the following:

    a. failing to tell the Claimant that there had been a sale of LMW's entire business to LMA;

    b. misleading the Claimant by stating in the Letter of Response that LMW was a small company effectively without any assets, which was untrue;

c. misleading the Claimant by stating that LMW was insolvent in January 2021 but without providing any documentary evidence of this, before performing a volte face in April 2021, when LMW said it was not insolvent and would engage with the proceedings, but without explaining why it had changed its position;

d. refusing, for no good reason, to supply documents reasonably requested by the Claimant to ascertain whether LMW was or was not insolvent;

e. failing to engage seriously with LMW's disclosure obligations;

f. doing the bare minimum to keep LMW's defence of the claim going without seriously engaging with it, such that the Claimant incurred the costs of the claim going all the way to trial, against a company which had been stripped of its assets, before deciding to place the company into liquidation just two weeks before trial;

g. directing a corporate reorganisation, from which she would personally benefit, but which would make the Defendant 'judgment proof'.

74. His oral submissions at the hearing were consistent with the above. However, he also submitted that the Sales Spreadsheet shows that the assertion in paragraph 23 of the Amened Defence that there had been "no sales" mainly attributable to PMT cannot have been reasonably believed to be true at the time it was made.

75. Mr Benson accepted that at all material times LMW was under the control of Ms Mathews. However, he submitted in his skeleton that:

a. Despite the large volume of evidence produced, not much of it addressed the relevant legal test for a NPCO.

b. There was little, if any, evidence of personal benefit to Ms Mathews in continuing the defence to PMT's claim.

c. Whether Ms Mathews has engaged in improper asset stripping of LMW is something that can only be decided in Australia.

d. It was perfectly proper for Ms Mathews as director/shareholder of LMW to cause a borderline business to defend a claim on bona fide grounds.

e. LMW was not under any obligation to disclose its full financial position and indeed doing so in the context of adversarial litigation against a well-funded opponent would be positively unwise. There is no duty of care to opponents in litigation.

f. All in all, PMT was the author of its own misfortune in choosing to plough on with litigation when it knew LMW had ceased trading and may be heading for liquidation.

76. Mr Benson's oral submissions were consistent with the foregoing.

Analysis

(i) Was Ms Mathews the real party to the litigation?

77. I am not persuaded by the submission that Ms Mathews was the real party to the claim at any stage. On the contrary on the evidence I have seen, it appears that LMW remained at times in substance and form the real defendant up to and including the without prejudice save as to costs offer which expired on 11 October.

78. It was common ground that Ms Mathews controlled LMW. I also accept that by October 2021, Ms Matthews was funding the defence of the claim. In paragraph 65 of her second witness statement Ms Mathews denied lending money personally to LMW to fund the proceedings and she denied paying MSS's bills submitted to LMW. Nevertheless, when Withers asked the simple question in October 2021 "Is Ms Mathews funding the defendant?" the answer they received was "Ms Mathews is currently funding the defendant" Ms Mathews did not say in terms that they were mistaken. Mr Bailey was also able to point to a difference between the sums which appear to have been paid to MSS from LMW's account and the sums budgeted for the litigation. Either MSS had outstanding invoices or they were paid by LMA (or Ms Mathews).

79. In the circumstances, I am prepared to accept that at least by October 2021 Ms Mathews was funding the litigation, probably indirectly via loans from LMA rather than personally. However, this is hardly surprising. LMW had ceased trading on 13 January 2021. As the balance sheet which was sent to Withers shows, it had only limited assets. If one compares the balance sheet sent to Withers in January 2021 with the information provided to the Liquidators in October 2021, it is entirely consistent with Ms Mathews' evidence that between 27 January 2021 and 14 October 2021 "LMW was working towards a voluntary liquidation and was continuing to receive payments from historical sales and negotiating with landlords in relation to various leases and the return of rental bonds". By the time LMW goes into liquidation, it is clear that the rental bonds assets have been realised and some creditors have been paid. This is entirely consistent with a company winding up its affairs. Such funding as Ms Mathews provided via LMA or otherwise was in my judgment part of the controlled winding up.

80. By October 2021, it seems clear that with some assets and some liabilities reduced what was left was only around AUS$30,000 in the bank in LMW's account, no further source of income but liabilities of at least AUS$98,000. It seems clear that at this point, MSS asked to be put in funds for trial and Ms Mathews on behalf of LMW refused so LMW went into liquidation.

81. Whilst control and funding are relevant factors, Goknur makes it clear that the touchstone is whether the proceedings were pursued for the benefit of the company or the respondent to the application. Ms Matthews' evidence is clear. In paragraph 65 of her second witness statement she says "I derived no personal benefit from these proceedings. It was always the intention of LMW to seek to resolve the proceedings on behalf of LMW for the benefit of LMW." I accept this. It is consistent with the exchanges between the parties and the documents submitted to the Liquidators. In particular, the provision of further information in relation to the pipeline commission claim in August 2021 and making a without prejudice save as to costs offer is consistent with the litigation being pursued for

the benefit of the company. Had PMT accepted the offer (from LMW), it would have been funded by Ms Mathews but would have been a settlement by LMW legally and factually.

82. Mrs Timms' witness statement did not contain any cogent evidence of what the personal benefit to Ms Mathews of the litigation could be. The closest she got was in paragraph 60 where it was suggested that Ms Mathews' name is indistinguishable from the brand and a judgment against LMW might have been reported about in the fashion press. I find that an unconvincing suggestion. It is hard to see what reputational damage would have been suffered by a court decision to the effect that LMW had to pay its former agent a commission. It is hard to imagine this hitting the headlines in the fashion press at all, still less that it would cause any reputational damage.

83. The second suggestion was in paragraph 62 of Ms Timms witness statement. This read:

> "Ms Mathews would have benefited personally, albeit indirectly, from a successful defence of the Claim or by seeking to ensure that the Defendant was not amenable to judgement by putting it into an insolvency process in spite of its solvency"

It is hard to follow exactly what is being alleged here. The question to be addressed is whether the respondent to the application was defending or pursuing the proceedings for his or her own benefit. In OCM Maritime LLC v Courage Shipping Co. [2022] EWHC 2696, the court was satisfied that the respondent to the NPCO application, a Mr Mallah, was defending the proceedings for a tangible personal benefit:

> "[24] I am also satisfied that the litigation was defended for the personal benefit of Mr Mallah. Essentially, the proceedings were about the right to possession of the vessels. Not only were the vessels chartered to companies of which Mr Mallah was the sole beneficial owner. but he regarded them as his own."

84. In Turner v Thomas [2022] EWHC 1944 (Ch), Zacaroli J. found that the respondent to a NPCO, a Mr Thomas, who was a director of the corporate Defendant in possession proceedings, liable in a NPCO was the real party to the litigation because: "he would have benefitted from a successful appeal, as it would have enabled him (as the "farmer" of the relevant land) to continue farming the land that he had originally leased from the respondents' predecessor in title, through the medium of the Company."

85. These two cases are merely examples. Benefit can come in all sorts and forms. However, if one asks here what benefit did Ms Mathews stand to make from a successful defence to PMT's claim, the answer is very hard to discern.

86. The dispute between the parties was from a very early stage not about liability as such but about simply how much was due to PMT under the Agency Regulations. From an early stage, LMW clearly relied on advice it had received that a relatively small sum was owed and US$70,000 already paid. PMT, by contrast asserted from early on that at least US$700,000 was due. Absent an effective Part 36 offer, the only sense in which there

was any prospect of a successful outcome was if LMW's expert evidence and legal arguments was in all respects preferred respects to that of PMT. This would have meant compensation under Regulation 17 being closer to US120,000 rather than the US$684,000 awarded and in any event a judgment for a sum in favour of PMT.

87. The claim under Regulation 12 was similarly confined to a dispute about quantum. Seeking to minimise the liability of LMW by serving expert evidence first and foremost potentially benefited LMW rather than Ms Mathews. In terms of a litigation cost benefit analysis, it may not have been the best use of LMW's remaining funds to continue to defend the claim in particular after the Sales Spreadsheet itself showed the extent of the likely pipeline commission and the experts had met but that is a long way from being evidence that Ms Mathews had anything to gain personally from a successful defence of the proceedings on any realistic scenario.

88. Even at the extreme hypothetical end of the spectrum, in which somehow PMT failed to prove their claim procedurally or otherwise and the claim was dismissed, then it would have been LMW which gained by having its liabilities reduced and potentially gaining an asset in terms of a claim for recovery of costs. Even on this highly unlikely scenario of a successful outcome, it is LMW which gains and not Ms Mathews.

89. My firm impression from all the evidence is that far from being personally financially interested in the proceedings or liable to benefit from them, Mrs Mathews simply gave instructions to MSS step by step to deal with the litigation on behalf of LMW. In my judgment, the evidence of what was actually done by MSS in the course of the litigation points firmly towards LMW continuing to be legally, factually and economically the real party to the litigation right up until the expiry of the without prejudice save as to costs offer. Indeed, why would anyone make an offer of that type unless it was a last ditch attempt to get something out of the litigation for LMW.

90. I should add that I could not follow the argument that the transfer of assets from LMW to LMA in mid 2020 made Ms Mathews the real party to the litigation. The transfer was made before the proceedings commenced (albeit after notice had been given of the claim). If the transfer is voidable because it was an improper attempt to avoid PMT's claim, that is a matter for the Liquidators to establish in Australia. If the Liquidators successfully challenge the transfer of assets under the ASA, there is a good chance that the costs order made by HHJ Pelling QC will be enforceable against LMW directly and there is no need for this application. Even if I felt that there were a strong case that the restructuring in 2020 was a debt avoidance strategy, I still do not understand how that would make Ms Mathews the 'real party' to the litigation in the sense required under *Goknur*. Any gain she made had already been made and cannot be described as meaning that the litigation was thereafter for her benefit.

(ii) Serious misconduct

91. As to the second limb on what the application is based, I am also left wholly unpersuaded that there was any serious misconduct in the way that the claim was defended. To the extent that one or two of the particular actions or failures complained of might have come close to the relevant test, I am sure that they did not cause PMT to incur costs that they would not otherwise have incurred.

92. I will take each of the particulars of misconduct relied upon in turn.

93. I was not referred to any authority which requires a company to inform a creditor that it has transferred its assets or business. The ASA between LMW and LMA is dated 30 June 2020. This was just under a year after PMT had sent a letter of claim but before proceedings were issued. Even after proceedings are issued, there is no provision of the CPR requiring a defendant to inform a claimant that its assets or business has been sold. The general rule is that claimants must take defendants how they find them and, generally speaking, must bear the risk that they are already or may become unable to satisfy any judgment.

94. I do not accept that it was seriously misleading of LMW's solicitors to describe LMW as "a small company with effectively no assets". First of all, by any measure LMW was a small company. I have no reason to doubt Ms Mathews description of how LMW operated out of a single space with no warehouse and only a few employees. True it had built a significant brand and a chain of seven stores by 2018-19 but I do not think it is incorrect to say that it was a small company. As to whether it "effectively had no assets", depends on what is meant by *effectively* in the context of this letter. What is being said I think on fair reading of this letter is that paying any judgment that PMT might secure would not be easy for LMW to pay out of available funds. This is consistent with the suggestion that LMW had overextended itself by taking borrowing from secured creditors, in particular Westpac Bank and Export Finance. I don't read the letter as suggesting that LMW had no value as a going concern.

95. However, even if what was being said was a deliberate playing down LMW's overall financial state, it is quite clear that PMT as LMW's agent for over a year had a very good idea of the size and nature of LMW's business. It seems to me to be utterly fanciful to suggest that PMT were in any way misled by this comment or lured into some action that they would not have otherwise taken. The way in which Withers responded to the letter also suggested that PMT were not the slightest bit convinced by the suggestion of impecuniosity. It is clear to me that PMT had indeed "considered carefully whether these are claims it wishes to pursue given the cost of litigation and the ultimate risk of recovery".

96. The third and fourth particulars of misconduct are linked and fall to be considered together. The nub of the complaint is that LMW sought to deceive PMT into thinking that it was insolvent in January 2021 and then refused to explain the volte face in April when MSS told Withers that LMW was not insolvent.

97. First, is it right to acknowledge that Ms Mathews herself says in her evidence that MSS were mistaken when they referred to LMW being insolvent. She refers to it as a "misunderstanding". However, in my judgment, PMT has sought to make far too much of the use of the word insolvency in this letter. What MSS told Withers initially on the phone and then in writing was, in my judgment, substantially accurate according to the documents I have seen. LMW had in fact ceased to trade on 13 January 2021, its assets had indeed been sold to a new company some months ago and a voluntary liquidation was indeed being pursued. This much is clear from the documents submitted to the Liquidators. Although MSS used the phrase "due to the insolvent nature of the company" it is clear from the rest of the letter that what is being contemplated is not an immediate

liquidation because LMW was insolvent in the sense that could not pay its liabilities as they fall due but rather the intention is for the company to be wound up in an orderly fashion by means of a voluntary liquidation.

98. The balance sheet sent by MSS had been prepared by LMW's accountant and listed in a standard way the current assets and liabilities. It was not suggested that this document was manufactured or designed to mislead or indeed that it was false. Withers were fully alive to the fact that a balance sheet is just a snap shot.

99. It is also clear that PMT and Withers did not accept the professed impecuniosity of LMW in any event. Withers not unreasonably immediately focussed on whether the transfer of assets was an attempt to avoid a future judgment. They made it clear that they intended to press on regardless of the suggestion that liquidation might be just round the corner. The use of the phrase "due to the insolvent nature of the company" in the 18 January email did not in my judgment cause PMT to incur expenses that it would otherwise have not incurred.

100. MSS's updates sent on 9 February and 4 March as to the impending liquidation on the evidence I have seen were entirely accurate. Withers realistically took the view that there was little they could do about the possibility of LMW going into liquidation other than to instruct solicitors in Australia to pursue their own enquiries, which is what they did. MSS was realistically taking the position that as soon as LMW did go into liquidation it would cease to be instructed.

101. In the meantime, pending a decision on the timing of the liquidation LMW had no alternative but to continue to engage in the litigation.

102. As to the volte face in April, it is true that MSS do not explain what the new information or advice was which caused them to say that LMW was not in fact insolvent. But it was also not entirely surprising either. The 13 January email had said that rather than immediate liquidation, LMW wanted to manage its creditors. That is consistent with it not being insolvent in the sense of not being able to pay its debts as they fell due. The April email simply corrected any suggestion of imminent insolvency but said nothing more than LMW is not insolvent. It did not say liquidation is now off the table or that LMW had started to trade again. I have no evidence to suggest that the April email was in any way misleading. It would appear that LMW still had some assets and used them to pay some creditors in the period between first announcing its likely liquidation in January 2021 and it finally happening in October 2021.

103. Even if the failure to provide answers to Withers questions could be said to amount to serious misconduct or bad faith, it is clear that this failure did not cause PMT to incur costs that it would not have otherwise incurred. When the liquidation did come in October, PMT did not abandon the proceedings and prove in the liquidation, it pressed on with trial. If the liquidation had come earlier in March or April or May, they would in my judgment clearly have done the same thing.

104. Furthermore, during the period of re-engagement things were done which assisted PMT. LMW's comments and additions to the Sales Spreadsheet provided by MSS actually made it easier for PMT to prove their Regulation 8 case. The experts clearly co-operated

and narrowed the issues which again assisted PMT to put its case in a coherent way to the court. This was therefore not a case where a Defendant sought only to obstruct the proceedings. LMW made appropriate applications whenever they needed to e.g. for extensions of time and for remote participation of witnesses. Withers usually consented to the applications.

105. More fundamentally, at all times between 13 January 2021 and 13 October 2021, PMT knew that it was dealing with a Defendant which was a financially precarious and non-trading. PMT decided to press on to judgment no doubt in the hope that either a settlement might be reached or enforcement may take place in Australia in any liquidation. The circumstances are therefore in my judgment far removed from the situation of a claimant being messed about and misled by dishonest or obstructive conduct.

106. I agree that the position taken in paragraph 23 of the Amended Defence looks unreasonable in light of the details later disclosed in the Sales Spreadsheet. However, I consider that in context it falls short of serious misconduct. The legal test for Regulation 8 is accepted, it is said accurately that it will turn on disclosure to be made in due course. The last sentence reads as a holding general denial. What is being signalled is that there will be an argument to be had in due course on the disclosure about "mainly attributable". But even if this is too generous a reading and the plea crosses the line into serious misconduct, it clearly caused no extra costs to be incurred. PMT knew itself which clients it had introduced. All it needed was to have the details of how much had been sold to whom by LMW. That information was eventually provided in the form of detailed comments on the Sales Spreadsheet which PMT's counsel deployed at trial to obtain judgment under Regulation 8.

107. Whilst there were delays in providing some documents, I note that no applications for an unless order or even for specific disclosure were ever made. The Regulation 8 claim resolved itself into just two issues of period and extent of discount and both experts seemed able to express reliable views on the value of the agency based on available documents. I am therefore not convinced that there were failures of disclosure which amounted to serious misconduct.

108. I also do not accept that it is fair to say that MSS on LMW's behalf did "the bare minimum" to keep the claim going. There was a period of a few weeks of minimal activity while it was believed that LMW might go into liquidation before disclosure but otherwise LMW's expert was properly instructed and engaged with his counterpart in a proper way as acknowledged by Withers, the witness statements once corrected were clearly bona fide attempts to explain how the agency from LMW's perspective had failed, MSS made proper applications when required and agreed documents required for proper case management such as the DRD and the List of Issues. MSS's conduct did not suggest that they had been instructed at any stage to tread water or disengage. As already noted, LMW's comments on the Sales Spreadsheet were positively helpful to PMT's case. In summary, LMW's engagement (until the money ran out for funding participation in the trial itself on 13 October) was in my view reasonable.

109. Finally, I am not in a position to take a view on whether the ASA was the result of a long-planned restructuring (as Ms Mathews contends) or was mainly an attempt to make LMW judgment proof in relation to this claim or was perhaps a mixture of two. That is

something which must be resolved in Australia if the Liquidators challenge the agreement. My focus has been on whether there is evidence which PMT can point to of improper or deliberately dishonest or obstructive conduct within or directly connected to these proceedings. My conclusion is that there is not.

Standing back

110. Standing back and asking myself whether in all the circumstances of the case it would be just to make an order under section 51, I do not consider it would be. A perfectly rational decision was made by PMT to start and continue with the claim to trial despite knowing that LMW had ceased to trade and was likely to go into liquidation. Although the process of entering into liquidation took longer than originally suggested and questions posed by Withers in correspondence went unanswered, neither Withers nor PMT were, in my judgment, materially misled at any time by LMW or MSS. In any event, PMT's reasons for continuing the claim at all stages were clearly based on their own assessment of what they were being told and knew about LMW from their own previous business dealings and third parties engaged in Australia. Thus nothing that LMW did or said made any difference to PMT's decision to continue with the proceedings and nothing that was said or done amounted to serious impropriety or bad faith. Ms Mathews did not abuse the proceedings for her own benefit. It follows that it is not a case where justice requires that Ms Mathew ought to pay PMT's costs of the litigation.

Conclusion

111. For all those reasons, I am not satisfied that this is an appropriate case for a non-party costs order to me be made. The application is dismissed.