

# Who is the real party to proceedings?

Joshua Mitchell reviews recent case law on non-party costs orders



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The court has jurisdiction to make a non-party costs order (NPCO) pursuant to section 51 of the Senior Courts Act 1981 (SCA 1981). However, it was not until the case of *Aiden Shipping v Interbulk Ltd (The Vimeira) (No 2)* [1986] 1 AC 965 that it was first recognised that the courts had discretion to make such an order against a non-party requiring them to pay the costs ordered in proceedings.

The procedural mechanism for obtaining an NPCO is governed by Civil Procedure Rule (CPR) 46.2. To make an NPCO, the relevant party must make an application and the respondent to the application must be added as a party to the proceedings for the purposes of costs and then given a reasonable opportunity to attend a hearing where the court will consider the application.

As an application for an NPCO is within the court's jurisdiction, each case will turn on its own facts. The court must consider whether in all the circumstances it is just to make an NPCO.

## CASES AGAINST DIRECTORS

The court has outlined factors for making an NPCO, such as their approach to summary applications, since *Aiden*. Various cases have been examined for when directors and/or shareholders of an insolvent company could be liable for the company's unsuccessful litigation costs under s51 of the SCA 1981.

The court is generally reticent to hold a director personally liable for costs in a situation in which they are properly discharging their duties to act in the interests of the company, as this would undermine the limited liability principle.

The applicant would need to demonstrate to prove that the director was not simply discharging their duties to the company and/or protecting the interests of creditors. Thus, the applicant would need to prove that the director was defending their own interests and it would be unjust to allow them now to hide behind the principle of limited liability of the company.

In 2021, the Court of Appeal helpfully summarised in *Goknur v Aytacli* [2021] EWCA Civ 1037 (*Goknur*) the factors that should be considered in applications for NPCOs, namely that the non-party was the

'real party' to the litigation and/or the non-party had been guilty of impropriety.

In order to assess whether the director was the real party to the litigation, the court will usually look at how the litigation was funded and who made decisions on the company's behalf. However, establishing that the director was funding the litigation and making decisions in the litigation will not be sufficient in and of itself. The applicant must show that the director would have benefited personally from the litigation – whether financial, reputational or otherwise.

## IMPROPRIETY

Impropriety is not a strict requirement in order for the court to provide an NPCO. However, an NPCO is more likely to be made when the applicant can show the court that there has been improper conduct within the litigation by the respondent.

In *Goknur*, the court confirmed that there are multiple potential categories of relevant impropriety. However, the impropriety must be of a serious nature and the court provided the following examples where a party "deliberately pursues a concocted claim or defence, knowing it to be false; or swears false evidence in support of such a claim or defence with the intention of misleading the court".

The most recent decision on NPCOs was provided in January 2023 by the High Court when it handed down its judgment in the case of *Asprey Capital Ltd v Rediresi Ltd & Anor (Re Non-Party Costs Order)* [2023] EWHC 28 (Comm) (*Asprey*).

In the original judgment, the court found for the claimant (*Asprey*) and ordered that the defendant (*Rediresi*) pay *Asprey* £2.5m as a debt, £525k as costs of the proceedings, and interest. *Rediresi* failed to pay any amount and subsequently entered into compulsory liquidation.

*Asprey* made an application to join *Gupta*, *Rediresi's* director and 100 per cent beneficial shareholder to the proceedings, for the purpose of making an NPCO against him.

A relevant factor for the court was whether *Gupta* was discharging his duties as director, rather than pursuing his own interests. The court had to determine whether *Gupta* had distinguished the interests of *Rediresi* from his own personal interests.



The court heard the application and made an NPCO on the basis that Gupta had been the ‘real party’ to the proceedings. Gupta had operated Rediresi without regard to its separate corporate identity and interests. Gupta would have been by some distance the greatest beneficiary of Rediresi successfully defending the claim. The court also stated “that the manner in which Mr Gupta directed that defence was in significant respects unreasonable... The fact that the judge found aspects of his evidence to have been dishonest also weighs in the scale, when considering the justice of making the order sought.”

Solicitors should also be aware that the court’s wide discretion can include making an NPCO against a party’s instructed solicitor. NPCOs are not commonly made against solicitors as the bar to obtain the same is high. To be successful, the applicant must show that the solicitor has stepped outside their role as a solicitor in the litigation. The court will again be looking to see who the litigation would ultimately benefit. The solicitor must be shown to have been acting in their own right rather than in their client’s interests.

#### KEY CONSIDERATIONS

The case of *Asprey* confirmed that the court “shall have full power to determine by whom and to what extent the costs are to be paid”. It also provides a stark reminder for any litigator

to consider whether it is appropriate for their client to contemplate an NPCO throughout the litigation process. This is especially the case in circumstances where the litigation has resulted in a costs liability that a company party cannot pay and where a third party (typically a sole director and majority shareholder) may ultimately benefit from the litigation.

Furthermore, when someone has been responsible for bringing proceedings or supporting the litigation (eg a director of a company), a solicitor should consider whether advice should be given on the discrete issue as to whether they are at risk of an NPCO.

When making such an application, factors over and above simply funding the litigation will need to be established to persuade the court to grant a NPCO. The court will review the third party’s connection to the proceedings, and in particular who will ultimately benefit from the litigation. The court will then consider whether the third-party had an ulterior motive or whether some other conduct justifies the making of a NPCO.

Although the guidance set out in *Asprey* and other recent decisions is helpful, the success of an application for an NPCO is highly dependent on its facts. An NPCO is an exceptional order made by the court and therefore the court has only been willing to make NPCOs when it considers the same to be just in all the circumstances of the case. <sup>SJ</sup>



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