[2013] UKPC 1
Privy Council Appeal No 0060 of 2011

JUDGMENT

Ebbvale Limited (Appellant) v Andrew Lawrence Hosking (Trustee in Bankruptcy of Andreas Sofroniou Michaelides) (Respondent)

From the Court of Appeal of the Commonwealth of the Bahamas

before

Lord Walker
Lord Mance
Lord Clarke
Lord Wilson
Lord Carnwath

JUDGMENT DELIVERED BY LORD WILSON ON

30 January 2013

Heard on 12 July 2012

Appellant
Paul Chaisty QC
Jason T Maynard

(Instructed by Arnold & Porter)

Respondent
Christopher Parker QC

(Instructed by Holman Fenwick Willan LLP)

LORD WILSON:

Introduction

1. This appeal, which was heard on 12 July 2012, requires the Board to consider the circumstances in which a petition for an order that a company be wound up should be dismissed as being an abuse of the process of the court.

2. The appeal is brought by Ebbvale Ltd ("the company") against an order of the Court of Appeal (Sawyer P, Blackman and John JJA) dated 19 April 2010, whereby it dismissed the company's appeal against an order of the Supreme Court, Commercial Division, (Lyons SJ) dated 28 August 2008 that it be wound up.

3. On 30 January 2001 the company was incorporated in the Bahamas as an International Business Company; and it is registered there. The issued shares are held by, or at any rate in the name of, Mr Meletiou, a resident of Cyprus.

4. The respondent to the appeal is recorded as being Mr Andrew Hosking. Following the hearing, an issue has arisen about his status as the respondent to it. The circumstances surrounding the issue are as follows:

(a) Mr Hosking was a licensed insolvency practitioner. Although the Board now learns that in April 2011 he resigned as a director of the Insolvency Practitioners Association, he has presumably continued to hold a licence to practise.

(b) At the hearing it was understood by the company, by the Board and even by those representing him, that Mr Hosking was a member of Grant Thornton UK LLP. It is now clear that he resigned from membership of the firm on 30 June 2011.

(c) On 21 December 2000, in England and Wales, Mr Andreas Michaelides had been adjudicated bankrupt and Mr Hosking had been appointed as trustee in bankruptcy of his estate. It is irrelevant that in due course Mr Michaelides was discharged from the bankruptcy.

(d) As trustee of Mr Michaelides' estate, Mr Hosking had, in circumstances which the Board will explain, become a creditor of the company.

(e) It was Mr Hosking who, in that capacity, had successfully petitioned for the order, dated 28 August 2008, that the company be wound up. He had therefore been made the respondent to the company's appeal to the Court of Appeal and to its further appeal to the Board.

(f) At the hearing before the Board it was understood by the company, by the Board and even by those representing him, that Mr Hosking continued to be the trustee in bankruptcy of Mr Michaelides' estate. By a letter to the Registrar of the Judicial Committee dated 20 September 2012, however, the company's solicitors explained that they had recently come to understand that, by the date of the hearing, Mr Hosking was no longer the trustee.

(g) The understanding of the company's solicitors turns out to have been correct. On 22 May 2012, on the joint application of Mr Hosking and of Mr Nicholas Wood, who is a member of Grant Thornton, a Registrar of the Companies Court had ordered that Mr Hosking be removed from his office as trustee in bankruptcy of Mr Michaelides' estate and that Mr Wood be appointed to the office in lieu of him. It also transpires that, following the hearing before the Board, namely on 2 August 2012, the Secretary of State released Mr Hosking from his liabilities as trustee pursuant to s 299(3)(b) of the Insolvency Act 1986.

5. The resulting issue about the right of Mr Hosking to have continued to oppose the appeal should not become a distraction from the subject-matter of the appeal; the Board will append a short resolution of it in a postscript to this judgment.

History

6. For a period until 19 December 2000 Mr Michaelides was registered at the Land Registry of England and Wales as the owner of properties which together formed Sunnyside Service Station, 87 Sunnyside Road, Crouch End, London N19. Sunnyside (which will be a convenient name for the properties) is, or was, a petrol station but it has development potential; and, at the hearing before the Supreme

Court, Commercial Division, the company alleged that it was worth several million pounds. On any view it was, and is, of substantial value.

7. On 19 December 2000, namely two days prior to the adjudication of Mr Michaelides as bankrupt and to the appointment of Mr Hosking as his trustee, Mr Leonidas Andreou and Mr Pantelis Andreou, who are alleged to be brothers, became the registered owners of Sunnyside.

8. Following his appointment Mr Hosking formed the view that Messrs Andreou did not exist or that, if they did exist, they were not genuinely involved in the acquisition of Sunnyside. He considered that the change in the registration of ownership of Sunnyside was purely cosmetic and that, in law or at least in equity, Mr. Michaelides had remained its owner on the date of the adjudication and that accordingly Sunnyside had then vested, and should be recognised as having vested, in him. So in August 2001 Mr Hosking registered a caution against Sunnyside. And in December 2003 he commenced proceedings in the High Court of England and Wales, Chancery Division, for a declaration that, if they existed, Messrs Andreou, whose names to this day remain on the register as the legal owners of Sunnyside, held the title on a bare trust for him and that the Land Register be so rectified as to show him to be its owner. Messrs Andreou, if they exist, have taken no part in the proceedings.

9. Meanwhile, however, Mr Hosking had been apprised of an allegation that in September 2001 Messrs Andreou had sold Sunnyside to the company. The allegation was that the company had paid £750k for Sunnyside, of which £380k had been advanced out of a loan of £450k which in June 2001 National Westminster Bank plc ("the bank") had made to the company. Mr Hosking was also told that, as a result of the caution which he had registered, the company had been unable to register its title to the property and that, for the same reason, the bank had been unable to register the mortgage on Sunnyside upon which it had insisted by way of security for the company's repayment of the loan of £450k plus interest. Sceptical about the ultimate destination of the £380k and about both the source and, again, the ultimate destination of any other money paid towards the balance of the alleged purchase price of £750k, Mr Hosking formed the view that the company was under the effective control of Mr Michaelides and that, accordingly, the alleged sale of Sunnyside to it was but a further attempt on his part to hide his continuing ownership of it. When in December 2003 he came to issue the proceedings for the establishment of his ownership of Sunnyside, Mr Hosking therefore made the company a further defendant to them; and, inasmuch as the bank was claiming to hold a mortgage on property which he alleged to be vested in himself, he made the bank yet a further defendant to them.

10. Criminal proceedings were brought in England against Mr Michaelides in relation to Sunnyside. The charge was that he had conspired to defraud the creditor who had petitioned for his bankruptcy and who at one stage had held security over Sunnyside. The action brought by Mr Hosking was stayed pending resolution of the criminal proceedings. In the Spring 2007 Mr Michaelides was acquitted of the charge, whereupon the stay was lifted and Mr Hosking's action began actively to proceed.

11. In September 2007 Mr Hosking reached a settlement of his claim as against the bank. The terms were that, in consideration of payments to the bank of £80k by Mr Hosking (the source of which he does not make clear) and of £295k by solicitors who had represented not only the company but also, as one might infer, the bank in the purported purchase and mortgage of Sunnyside, the bank would assign to him both the debt owed to it by the company amounting to £450k plus interest (of repayment of which the company was by then in default) and the purported mortgage over Sunnyside; and the assignments were effected on 5 October 2007.

12. Mr Hosking's purchase of the bank's debt was on any view an unusual transaction for a trustee in bankruptcy to enter into. His purpose in doing so has not been clearly explained but, as Lord Mance suggested in the course of the hearing, it could be regarded as a way of his insuring against the possible loss of his action against the company. Were he to lose, he would have a substantial claim against the company, acquired by him for a small fraction of its value, and Sunnyside would represent ample security for it. But, were he to win, it might well be impossible to enforce the debt: for the company appears never to have had any substantial assets apart from its alleged interest in Sunnyside and the mortgage would be void inasmuch as, in that event, the company would have no mortgageable or other interest in Sunnyside, ownership of which indeed would already be vested in Mr Hosking himself.

13. It is clear, however, that Mr Hosking's acquisition of the bank's debt also enabled him to apply pressure to the company in relation to his action, to which by then it was the only active defendant.

14. Early in March 2008 Mr Hosking served on the company, at its registered office in Nassau, a statutory demand for payment of £582k, comprising the principal debt of £450k plus interest. The demanded payment was not made but the company has never disputed its liability to make it. Mr Hosking's petition to the Supreme Court for an order that the company be wound up for failure to respond to the demand bears a court stamp dated 1 May 2008; but it appears that he was unable to present it to the Registrar, in accordance with the rules, until 9 June 2008. In the petition Mr Hosking alleged that the debt had risen to £588k.

15. Meanwhile Mr Hosking's English action had been set down to be heard by a judge of the Chancery Division for four to five days (later extended to seven to eight days) beginning on 27 October 2008. In July 2008 Mr Hosking applied for vacation of the hearing dates. He alleged that the company had been slow to file its defence and to give disclosure, as a result of which he would have insufficient time to prepare for trial. The company energetically opposed his application to vacate the dates; and on 7 August 2008 David Richards J refused it.

16. At the hearing on 7 August 2008 David Richards J was informed of Mr Hosking's petition to wind up the company, which by then was fixed to be heard on 28 August 2008. Although he made clear that nothing said by him was intended to pre-empt the outcome of that hearing, he made remarks in the course of the hearing, on which the company heavily relies. Unfortunately the parties did not bespeak a transcript of his remarks but the account given by the company's English solicitor of what the judge said, set out first by letter and later in affidavit, was only limply disputed on behalf of Mr Hosking; and it seems appropriate to rely on the solicitor's version.

17. David Richards J remarked that:

(a) it was obvious that the presentation of the winding-up petition was strategic, designed to secure for Mr Hosking an advantage in the proceedings before him;

(b) Mr Hosking was seeking to attack the company through the back door and to storm the castle from both sides;

(c) were a liquidator to be appointed on 28 August 2008, there might need to be the adjournment of the trial which Mr Hosking was seeking but to which, on the material presently filed, he was not entitled; and

(d) Mr Hosking might be able to secure a more favourable settlement of the action if a liquidator were to begin to direct the company's defence of it.

18. In referring to the possibility that Mr Hosking might achieve settlement with a liquidator, the judge was elaborating on a point made by Mr Hosking's solicitor in a witness statement placed before him, as follows:

> "The merits of the Petition in the Bahamas does not concern the Court here. If Ebbvale is wound up, that does not necessarily mean that the liquidator will choose not to continue the defence of the English proceedings. What it does mean however is that the liquidator, being an independent professional third party, will consider the defence and other relevant factors. The liquidator's role will be to take a balanced view as between all those interested in Ebbvale, which will include its creditors, shareholders and those who control it."

The reference to the "creditors" of the company appears to be a reference not only, of course, to Mr Hosking but also to Mr Meletiou, the ostensible owner of the company, who claims to have lent money to it in order to help it to buy Sunnyside and to fund its costs of defending Mr Hosking's English action.

19. In their skeleton argument in support of the winding up petition the attorneys for Mr Hosking elaborated on the point which his English solicitor had made. They pointed out that:

(a) interest was accruing on the debt and was not being paid;

(b) were Mr Hosking to win the English action, the debt would be unsecured;

(c) Mr Hosking was incurring substantial costs in the English action which, were he to win, would probably be the subject of an order for costs which could not be enforced against the company because, in that event, it would probably have no substantial assets; and

(d) the company was therefore in the inappropriately favourable position of proceeding with its defence of the English action, with funds ostensibly provided by Mr Meletiou, in the knowledge that, were it to lose, any order for costs against it would probably be unenforceable.

20. Fortified, however, by the comments of David Richards J, the company based – and, before the Board continues to base – its opposition to the winding-up petition on the proposition that the purpose of Mr Hosking in bringing it was improper and such as to render it an abuse of the process of the court. The company also made other points which are no longer pursued.

21. In the written judgment by which he explained the reasons for his decision on 28 August 2008 to order that the company be wound up, Lyons SJ said:

> (a) that, in presenting the petition, Mr Hosking was "playing hard ball" but that any advantage in the English action to be derived by him from the winding-up would not be unfair;
>
> (b) that the liquidator would be likely to instruct the company's existing solicitors and counsel in the English action and that he should be able to make himself ready for the trial fixed to begin on 27 October 2008; and
>
> (c) that it was unrealistic to consider that Mr Hosking, an officer of the court, and a Bahamian liquidator, also an officer of the court and answerable to the judge himself, would reach a settlement of the English action which favoured Mr Hosking and prejudiced the company in a manner not reflective of the merits of the dispute.

22. On 7 October 2008 the company filed notice of appeal against the judge's order that it be wound up. At around that time the dates, beginning on 27 October 2008, for the trial of the English action were vacated, apparently by consent. The basis of their vacation is not clear but the trial could hardly have proceeded during the pendency of the appeal.

23. In her written judgment dated 19 April 2010, with which the other two members of the court agreed, Dame Joan Sawyer, President of the Court of Appeal, upheld the order of Lyons SJ in effect for the reasons which he had given.

24. No doubt it is because of the company's further appeal to the Board that the English action still remains unheard. Counsel for Mr Hosking informed the Board that, conditional upon the dismissal of the present appeal and upon the approval of the Supreme Court, Commercial Division, the liquidator, pursuant to the advice of counsel, has entered into a settlement with him of the English action.

Discussion

25. Analysis of the entitlement of an unpaid creditor to a winding-up order should begin with a general proposition, which, in *In re Amalgamated Properties of Rhodesia (1913) Ltd* [1917] 2 Ch 115 Sargant J articulated as follows, at p 121:

> "the petitioners, as judgment creditors for this very large sum, are prima facie entitled ex debito justitiae to a winding up order, and it seems to me to be impossible to displace that prima facie position without the very strongest proof that the petition is being improperly made use of for some ulterior motive."

In *In re Southard & Co Ltd* [1979] 1 WLR 1198 Buckley LJ put the proposition as follows, at p 1203E-F:

> "where the debt is established and not satisfied and there are no exceptional circumstances, the creditor is entitled to expect the court to exercise its jurisdiction in the way of making a winding up order."

But the debt must in effect be undisputed or not able to be disputed: if the company disputes the debt on substantial grounds, the petitioner will be restrained from proceeding with it on the basis that he should first establish his debt by an ordinary action in the appropriate court: *Mann v Goldstein* [1968] 1 WLR 1091. Indeed, if, while acknowledging the debt, the company has a cross-claim of substance against the petitioner in an amount not less than the debt, the court is likely, in the absence of special circumstances, so to exercise its discretion as to dismiss the petition: *In re Bayoil SA, Seawind Tankers Corp v Bayoil SA* [1999] 1 WLR 147.

26. Sometimes a petitioner who presents, or threatens to present, a winding-up petition seeks not to obtain an actual order but rather, by the application of pressure on the company and in particular through the prospect of damaging publicity as a result of the requisite advertisement of the petition, to cause it to act in a particular way. Such is a classic example of abuse of the process of the court, which will lead it to accede to an application by the company to stay the petition or, by injunction, to preclude its presentation. Thus in *Cadiz Waterworks Company v Barnett* (1874) LR 19 Eq 182 Sir Richard Malins V-C enjoined an alleged creditor from presenting a petition because his object was to pressurise the company into paying his alleged debt rather than continuing to dispute it. In *In re A Company* [1894] 2 Ch 349 a disaffected shareholder petitioned for a winding-up order in order to secure what he regarded as an improvement in its management. In a passage on which the company in the present case relies, Vaughan Williams J held, at p 351:

> "In my judgment, if I am satisfied that a petition is not presented in good faith and for the legitimate purpose of obtaining a winding-up order, but for other purposes, such as putting pressure on the company, I ought to stop it if its continuance is likely to cause

damage to the company. I think those reasons apply in the present case..."

In *Charles Forte Investments Ltd v Amanda* [1964] Ch 240 the English Court of Appeal approved the decision of Vaughan Williams J when restraining a threatened presentation of a petition by a shareholder whose purpose had been thereby to put pressure on the company's directors to exercise their discretion to register a transfer of his shares. And in *Re Bellador Silk, Ltd* [1965] 1 All ER 667 Plowman J dismissed a petition brought by a shareholder whose object was not that the company be wound up but that it should repay a loan to another company in which he was interested. In a passage on which, again, the company relies, Plowman J said, at p 672 A-B:

"A petition which is launched not with the genuine object of obtaining the relief claimed, but with the object of exerting pressure in order to achieve a collateral purpose is, in my judgment, an abuse of the process of the court, and it is primarily on that ground that I would dismiss this petition."

27. But the problem for the company is that Mr Hosking undoubtedly did want - and has continued to want - the winding-up order to be made, with the result that the four authorities referred to in para 26 above, and thus the statements of principle therein, are not in point.

28. The problem leads the company on this appeal to place its principal reliance on the decision of Harman J in *In re a company* [1983] BCLC 492. The facts of the case were extreme. The major asset of the company, which was in financial difficulties, was a lease, of which a term was that, were a petition to wind up the company presented prior to 1 April 1983, the landlord would terminate the lease and grant a new lease to the petitioner. On 15 March 1983 a court made an order for costs, to be taxed if not agreed, against the company in favour of the petitioner; and on the same day, in the absence either of agreement, or of course of taxation, of the costs, the petitioner, as a prospective creditor, presented a petition to wind up the company. Harman J acceded to the company's application to dismiss the petition as an abuse of the court's process. He said, at p 495 c-i:

"The true position is that a creditor petitioning the Companies Court is invoking a class right... and his petition must be governed by whether he is truly invoking that right on behalf of himself and all others of his class rateably, or whether he has some private purpose in view. It has long been the law that a petition presented for the

purpose of putting pressure on the company is not properly presented: see *In re a company* [1894] 2 Ch 349 and in a slightly different context *Re Bellador Silk Ltd* [1965] 1 All ER 667.

The question for me, therefore, is whether I am satisfied that the petitioner seeks this winding up for the benefit of his class. I am not concerned with his motives or with the past conduct of the company, which was here deplorable or worse and which may have led the petitioner to have justifiable dislike for and a desire to see the downfall of some person such as the main protagonist in the company... the only proper purpose for which a petition can be presented is for the proper administration of the company's assets for the benefit of all in the relevant class. To hold otherwise would be to confuse motive, which is past, with purpose, which is future.

The question, therefore, is not 'does the petitioner genuinely wish to wind up this company', as counsel for the petitioner... submitted. It would be hard for me to find that this petitioner, which has taken all regular steps to prosecute its petition and which plainly has reasons to desire the winding-up of this company, since that must put beyond much cavil the future of the company's lease, does not in truth desire to wind up the company. In my judgment the true question is 'for what purpose does the petitioner wish to wind up this company'. A judge has to decide whether the petition is for the benefit of the class of which the petitioner forms a part or is for some purpose of his own. If the latter, then it is not properly brought.

If the petitioner can show that he and his class stand together and will benefit or suffer rateably, then his ill motive is nothing to the point. But here it is plain that no such even-handedness exists. If the petition is properly brought, then the petitioner stands to get a valuable asset for itself and the rest of the class of creditors are likely to get nothing."

In drawing the distinction between motive and purpose Harman J appears to have taken "motive" to embrace the reasons which have led a petitioner to embrace his "purpose". On that basis he was right to observe that "motive" was irrelevant – the English Court of Appeal had also said so in *Bryanston Finance Ltd v De Vries (No 2)* [1976] Ch 63, at p 75E - although it may have been a little glib for him to say that, whereas "purpose" was future, "motive" was past.

29. What, then, has been Mr Hosking's purpose in seeking that the company be wound up? Before Lyons SJ the company's primary contention was that his purpose was to secure the adjournment of the English trial to which, three weeks earlier, David Richards J had held that he was not entitled. Such was a very difficult contention in light of the facts that Mr Hosking had served the statutory demand in March 2008 and had presented the petition on 9 June 2008, well prior to the time when he appears to have formed the view that he needed an adjournment. Before the Court of Appeal, and certainly before the Board, the company's contention became, instead, that the purpose of Mr Hosking was to replace the direction of the company's defence of the English action by its directors with that of a liquidator who might prove to be a weaker opponent, and thereby to secure for himself an unfair advantage in the litigation. Indeed, by his English solicitor and, later, his attorneys, Mr Hosking had admitted that his purpose was to vest direction of the company's defence to the English action in a liquidator (see paras 18 and 19 above); but he had in effect argued that a liquidator would be likely to be not a weaker opponent but one who would direct the defence in a manner more responsive to the true interests of the company, whether such would be to pursue it if it was clearly likely to succeed, to abandon it on the least unfavourable terms if it was clearly likely to fail or to seek compromise on more favourable terms if the likely result was not clear-cut. Such (ran his argument) would be for the benefit of all those genuinely connected to the company, whether, like himself, as a creditor or indeed as a contributor.

30. Here lies the heart of the appeal.

31. In *In re Wallace Smith & Co Ltd* [1992] BCLC 970 a company, acting by its liquidators, presented a petition for the winding-up of Wallace Smith and Co Ltd ("Wallace Smith"). The petitioner, by its liquidators, had also issued proceedings in Canada against Wallace Smith, which remained pending. The petitioner's liquidators intended that, in the event of a winding-up order, they themselves or their associates should be appointed as the liquidators of Wallace Smith. Inevitably the judge found that such would give rise to an acute conflict of interest in relation to the Canadian proceedings and observed that, had there not been another reason to dismiss the petition, he would have dismissed it for that reason.

32. In the present case there is no suggestion that Mr Culmer, the accountant in the Bahamas whom Mr Hosking successfully sought to be appointed as the company's liquidator, and whom the judge described as a very experienced professional in whom he had full confidence, had any connection with him. In its appeal, however, the company relies on an observation made by Nourse LJ in *In re Bayoil SA*, cited above, in the course of explaining why, where a company had a cross-claim of substance against the petitioner, the court would usually dismiss the petition that the company be wound up. He observed, at p 155E:

> "Nor can it be certain that a liquidator, even with security behind him, will prosecute the company's claims with the diligence and efficiency of its directors."

But in *In re Latreefers Inc, Stocznia Gdanska SA v Latreefers Inc* [1999] 1 BCLC 271 one of the company's objections to the winding-up petition was that, in assuming the direction of its counterclaim against the petitioner in other pending proceedings, a liquidator would be likely to pay undue respect to the views of the petitioner as the company's largest creditor and thus that an order would in effect stifle the counterclaim. Lloyd J dismissed the objection. He said, at p 284a:

> "...the task would be undertaken by an independent insolvency practitioner, as an officer of the court, able to apply what may be a greater degree of objectivity to the task than can either of the warring parties in the present litigation."

33. The conclusions of the Board are as follows:

(a) It has no view about where the merits of the English action between Mr Hosking and the company lie.

(b) There is no doubt that Mr Hosking's purposes in presenting the petition for the company to be wound up were intimately related to the English action.

(c) It is indeed probably the case that Mr Hosking regarded a winding-up order as likely to be of advantage to him in his capacity as the claimant in the English action as well as in his capacity as the petitioning creditor. For the company's continued defence of the action was leading him to incur very substantial costs in its continued prosecution and was thus generating a potential increase in its total liability to him and a corresponding increase in the risk that such could not be met. In his capacity as claimant in the action Mr Hosking therefore probably considered it advantageous to secure a winding-up order which might lead to his saving of some such costs.

(d) But a winding-up order was also, objectively, likely to be of substantial advantage to him in his capacity as the petitioning creditor; and to secure such an advantage was the other of his purposes. It is not necessary that it should have been his principal

purpose: see *In re Millennium Advanced Technology Ltd* [2004] EWHC 711 (Ch), [2004] 1 WLR 2177 at para 42 (Michael Briggs QC sitting as a deputy High Court judge).

(e) For Mr Hosking, as trustee, was a large creditor of the company; his debt was contingently unsecured and he was not even in receipt of interest. It was in the interests of the insolvent company, and in particular of himself in that capacity, that, before it proceeded, from some source or other, to incur yet further indebtedness with which to fund the maintenance of its defence at a trial estimated to last for seven or eight days, a professional decision should be taken on its behalf about the further conduct of the defence and, in the light of the latter's apparent strength or otherwise, about the terms of any compromise which it would be commercially sensible for it to propose to Mr Hosking.

(f) In its defence of the winding-up petition the company therefore failed to establish that Mr Hosking's petition represented an abuse of the process of the court and failed to displace his entitlement to an order.

34. The Board will therefore humbly advise Her Majesty that the appeal should be dismissed and that, subject to para 37 below and in the absence of representations to the contrary filed on behalf of the company within 21 days of the date of delivery of this judgment, it should be ordered to pay Mr Hosking's costs of it.

Postscript

35. The significance of Mr Hosking's replacement by Mr Wood as trustee in bankruptcy has been the subject of protracted and contentious written submissions and of a witness statement by Mr Wood. Mr Hosking remained on the record, and ostensibly continued to give instructions to solicitors and counsel, when he was no longer an office-holder with authority to do so. The fact that he remained personally liable for costs did not by itself prolong his official authority, which came to an end on 22 May 2012.

36. The correct course would have been a routine application under rule 31 of the Judicial Committee Rules for Mr Wood to become the respondent in place of Mr Hosking. The omission to make such an application understandably led to doubt as to whether Mr Wood had given authority for continued opposition to the appeal.

It appears from Mr Wood's witness statement that he took no legal advice about any of these matters, which is surprising, but that he did know and approve of the continued opposition to the appeal.

37. The course taken by the successive office-holders was not best practice. It was irregular, but not so as to raise any doubt about the validity of the appeal hearing. The company's advisers were entitled to raise the point when it came to their notice; but their contentions about the proper consequences of the irregularity have been extravagant. There is no point in making a substitution order now. As to costs, the Board proposes to order that each side should bear its own costs of the issue as to the status of Mr Hosking.