
**Michaelmas Term**
[2016] UKPC 33
**Privy Council Appeals No 0114 of 2013; 0017/2014 and 0040 of 2014**

# JUDGMENT

# PricewaterhouseCoopers (Appellant) *v* SAAD Investments Company Limited (In Official Liquidation) and another (Respondents) (Bermuda)

# PricewaterhouseCoopers (Appellant) *v* SAAD Investments Company Limited (In Official Liquidation) (Respondent) (Bermuda)

# Singularis Holdings Ltd (In Official Liquidation) (Appellant) *v* PricewaterhouseCoopers (Respondent) (Bermuda)

## From the Court of Appeal of Bermuda

**before**

**Lord Neuberger**
**Lord Mance**
**Lord Clarke**
**Lord Sumption**
**Lord Collins**

## JUDGMENT GIVEN ON

## 17 November 2016

**Heard on 9 June 2016**

*Appellant/Respondent*
David Chivers QC

(Instructed by Herbert Smith Freehills LLP)

*Respondents/Appellants*
Felicity Toube QC
Stephen Robins
(Instructed by Blake Morgan LLP)

**LORD MANCE:**

1. This judgment is supplementary to those delivered by the Board on 10 November 2014 in proceedings between PricewaterhouseCoopers ("PwC") and Saad Investments Co Ltd ("SICL") [2014] UKPC 35: [2014] 1 WLR 4482 and between PwC and Singularis Holdings Ltd ("SHL") [2014] UKPC 36: [2015] AC 1675. The issue now for decision concerns the costs incurred by PwC, which is a registered exempted partnership in Bermuda, in preparing to comply with two orders for disclosure of documents made by Kawaley CJ on 15 April 2013. Both orders were set aside - in the proceedings involving SICL by the Court of Appeal whose judgment was upheld by the Board and in the proceedings involving SHL by the Board.

2. The full history is set out in the Board's previous judgments. For present purposes, what is relevant is that both SICL and SHL were incorporated in the Cayman Islands, both had been ordered to be wound up there in or about 2009 and in the course of their winding up there their Liquidators had obtained disclosure from PwC of documents belonging to SICL and SHL. The Liquidators wished however to obtain wider disclosure of PwC's working files relevant to give the Liquidators a fuller understanding of the affairs of SICL and SHL. In the present context, it will be convenient to continue to refer to them as the Liquidators, although, as will appear, they never were in the case of SHL, and should never have been in the case of SICL, in Bermuda.

3. With a view to obtaining the wider disclosure which they desired, the Liquidators applied for, and in September 2012 obtained, a winding up order in Bermuda in respect of SICL on the basis that SICL held assets there and/or that such an order was just and equitable. They followed this up by applying for, and on 4 March 2013 obtaining, an ex parte order under section 195(3) of the Bermudan Companies Act 1981 requiring PwC to produce the further books or papers in their custody or power. In the case of SHL no attempt was made to wind up SHL, and the Liquidators simply applied for, and on 4 March 2013 obtained, an ex parte order against SHL "by analogy with the statutory powers contained in section 195".

4. PwC applied inter partes to discharge the ex parte orders. On 15 April 2013, Kawaley CJ refused to set them aside, but, after hearing submissions about the time frame required for compliance, he extended this to require production within four months of 1 April 2013, and by no later than 1 August 2013. The extension was sought to give sufficient time for compliance, and not because of the possibility of an appeal. The Chief Justice did however have the possibility of an appeal in mind, as his judgment records at para 93, where he said that the extended period:

> "achieves a more clear-cut result and also takes into account the reality that PwC Exempted may wish to pursue its appeal rights, a possibility that I somewhat delicately sought to elicit at the hearing but a topic upon which counsel refused to be drawn. The next session of the Court of Appeal is in just over two months' time."

5. PwC did in due course appeal. Its appeals were heard on 13, 14 and 18 June 2013. On 18 July 2013, PwC applied to the Supreme Court of Bermuda and obtained a further extension of the time for disclosure until 14 days after the handing down by the Court of Appeal of its judgment. In the event this occurred on 18 November 2013. The Court of Appeal, in a single set of judgments, quashed the order obtained by SHL and by a majority dismissed the appeal in respect of the SICL disclosure order, but (subject to a carve-out, which in the light of subsequent orders, became irrelevant) continued the stay of the SICL disclosure order until after the Board had given judgment allowing PwC's appeal in that case.

6. After 15 April 2013 and before the date the appeals to the Court of Appeal were decided (in probability before the end of July 2013), PwC did the preparatory work necessary to enable compliance, if required, with Kawaley CJ's orders by 1 August 2013. The work was undertaken internally, and PwC wishes to recover in respect of it some USD250,000, said to derive from some 1,500 hours of staff work at ordinary charging out rates.

7. That this was PwC's estimate of the cost of the work was put before Kawaley CJ by Trent Lyndon, PwC's General Legal Counsel, in an affidavit sworn on 22 March 2013. He gave this figure by reference to the cost of the exercise conducted in the Cayman Islands (which PwC had been required to undertake without indemnification). Mr Lyndon put the figure forward in arguing that the order for disclosure was, in the absence of any offer to pay anything towards either this or the Cayman Islands exercise, "totally unreasonable" and should not be permitted. Kawaley CJ did not accept this argument, but upheld the two orders with an extended time limit, as already mentioned, without making any reference in his judgment to the costs of, or preparatory to, compliance.

8. In their appeal to the Court of Appeal, PwC submitted that the orders should be discharged because (as its skeleton argument put it):

> "… the court did not rule upon the appellant's argument that the respondents should give an undertaking for the appellant's costs of complying with the Orders.

> 89. The court was asked to determine this point and did not do so. This court is invited to order the "[Liquidators]" to give such an undertaking rather than remit the question back [to] the Supreme Court. The respondents are invited to give such an undertaking to avoid the need for it to be addressed, but this point will be dealt with in submissions to the extent necessary."

9. The majority of the Court of Appeal, having allowed PwC's appeal in respect of the SHL order, but dismissed it in relation to the SICL order, dealt with this submission for reasons given by Bell AJA as follows:

> "**The Cost of Compliance**
>
> 62. As I indicated, the grounds of appeal referred to a figure 'in excess of $500,000' as the cost of complying with the orders made in both Cayman and Bermuda. In its skeleton argument, PwC Exempted indicated that the Chief Justice had been asked to determine this point and had not done so, and asked the Joint Liquidators to give an undertaking in regard to costs rather than have the matter remitted to the Supreme Court. The evidence of Mr Lyndon was that the Joint Liquidators had required PwC Exempted to spend 1,500 hours and incur over $250,000 in costs, but it appears that those figures related to the cost of compliance with the Cayman orders, and presumably the figure of $500,000 appearing in the grounds of appeal was reached simply by doubling that figure. Certainly, we were shown no evidence as to how this figure was reached. Mr Attride-Stirling [counsel for the Liquidators] submitted there was no authority for the court to make an order which recovered management time spent in compliance, which presumably would constitute the lion's share of the cost in this case. Mr Chivers for his part accepted that the figure for costs had not been broken down, and did not provide authority for the undertaking or order which he sought.
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> 63. In the absence of authority, I would not make an order that the Joint Liquidators either be responsible for or give an undertaking in relation to the cost of compliance with the orders made by the Chief Justice, particularly in circumstances where the cost of compliance is far from clear."

The way in which the Court of Appeal put the matter indicates that it saw the issue ultimately as one involving the exercise of a discretion in circumstances for which there was no authority, rather than as one of strict jurisdiction.

10. Before the Board, the matter was put by PwC in its written case by reference to two points: first, the need for an undertaking, both at the ex parte and later at the inter partes stage, in respect of compliance costs coupled with a submission that there was an implied undertaking, in the absence of any such express undertaking; and, second, the principle in *In re Condon, Ex p James* (1874) 9 Ch App Cas 609 that officers of the court should not be permitted to benefit by their own error. Reliance was placed on dicta in the Board's previous judgment in the proceedings involving SHL by Lord Sumption and Lord Mance at paras 25 and 121 respectively about the need for an appropriate order or undertaking in situations such as the present. Lord Sumption said "as with other powers of compulsion exercisable against an innocent third party" the exercise of a common law power to compel production of information was "conditional on the applicant being prepared to pay the third party's reasonable costs of compliance". Lord Mance said that "PwC should have been protected" in respect of the costs of compliance, since "Common justice and established practice relating to freezing injunctions, *Anton Pillar* orders and *Norwich Pharmacal* relief should have confirmed the need for an appropriate order or undertaking in that respect".

11. In the course of oral submissions, Mr Chivers QC for PwC addressed submissions which relied on two further principles additional to those identified in his written case. He sought, as a third ground, to draw an analogy with the principle in *Norwich Pharmacal Co v Comrs of Customs and Excise* [1974] AC 133, according to which a person innocently mixed up in another's apparently tortious conduct is under a duty to assist the victim by disclosing information in his possession which may help pursue the tortious claim. In that case, Lord Reid said (p 175C) that "It may be that if this causes him expense the person seeking the information ought to reimburse him", while Lord Cross (at p 199G) put the matter more positively, saying that "The full costs of the respondent of the application and any expense incurred in providing the information would have to be borne by the applicant".

12. Fourthly, he took up references in SHL's and SICL's written case to the principle in *In re Aveling Barford* [1989] 1 WLR 360 and *In re Bank of Credit and Commerce International SA* [1997] BCC 561, according to which there is, in the case of orders obtained under provisions such as section 195 by those responsible for the affairs of a company in receivership or insolvency requiring a third party to assist with information in the public interest, no presumption that the costs of compliance will be covered, but the appropriate time for considering any application for such costs will be after full compliance with the order.

13. In the present case, it is clear that what PwC were seeking from Kawaley CJ and from the Court of Appeal was that their internal costs of compliance should be covered, by undertaking (or if not then perhaps by order) ancillary to the disclosure orders. They were not seeking protection against the possibility of the disclosure orders made by Kawaley CJ being set aside. Such protection could have been sought by inviting the Liquidators to give an undertaking to cover the costs wasted, if the disclosure orders were set aside after preparatory work was done, but before compliance by actual disclosure. Alternatively, PwC could have applied to Kawaley CJ or by urgent application to the Court of Appeal for a stay of the disclosure orders unless such an undertaking was given. In fact, however, they sought and failed to obtain an outright undertaking or order for costs in any event.

14. Mr Chivers laid stress on what he described as the Liquidators' failure to tender an undertaking at the ex parte stage. But this is not in the Board's judgment relevant in relation to the preparatory costs incurred. The Liquidators were seeking a final not an interim order. There would be and was the opportunity for PwC to apply to have the order set aside inter partes before they incurred any costs preparatory to compliance with it. If PwC have any complaint about the absence of an undertaking, it must relate to the judge's failure to extract one at that stage. But in fact, as already pointed out, the judge was not asked to give an undertaking against the possibility of an appeal. He was asked to make an order for SHL and SICL to bear the costs of compliance in any event. SHL and SICL resisted the suggestion that they should give any undertaking. The judge accepted in effect that they should not by allowing the orders to stand as final orders not subject to any condition.

15. Should the judge have extracted an undertaking at the inter partes stage against the possibility of a successful appeal? And is any undertaking to be implied when he did not do so? The basic position is that undertakings are voluntary. Orders may be made conditional upon their giving, but the person required to give an undertaking as a condition of obtaining an order has the opportunity to consider whether or not to forego the order or give the undertaking. In an English context, the law and practice regarding the giving of a cross-undertaking as the "price" of an injunction pending trial was examined fully, and in the Board's view accurately, by Lewison J in *SmithKline Beecham Plc v Apotex Europe Ltd* [2005] EWHC 1655 (Ch); [2006] 1 WLR 872, paras 25-52. He considered a passage in Gee's *Mareva Injunctions and Anton Pillar Relief*, 4th ed (1998) adopted by Laddie J in *A Bank v A Ltd* (The Times, 18 July 2000) and explained this in the light of prior authority not all of which had been cited to Laddie J. This included *Tucker v New Brunswick Trading Co of London* (1890) 44 Ch D 249. On appeal, Lewison J's reasoning was effectively uncontroversial: see [2006] EWCA Civ 658; [2007] Ch 71, paras 23-32.

16. In the English legal context, there are practice notes or rules which in certain contexts make clear that an interlocutory application will carry with it, unless the contrary is made clear, an implied cross-undertaking by the applicant. In those contexts,

consent is taken as existing. It is still not imposed against the applicant's will, and, if the applicant makes clear that he does not consent, the order will not be made. Lewison J referred to cases of undertakings which can be taken as implied, on the basis of such notes or rules or by invariable custom and common understanding, in paras 26, 30 and 32 of his judgment. But he also made clear that he was speaking throughout of interim injunctions pending trial (see eg paras 25, 31-32, 34 and 44), and that, even then, it was necessary to examine closely the contexts in which and extent to which it had become standard practice to extract a cross-undertaking (see eg paras 50-52 and 55-57).

17. The Board was not referred to any Bermudan practice direction, note, rule or customary understanding relevant in the present situation. It is, however, prepared to assume that it may well be understood in Bermuda that a cross-undertaking is expected or, in the absence of anything said to the contrary, implied, when an interim injunction is obtained pending trial. But the present case is not concerned with an interim injunction or even with interim disclosure orders. On the contrary, it concerns final disclosure orders, upheld on an inter partes basis. There is no practice to require a cross-undertaking in respect of loss which may be incurred as a result of a final judgment or order, which may be and is the subject later of a successful appeal. Further and in any event, SHL and SICL or their Liquidators made clear that they were not willing to undertake any responsibility for the costs of compliance which were sought. There is and was therefore no basis for treating the orders confirmed inter partes by Kawaley CJ as subject to any cross-undertaking. The remedy in respect of such orders was to appeal, and, if (as here) compliance with the orders would involve preparatory costs before any appeal could be determined, to apply for a further extension of the time for compliance or for a stay of execution pending appeal. Here, as already indicated, PwC decided at some point to appeal Kawaley CJ's judgment given on 15 April 2013, but did not apply for a further extension of time or for a stay. Had they applied for either, it would have been open to the court to order an extension and a stay unless SHL and SICL or the Liquidators gave a cross-undertaking to cover costs incurred in preparing to comply with the orders, if the orders were set aside on appeal. SHL, SICL and the Liquidators would then have been able to exercise an informed choice whether or not to give any cross-undertaking that might be required of them to obtain the disclosure orders they were seeking.

18. On the above basis, Mr Chivers' first ground of appeal must fail. It also follows that his second ground of appeal must be rejected. There was no obligation or practice according to which SHL or SICL or the Liquidators should, legally or morally, have tendered any cross-undertaking and there was no error in their not doing so. This is quite apart from the difficulty that the Liquidators never held any official position in Bermuda in relation to SHL, and that the Board has held that the Supreme Court of Bermuda had no jurisdiction to wind up SICL or to appoint the Liquidators as liquidators of SICL in Bermuda.

19. The Board turns to the further points that Mr Chivers raised during his oral submissions: see paras 11-12 above. Both amount to this, that the original orders were defective, since they should have contained provision for PwC's costs of compliance to be covered outright in all events, not merely in the event of an appeal against the orders succeeding. In so far as *Norwich Pharmacal* is relied on, this was not a *Norwich Pharmacal* case, since there was no suggestion that PwC was mixed up in any tort. The Liquidators disavowed any case of that nature: see the judgment of Lord Mance in the SHL appeal to the Board, paras 128-129. However, as those paragraphs show, the Liquidators were in fact venturing to seek a wider and more stringent order than could even be obtained in *Norwich Pharmacal* proceedings, without exposing themselves to the trouble and difficulty of showing that PwC were mixed up in any sort of wrongdoing. That is a factor on which PwC are entitled to rely in submitting that the Board should be more ready than in a *Norwich Pharmacal* case to order that the costs of compliance be covered. The fact that no disclosure was in the event received by SHL, SICL or the Liquidators cannot constitute much of a counterweight, when this was and is because there proved on appeal to be no sustainable basis for the disclosure orders.

20. As regards Mr Chivers' reliance on the insolvency principle recognised in the cases of *Aveling Barford* and *BCCI*, the Liquidators were however seeking to perform a public duty owed by them in their capacity as appointed liquidators of both SHL and SICL in the Cayman Islands. The problem they faced, and which proved ultimately insurmountable, was that PwC had documents which they wanted for understandable reasons to inspect, but which they could not obtain under Cayman Islands law and which they could not (in the case of SHL as a result) establish a basis for seeking under the wider powers available in Bermuda where PwC was registered. The Board would accept that the public interest element arising from the Liquidators' Cayman Islands roles is a factor of some weight, even though the Liquidators never had in the case of SHL or should never have been given in the case of SICL any official status in Bermuda.

21. Bell AJA for the majority in the Court of Appeal expressed himself (see para 9 above) as declining to "make an order that the Joint Liquidators either be responsible for or give an undertaking in relation to the cost of compliance". The only ground of appeal in fact before the Court of Appeal was for discharge of the disclosure orders for failure to require an undertaking. Miss Toube QC was prepared to accept that the Board would have jurisdiction and consequently a discretion to make an order for the compliance costs by reference to section 195, at least in the case of SICL. She and Mr Chivers wanted the present issue resolved now, without further applications or costs.

22. It is, however, difficult to see how there can strictly be jurisdiction to do this, when the Board has held that there was no jurisdiction to wind up SICL in Bermuda, and has consequently discharged the order made under section 195. It is at least as difficult to see how the Board could make any order now in relation to the compliance costs incurred pursuant to the disclosure order made in favour of SHL, which the Board has discharged as having amounted to "forum-shopping" (see para 29 of Lord

Sumption's judgment in the SHL appeal). It was not argued that the Board could or should properly have made such discharge conditional on SHL agreeing to pay PwC's costs.

23. On analysis, the Court of Appeal appears to have been correct to refer to an absence of authority covering a situation like the present. The Court of Appeal also noted the somewhat thin basis on which the suggested costs figure of USD 250,000 was explained and put forward, and, more importantly, noted that these were management costs (which would not necessarily relate to any actual financial loss in terms of clientele, work or anything). It decided that it would not make any order, even though it had discharged the disclosure order in favour of SICL.

24. If the Board has jurisdiction and a discretion which it could now exercise by way of appeal on the third or fourth of the grounds which Mr Chivers now advances, it would, as the Board has also said, involve determining that Kawaley CJ should have ordered that the costs of preparation for compliance be borne by SHL or SICL or the Liquidators outright, irrespective of any appeal. The Board would have at the same time to make clear that this order should have provided that it was to stand as regards preparatory costs, even if the actual disclosure orders were set aside on appeal. There appear to the Board to be a number of problems about such a course.

25. First, this would mean determining that the Court of Appeal was wrong when it refused to make any order for costs outright in circumstances which, as the Board reads its reasons, it saw as being ultimately discretionary.

26. Second, the Board itself is unconvinced that it would have been wrong for Kawaley CJ to refuse (even if he had been asked) to make an order for the costs of compliance to be met outright. The cases of *Aveling Barford* and *BCCI* indicate, at least by analogy, that it may well be appropriate for a court in a situation like the present to defer consideration of the position regarding costs of compliance until after compliance. The difficulty in this case is that, although preparation costs were incurred, actual compliance never took place, because the orders were set aside on appeal.

27. Third, this brings the Board back to the real nub of the present issue. PwC are seeking precisely what they never asked for at the time, that is, not the costs of compliance, but protection in respect of preparatory costs thrown away as a result of a successful appeal which meant that they did not have to comply. Such protection is achieved, if at all, by appealing, seeking an extension of time for compliance or a stay of execution pending the determination of the appeal, and, if this is resisted, insisting as a condition of the refusal of an extension or stay, on an undertaking in damages to cover costs wasted. PwC were, in their written case, correct therefore to focus on the suggested need for or implication of such an undertaking.

28. Here, however, the Liquidators made clear that they were not willing voluntarily to meet any compliance costs and were expecting compliance within the extended four-month period allowed by Kawaley CJ. PwC, once they had determined that they would appeal, did not seek protection in the manner that the Board has indicated, and there is as the Board sees it no basis on which the Board can now require an undertaking which the Liquidators were not asked and not willing to give, or afford PwC any similar protection to that which they might have sought at the time. There is also no way of knowing whether the Liquidators would, if required to give an undertaking as a condition of avoiding a stay pending appeal, have been prepared to give one. It seems entirely possible that they would have decided that, despite any wish to receive the material as quickly as possible in view of possible limitation concerns, they should at least wait for the outcome of an appeal to the Court of Appeal. It is again speculation what might then have happened, once that outcome was known in the light of whatever appeared to be the limitation position then.

29. In the result, the Board is not persuaded that PwC is entitled to relief on any of the four bases now advanced. In the light of the above reasoning, it will be apparent that the Board, in the light of fuller scrutiny of the course of events and detailed submissions on the legal position by counsel, sees the matter differently from the way in which it was put in the obiter observations of Lord Sumption and Lord Mance at paras 25 and 121 respectively in the Board's previous judgment in the proceedings involving SHL, quoted in para 10 above, which must now be regarded as having gone too far. The Board will humbly advise Her Majesty that PwC's application for an order for the costs it incurred in preparing to comply with the disclosure orders made by Kawaley CJ on 15 April 2013 should be dismissed accordingly.

**LORD CLARKE: (dissenting)**

30. I have reached a different conclusion from that reached by the majority of the Board. In my opinion PwC should be held entitled to recover at least some of their costs in complying with the orders made on the applications of the "Liquidators".

31. I do not disagree with Lord Mance's description of the proceedings so far. Thus PwC did seek an undertaking, at the outset and before doing any of the work, that SHL or SICL should undertake to pay the costs of carrying out the order. As Lord Mance explains in para 7, it was submitted to Kawaley CJ that the order for disclosure was, in the absence of any offer to pay anything towards the costs incurred in Bermuda (or the Cayman Islands) "totally unreasonable" and should not be permitted. Lord Mance adds that Kawaley CJ did not accept that argument. He upheld the two orders without making any reference in his judgment to the costs of or preparatory to compliance. In para 8 Lord Mance quotes from PwC's skeleton argument in the Court of Appeal complaining that the court did not rule upon the argument that the Liquidators should give an undertaking for PwC's costs of compliance. In para 9 Lord Mance quotes paras 62 and

63 of the judgment of Bell AJA for the majority in the Court of Appeal. As Lord Mance says, the Court of Appeal treated the issue as one of discretion.

32. The first two points taken on behalf of PwC are summarised by Lord Mance in para 10: first, the need for an undertaking, both at the ex parte and later at the inter partes stage, in respect of compliance costs coupled with a submission that there was an implied undertaking, in the absence of any such express undertaking; and, second, the principle in *In re Condon, Ex p James* (1874) 9 Ch App 609 that officers of the court should not be permitted to benefit by their own error. I agree with him that, whatever the position would or might have been if the orders had been interim orders, these were final orders and the first ground of appeal must fail for the reasons given by Lord Mance in paras 13 to 18 above. I also agree with him that the second ground must fail for the reasons given in para 18.

33. Lord Mance sets out the third and fourth grounds of appeal in paras 11 and 12 above. In the third ground PwC rely upon an analogy with the approach in a *Norwich Pharmacal* case and in the fourth ground they rely upon the English decisions in *Aveling Barford* and *BCCI*, where in the case of orders under provisions such as section 195 of the Bermudan Companies Act 1981, no presumption is made that the costs of compliance will be covered but the appropriate time for considering an application for such costs will be after full compliance with the order.

34. As to *Norwich Pharmacal*, I agree with Lord Mance (at para 19) that this was not such a case because there is no suggestion that PwC were mixed up in any tort. However, Lord Mance correctly adds that the Liquidators were seeking a wider and more stringent order than could be obtained in *Norwich Pharmacal* proceedings, without exposing themselves to the trouble and difficulty of showing that PwC were mixed up with any sort of wrongdoing. I agree with him that that is a factor on which PwC are entitled to rely in submitting that the Board should be more ready than in a *Norwich Pharmacal* case to order that the costs of compliance be covered. I also agree with him that the fact that no disclosure was in the event received by SHL, SICL or the Liquidators cannot constitute much of a counterweight, when this was and is because there proved on appeal to be no sustainable basis for the disclosure orders.

35. In para 20 Lord Mance notes that, as regards PwC's reliance on the insolvency principle recognised in the cases of *Aveling Barford* and *BCCI*, the Liquidators were seeking to perform a public duty owed by them in their capacity as appointed liquidators of both SHL and SICL in the Cayman Islands. He adds that the problem they faced, and which proved ultimately insurmountable, was that PwC had documents which they wanted for understandable reasons to inspect, but which they could not obtain under Cayman Islands law and which they could not (in the case of SHL as a result) establish a basis for seeking under the wider powers available in Bermuda where PwC was registered. For my part, I accept that that was the position, although I doubt whether the

public interest element arising from the Liquidators' Cayman Islands roles is a factor of any real weight given that, as Lord Mance correctly acknowledges, the Liquidators never had in the case of SHL or should never have been given in the case of SICL, any official status in Bermuda. I note that Lord Mance only describes the point as having "some weight".

36. Lord Mance notes in para 22 that, although the thrust of PwC's case was the failure to require an undertaking, counsel for SHL and SICL was prepared to accept that the Board would have jurisdiction and consequently a discretion to make an order for the compliance costs by reference to section 195, at least in the case of SICL. I agree that the Board would have power to make such an order. Why then was it (or is it) not appropriate to make such an order in circumstances in which the order or orders should not have been made?

37. For my part, I would hold that in principle such an order should have been made. I note in this regard that in *Aveling Barford* Hoffmann J considered an application by solicitors to discharge an order made ex parte by Mr Registrar Buckley under section 236 of the Insolvency Act 1986 requiring them to produce documents and furnish information relating to the affairs of Aveling Barford Ltd and two associated companies. The order had been made on the application of the administrative receivers of the companies. The application also sought an order that the solicitors be indemnified against all costs incurred by them in complying with the order.

38. Hoffmann J said this at p 366:

> "[The solicitors] ask by their motion for an order that they should be indemnified against all costs incurred in compliance with the registrar's order. Rule 9.6(4) of the Insolvency Rules 1986 provides that a person 'summoned to attend for examination under this chapter' shall be tendered a reasonable sum in respect of travelling expenses but that 'Other costs falling on him are at the court's discretion.' Mr Mortimore [for the receivers] said that this discretion is limited to the costs of persons summoned to attend for examination. It has no application to a respondent who has not been summoned to attend but, as in this case, required to comply with an order for production of books and papers by allowing their inspection by the receivers' solicitors or required to submit an affidavit. In my judgment there could be no reason for such a distinction. I think that in the context of the rule, a 'person summoned to attend for examination' includes a person required to give information by the alternative methods permitted under section 236.

> It would however be premature in this case to make an order for the payment of [the solicitors'] costs. An order under section 236 seems to me to have stronger analogies with a subpoena duces tecum or ad testificandum, by which a citizen is required to perform a public duty in aid of the administration of justice, than with, say, a *Norwich Pharmacal* order … or *Mareva* injunction affecting a third party at the instance of a private litigant. I therefore see no reason why there should be a presumption under section 236, any more than there was under section 561 of the Companies Act 1985, that a respondent is entitled to be indemnified against his costs of complying with the order. I do not however wish to say anything to inhibit [the solicitors] from making an application for costs at an appropriate time which would in my view be after they have complied fully with the order."

39. Similarly in the *BCCI* case Robert Walker J noted at p 578 that the *Aveling Barford* case was not cited to Vinelott J in *In re Cloverbay Ltd* (1989) 5 BCC 732 and expressed his own views in this way at pp 578-579:

> "Vinelott J took the view that the court had no power to make an order for the expenses of a respondent who was directed simply to produce documents. Hoffmann J seems to have accepted (without, it seems, argument to the contrary) that there was such jurisdiction. However, Hoffmann J expressed the view that there was no presumption that such an order should be made. He also treated the application as premature. He finished what he had to say on the subject at p 552 by indicating that he did not wish to say anything to inhibit the solicitors who were respondents in that case from making an application for costs at an appropriate time which would, in his view, be after they had fully complied with the order.
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> It seems to me that if I have jurisdiction to make such an order, I should in this case follow the course indicated by Hoffmann J and defer any decision on the question of costs of compliance until a later stage (and prima facie when compliance has been fully achieved or at any rate is well on the way to achievement). I can well see that the costs of express air freighting up to 100 boxes of 2,000 pages of documents each from San Francisco to London may be very substantial, but Bank of America is a very substantial institution.
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> In the circumstances I think it would be wrong for me to express any final view as between two very experienced and respected

> insolvency judges on this point. However, my tentative view is to prefer that of Hoffmann J largely because section 236(2) of the Insolvency Act 1986 deals in very much the same way with the respondents who are summoned, whether for the purpose of oral examination or for the production of documents (or, I would add, for both purposes simultaneously). It would be surprising, therefore, if the court had jurisdiction to provide for expenses of a witness summoned for oral examination but not the expenses of a respondent required to produce documents.
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> In this case, as in *In re British and Commonwealth Holdings* [1992] BCC 172; [1992] Ch 342 that was cited to me at the earlier hearing, the cost of compliance may be very great, as Woolf LJ recognised in that case (at p 201; p 392; again, the jurisdiction seems not to have been the subject of any argument).
>
> As regards the costs of the application which I have decided, it appears on close examination that they are not dealt with by rule 9.6(1) of the Insolvency Rules (compare the distinct wording of rule 9.6(2) but are to be dealt with on ordinary principles but bearing in mind, as I do bear in mind, that jurisdiction under section 236 is in some ways different from ordinary litigation between parties. Nevertheless, I am satisfied that in contested applications for an examination under section 236, whether oral or by production of documents, the normal rule, subject of course to the court's discretion to depart from it in appropriate circumstances, is that costs should follow the event."

40. For my part I agree with the approach of Robert Walker J. It seems to me that that approach also applies in a case such as this. Lord Mance suggests in his para 22 that it is difficult to see how there can strictly be jurisdiction to make an order, when the Board has held that there was no jurisdiction to wind up SICL in Bermuda, and has consequently discharged the order made under section 195. He adds that it is at least as difficult to see how the Board could make any order now in relation to the compliance costs incurred pursuant to the disclosure order made in favour of SHL, which the Board has discharged as having amounted to "forum-shopping". Finally he notes that it was not argued that the Board could or should properly have made such discharge conditional on SHL agreeing to pay PwC's costs.

41. I respectfully disagree with those considerations. Lord Mance recognises in his para 26 that the cases of *Aveling Barford* and *BCCI* indicate, at least by analogy, that it may well be appropriate for a court in a situation like the present to defer consideration of the position regarding costs of compliance until after compliance. I agree and, so far

as I can see, there is no reason not to make an appropriate order on the facts of this case. Indeed, as things stand, the position here is as he has described, namely that consideration of the position has been deferred until now. I am not persuaded by the reasons given by Lord Mance (and the majority) that the facts here lead to any other result.

42. It is true that, as Lord Mance says in para 26, the position is that although preparation costs were incurred, actual compliance never took place, because the orders were set aside on appeal. However, I do not agree with him that that creates a difficulty. PwC carried out the work under pressure from the Liquidators and in accordance with the orders. They acted reasonably in doing so and to my mind cannot be said to be deprived of costs reasonably incurred merely because in the event the work was not completed because the orders were subsequently set aside on appeal. As I understand it, it was not suggested at the time that PwC should not continue the work pending determination of the appeal.

43. The reasons for denying any order for the costs or part of the costs are several. In para 23 Lord Mance says that, on analysis, the Court of Appeal appears to have been correct to refer to an absence of authority covering a situation like the present. That is true but it seems to me that, for the reasons given above, such an order would not be significantly different from the orders contemplated by Hoffmann and Robert Walker JJ in *Aveling Barford* and *BCCI*.

44. Lord Mance also says in para 23 that the Court of Appeal noted the somewhat thin basis on which the suggested costs figure of USD250,000 was explained and put forward, and, more importantly, added that these were management costs (which would not necessarily relate to any actual financial loss in terms of clientele, work or anything). He adds that the Court of Appeal decided that it would not make any order, even though it had discharged the disclosure order in favour of SICL. I can see that there may be scope for argument on quantum but cannot see why such costs should not in principle be recoverable.

45. Lord Mance identifies some further difficulties. First, he says that it would be necessary to determine that the Court of Appeal was wrong when it refused to make any order for costs outright in circumstances which it saw as being ultimately discretionary. Second, the majority was unconvinced that it would have been wrong for Kawaley CJ to refuse (even if he had been asked) to make an order for the costs of compliance to be met outright.

46. Third, as Lord Mance puts it at para 27, this brings the case back to the real nub of the present issue. PwC are seeking precisely what they never asked for at the time, that is not the costs of compliance, but protection in respect of preparatory costs thrown

away as a result of a successful appeal which meant that they did not have to comply. Such protection is achieved, if at all, by appealing, seeking an extension of time for compliance or a stay of execution pending the determination of the appeal, and, if this is resisted, insisting as a condition of the refusal of an extension or stay, an undertaking in damages to cover costs wasted. PwC were in their written case correct therefore to focus on the suggested need for or implication of such an undertaking. Here, however, the Liquidators made clear that they were not willing voluntarily to meet any compliance costs and were expecting compliance within the extended four-month period allowed by Kawaley CJ. PwC, once they had determined that they would appeal, did not seek protection and there is no basis on which the Board can now require an undertaking which the Liquidators were not asked and not willing to give, or afford PwC any similar protection to that which they might have sought at the time. There is also no way of knowing whether the Liquidators would, if required to give an undertaking as a condition of avoiding a stay pending appeal, have been prepared to give one. It seems entirely possible that they would have decided that, despite any wish to receive the material as quickly as possible in view of possible limitation concerns, they should at least wait the outcome of an appeal to the Court of Appeal. It is again speculation what might then have happened, once that outcome was known in the light of whatever appeared to be the limitation position then.

47. There is undoubted force in those points, which may well lead to the conclusion for the future that those in the position of PwC would be well advised to seek the costs of compliance, or at least protection in advance for the future incurring of such costs, in advance. However, as I see it here, PwC have a strong case for the reasonable costs incurred in complying with the orders. While in some cases it may be desirable to seek protection in advance, it is not compulsory. Both *Aveling Barford* and *BCCI* recognise that it may be appropriate to seek an order for costs after the costs have been incurred. Indeed, in *Aveling Barford* Hoffmann J said (in the passage quoted above) that an appropriate time for making the application would be after full compliance with the order. In the instant case PwC complied with the order until it was held to be wrongly made. In my opinion that strengthens the case for the recovery of costs.

48. It may well be just to make such an order where (as was the position here) it was reasonable to incur the costs while at the same time seeking to appeal the underlying order or orders. In the instant case I would hold that PwC should in principle recover their costs. As I see it, neither Kawaley CJ nor the Court of Appeal gave satisfactory reasons for denying their claim. It is clear from para 63 of the judgment of Bell AJA in the Court of Appeal (quoted above) that it was appreciated that the case for PwC was not limited to an undertaking but sought in the alternative an order that the Liquidators be responsible for the costs. For the reasons I have given I do not think that the only course open to PwC was to obtain an undertaking to pay in the future. Once it is accepted that there is jurisdiction to make such an order after the costs have been incurred, it seems to me to follow that this is a classic case for such an order because the order or orders were declared to be unlawful.

49. I would hold that Kawaley CJ should have considered the issue in his judgment at first instance and that the Court of Appeal was wrong to dismiss the appeal on this part of the case. The correct approach should have been for the first instance court (or Court of Appeal on appeal) to acknowledge the possibility of recovering compliance costs and state that it would be open to PwC to make an application for such costs at an "appropriate time" which in *In re Aveling Barford* was when compliance had been achieved, and in this case would be once the orders were discharged. I would add that, because the purported order in relation to SHL was made by a common law power analogous with the statutory powers contained in section 195, the analogy with section 236 and the *Aveling Barford* and *BCCI* cases applies equally well to the SHL order as it does the SICL order.

50. For these reasons I would allow the appeal and make an order to that effect. However, I appreciate that there may be ample scope for argument as to how such costs should be assessed. I would therefore remit all issues of quantum to the courts below.