

## Legal Briefing

### Ted Lowery examines a lesser spotted non-party costs order

*Thomas Barnes & Sons plc (in administration) v Blackburn with Darwen Borough Council [2026] EWHC 24 (TCC)*

In the Business and Property Courts in Manchester

Before HHJ Stephen Davies sitting as a High Court Judge

Judgment delivered 13 January 2026

#### The facts

Thomas Barnes & Sons plc ('TBS') was a family company owned by two brothers, Thomas Barnes and Brian Barnes. During 2014 TBS entered into a contract with the Council for the construction of a new bus station in Blackburn town centre. The Council terminated the contract on 4 June 2015 before the works were completed and in November 2015, TBS entered into administration.

Brian Barnes died in 2015 and his interests in TBS passed to his widow, Pamela Barnes, and his two sons, Craig Barnes and Scott Barnes, as the executors of his estate.

With the encouragement of Thomas Barnes and the agreement of Pamela Barnes, Craig Barnes and Scott Barnes, during 2016 the administrators of TBS notified a claim for wrongful termination against the Council. The Council's solicitors responded requesting security for costs and querying who would be funding the litigation, "...in the context of *Third Party Cost orders*...".

When in 2020 the administrators commenced proceedings claiming more than £3 million in damages, the Council formally applied for security for costs and obtained via a compromise agreement some £583,000, comprising a payment into court of £138,000 and charges over various properties with an aggregate value of £445,000.

Following a trial in July 2022, judgment was handed down in October 2022 dismissing the claim. The

Council's total costs were £995,000. Having collected the £583,000 held by way of security, during September 2025 the Council applied for a non-party costs order against Thomas Barnes, Pamela Barnes, Craig Barnes and Scott Barnes ('the Respondents') seeking recovery of their costs shortfall of £412,000.

The Council contended that the Respondents had funded the proceedings, had a direct financial interest in the outcome, had controlled (at least to some extent) the conduct of the proceedings and were in substance the real parties to the litigation. Hence it was just that the Respondents should be ordered to pay the Council's recoverable costs, to the extent not satisfied by the security for costs.

#### The issue

Was the Council entitled to a non-party costs order against the Respondents?

#### The decision

The judge first considered the applicable principles, primarily that: (i) whilst costs orders against non-parties were exceptional, this meant only that the case fell outside of the ordinary arrangements in which parties pursue or defend litigation for their own benefit and at their own expense; (ii) the ultimate question was whether in the particular circumstances it was just to make a non-party costs order; (iii) generally speaking an order will not be made against pure funders i.e. those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it, and do not control its course; and (iv) if a non-party funds but also controls and will likely benefit from the litigation, justice will ordinarily require that the non-party pays the successful party's costs if the claim/defence fails. In this scenario, the non-party is gaining access to justice for its own purposes and can be considered a real party to the litigation.

Turning to the facts, the judge found that the Respondents had collectively funded the proceedings and stood to benefit personally if the claim was successful. The judge was also satisfied that although the administrators were involved, Thomas Barnes had exercised a real degree of control over the proceedings from start to finish. Whilst the other Respondents may have left Thomas Barnes and the administrators to progress the litigation, they were prepared to

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support the former's determination to pursue the claim by providing funding for the proceedings.

Accordingly, where the Respondents were the funders of the proceedings and the persons who would substantially benefit from same if successful, they were to properly be treated as the real parties to the litigation in important and critical respects. It was therefore just that the Respondents should have to pay the Council's costs.

The judge further considered that this was not a case where the public interest precluded a non-party costs order being made: the order was not being sought against an officeholder or a director with no or only a modest personal interest in the success of the litigation and with little or no real control over the proceedings. Nor was it likely that making an order would have a chilling effect on the ability of officeholders (typically administrators and liquidators) in similar situations to fund justifiable claims against third party debtors.

### Commentary

The court's power to award costs against a non-party, as set out in sections 51(1) and 51(3) of the Senior Courts Act 1981, has rarely been exercised, largely because it can only be triggered in the exceptional circumstances outlined by the judge. The applicable principles are nonetheless clear and, it has to be said, logical and reasonable. On the facts of this case, the administrators of TBS were the nominal claimants but the Respondents were the real parties to the litigation: it was fair that the real (losing) parties should bear liability for the Council's costs.

**Ted Lowery**  
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