NEW SQUARE Chambers

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COSTLY MISTAKES TO AVOID IN NON-PARTY DISCLOSURE APPLICATIONS
TRUELL V ZALINSKA [2025] EWHC 1718 (Ch)

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Documents held by an innocent non-party can often prove to be game-changers and an application for non-party disclosure ('NPD') is a powerful tool in the civil litigation arsenal. But before handling powerful tools, it often pays to read the user manual thoroughly.

THE FACTS

The underlying claim in *Truell v Zalinska* ('*Truell*') revolves around allegations that the late Mr Daniel Truell, a successful fund manager, was subjected to various forms of financial abuse by the late Ms Magdalena Zalinska, whose personal representative is now the defendant. The claim is due to go to trial later this year. Almost all of the transactions on which the claim is based involved payments made by the late Mr Truell's former bankers, now called Union Bancaire Privée (UK) LLP ('the Bank'). The late Mr Truell had normally used his work email account when communicating with the Bank.

THE NPD APPLICATION

The claimant executor made an NPD application against the Bank. By the time the NPD application was issued, disclosure in the claim had taken place and the Bank had voluntarily disclosed two batches of documents. The defendant's disclosure in the claim had included emails passing between the Bank and the late Mr Truell, obtained via a subject access request made by the defendant to the late Mr Truell's former employer. The Bank, as a non-party, had no direct knowledge of what had already been disclosed in the claim. The second batch of documents from the Bank contained more of the same and also some internal bank records of telephone conversations and meetings.

It became clear that the claimant had not analyzed the documents received from the defendant or the Bank before the NPD application was issued or even before the first hearing of that application before Master Marsh in June 2025. This came to light because, unusually, the claimant had sought an order that

the costs of the application and the Bank's compliance with any NPD order made be split equally between the claimant and the defendant. As a result, the defendant attended the hearing of the NPD application.[1]

The claimant's evidence in support of the NPD application had proceeded on the basis that, without the NPD sought from the Bank, the claimant had no access to documents in the categories sought. However, it became apparent when the NPD application came before the court that many Bank documents likely to have probative value were already in the claimant's hands. The court was understandably concerned at how this state of affairs had come about.

In the result, the NPD application was dismissed. **The claimant was ordered to pay the defendant's costs and to pay the Bank's costs on the indemnity basis.**

WHY THE NPD APPLICATION FAILED

The numerous authorities cited, and reviewed by Master Marsh at [32]-[37] of his judgment, arguably add little of substance to the wording of the CPR itself, which make clear that the guiding principles in NPD applications are **probative value and necessity**, subject to which the court's power to order NPD is **discretionary**.[2]

An NPD application **seeking broad or ill-defined categories of document or requiring qualitive analysis** by the non-party is likely to be challenged, successfully, on grounds that all documents in the category are not likely to have sufficient probative value and that, as a matter going to discretion, compliance would impose a disproportionate and unwarranted burden on the (innocent) non-party.[3]

In *Truell* the application failed partly because the claimant was unable to show likely probative value (for example the application that the Bank disclose its internal policies in relation to "vulnerable" customers generally)[4] and partly because the claimant was unable to show that NPD was necessary, as it became clear that the claimant already had what were likely to be the only or at least the most relevant documents held by the Bank in various categories. The unsatisfactory manner in which the application had proceeded caused the court to exercise its discretion against ordering NPD of a small remaining category of documents, that may have satisfied these two tests.[5]

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[1] See *Truell* at [38].

[2] *CPR Rule 31.17(3) The court **may** make an order under this rule **only where—***
*(a) the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings; **and***
*(b) disclosure is **necessary** in order to dispose fairly of the claim or to save costs.* (emphases added).

[3] See e.g. *Truell* at [61] & [71].

[4] *Truell* at [57]-[59].

[5] *Truell* at [72]-[73].

THE GENERAL RULES AS TO NPD COSTS

The general rule in an NPD application is that **the applicant pays the respondent's costs**.[6] While there may be circumstances where the general rule does not apply, it is not, for example, displaced if the respondent resists the application unsuccessfully but on reasonable grounds.

The general rule as between the parties to the underlying claim is that costs of an NPD application are recoverable as damages, if incurred before a claim is issued, but should otherwise be dealt with as part of the general costs of the claim at the end of the day,[7] which is unfortunately something the White Book does not make entirely clear.[8] An exception might be, for example, where a party's culpable failure to give disclosure made an NPD application necessary.

These general costs rules further the overriding objective, as it means that only the applicant and the non-party will normally need be involved at any stage of an NPD application. In *Truell* no grounds for departing from either general rule, by making the defendant immediately liable for half of the respondent's costs of the NPD application, were made out.

PRACTICAL POINTS

A successful NPD application is likely to require careful consideration of the following:

- Whether it can be shown that the non-party holds **identifiable documents that may well**[9] **have probative value** (and are not merely likely to be relevant more broadly).
- Whether it can be shown that ordering NPD is **necessary**, which will be fact specific but should certainly involve review of all documents already available, consideration of what documents are likely to become available through disclosure in the claim or are likely to be more readily available from another source.
- Whether the NPD sought can be **limited to specific documents or narrowly defined categories of document** (in terms of e.g. date range, type and topic) which can readily be identified by the non-party, including by using search terms against electronic documents it holds where appropriate, without going outside the terms of the order being sought.
- How any interest of the respondent or other non-parties in the NPD sought, including in **maintaining confidentiality**, is to be addressed. In some cases, interested non-parties may need to be made respondents to the application. It was argued by the Bank in *Truell* that it was

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[6] CPR Rule 46.1.
[7] *McCarthy v Jones* [2023] EWCA Civ 589 at [72]-[76].
[8] See White Book 2025 at paras 31.17.6 & 46.1.2.
[9] The interpretation of "likely" adopted in *Three Rivers DC v Bank of England (No. 4)* [2002] EWCA Civ 1182 at [43], likelihood for the purposes of NPD is a lower standard than more-likely-than-not.

obliged to seek to preserve the confidentiality of the affairs of its late customer, even against his personal representatives, but it is unclear to the authors how this can be so.

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