

REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

Case No: 09/35913

Date: 16/05/2011

In the matter between:

EXCELLENT PETROLEUM (PTY) LTD (IN LIQUIDATION)
(Represented by its duly appointed liquidators,
Trevor Philip Glaum and Peter Carolus)

Plaintiff

and

SYNCHRONY LOGISTICS (PTY) LTD
t/a IMPERIAL BULK SERVICES

Defendant

JUDGMENT

MEYER, J

[1] Excellent Petroleum (Pty) Ltd (in liquidation) ('Excellent Petroleum') has been placed under winding up on 18 July 2006 by an order of court on the grounds that it was unable to pay its debts as contemplated in s 344(f) as described in s 345 of the Companies Act.¹ Its winding up is for purposes of s 340(2)(a) read with s 348 of the

¹ Act No. 61 of 1973.

Companies Act deemed to have commenced on 3 April 2006.² Messrs Trevor Philip Glaum and Peter Carolus are its duly appointed joint liquidators. They, representing Excellent Petroleum, seek to set aside payments adding up to an amount of R4, 860, 000.00, which Excellent Petroleum made to the defendant company,³ Synchrony Logistics (Pty) Ltd t/a Imperial Bulk Services ('Imperial'), during the period 30 October 2005 until 8 March 2006 as being voidable preferences as contemplated by s 29(1) of the Insolvency Act⁴ read with s 340 of the Companies Act.

[2] It is common cause that the payments constitute dispositions as defined in s 2 of the Insolvency Act by Excellent Petroleum of its property; that such dispositions were made not more than six months before the winding up of Excellent Petroleum as contemplated in s 29(1) of the Insolvency Act read with s 340 and s 348 of the Companies Act; that the dispositions were made to the defendant, Imperial, which was a creditor of Excellent Petroleum on each occasion; and that the dispositions had the effect of preferring Imperial above the other creditors of Excellent Petroleum.

[3] The plaintiff, in order to succeed in respect of each payment, must prove that immediately after the making of each such disposition the liabilities of Excellent

2 The date of presentation of the winding up application.

3 It is common cause that Excellent Petroleum paid Imperial Bulk Services an amount of R3, 500, 000.00 on 31 October 2005; an amount of R250, 000.00 on 11 November 2005; an amount of R100, 000.00 on 16 November 2005; an amount of R800, 000.00 on 8 November 2005; an amount of R50, 000.00 on 23 November 2005; an amount of R20, 000.00 on 22 December 2005; an amount of R100, 000.00 on 9 January 2006; an amount of R20, 000.00 on 9 February 2006; and an amount of R20, 000.00 on 8 March 2006.

4 Act No. 24 of 1936.

Petroleum exceeded the value of its assets. In respect of each payment for which the plaintiff has established this requirement the *onus* shifts to Imperial to prove that such disposition was made in the ordinary course of business without intending to prefer it over the other creditors.⁵ In order to decide these issues it is necessary to investigate the facts and circumstances surrounding the payments to Imperial.

[4] Imperial is the logistical arm of the Imperial group of companies. It is licensed as a wholesale supplier in petroleum products and it purchases such products wholesale from the major producers, such as British Petroleum, Caltex, and the like. Its purpose is to secure fuel at reasonable prices and to ensure a countrywide supply of fuel to the vehicles used by the Imperial group of companies, particularly in smaller towns. Excellent Petroleum was a retail supplier of petroleum products in *inter alia* the town Worcester, Western Cape.⁶

[5] Imperial and Excellent Petroleum concluded an agreement in terms whereof Imperial undertook to supply petroleum products to Excellent Petroleum wholesale and Excellent Petroleum in turn undertook to supply such products on a retail basis to the Imperial vehicles at Worcester and to make available to them truck stop and overnight facilities. The contract did not prohibit Excellent Petroleum from supplying petroleum products to the open market. The contract was subsequently formalised by the conclusion between them of a written agreement, dated 23 September 2004. The written contract *inter alia* provides for diesel fuel lubricants to be supplied by Imperial to Excellent Petroleum at a particular ruling price minus a rebate and for a

⁵ *Gore and Others NNO v Shell South Africa (Pty) Ltd* 2004 (2) SA 521 (CPD), para [3].

⁶ It appears that Excellent Petroleum also conducted a petroleum depot in Maitland, Cape Town.

30 day from date of statement credit facility in respect of such sales.⁷ Similar provisions governed the supply by Excellent Petroleum of fuel to Imperial.

[6] Excellent Petroleum did not always comply with its contractual obligations to Imperial timeously and in accordance with its contractual obligations during the period in which Imperial was its principal supplier. Telephonic reminders and meetings between representatives of Excellent Petroleum and of Imperial aimed at ensuring payment by Excellent Petroleum of its indebtedness owing to Imperial under the contract occurred from time to time. Arrangements outside the contract were agreed upon to accommodate Excellent Petroleum and to secure payment to Imperial.

[7] The managing director of Imperial, Mr Gerald Rudman, testified that the business of Excellent Petroleum grew exponentially in a short period of time as a result of it commencing to supply diesel to fishing fleets in the Western Cape. His evidence in this regard is corroborated by the financial statements of Excellent Petroleum for its financial years ending 30 September 2003 and 30 September 2004, and its draft financial statement for its financial year ending 30 September 2005. These statements reflect sales of R7, 862, 357.00 for the year ending 30 September 2003, of R19, 946, 117.00 for the year ending 30 September 2004, and of R45, 639, 100.00 for the year ending 30 September 2005.

[8] Imperial, as it was fully entitled to do in terms of the contract, begun a process of reviewing the security cover that it had obtained from Excellent Petroleum, which appeared to be inadequate in the light of the increased difference between its much

⁷ The contract expand on this term by stipulating that '...all product purchased from the 26th of one month through to the 25th of the following month needs to be paid for by the last day of the month thereafter.'

higher sales of petroleum products to Excellent Petroleum than its purchases from Excellent Petroleum. It appears that this process was abandoned once Imperial had resolved to discontinue its supply of petroleum products to Excellent Petroleum. Mr Rudman testified that the growth in turnover of Excellent Petroleum caused Imperial to indirectly compete with its suppliers, the major petroleum companies. Imperial did not wish this to happen, but only to secure diesel for the Imperial fleet. It was agreed that Imperial would withdraw from being the principal supplier to Excellent Petroleum with effect from 1 October 2005, since which date Total Commercial Services (Pty) Ltd ('Total') became Excellent Petroleum's principal supplier in the stead of Imperial. It was agreed that Imperial would pay Total directly for the petroleum products that were to be supplied to it by Excellent Petroleum. It was also agreed that '... the September month-end must be fully settled...' between Excellent Petroleum and Imperial and that Imperial would relinquish all the securities it held, except for the personal surety of Mrs Valentyn until the account between it and Excellent Petroleum had been settled in full.

[9] The amount due and payable by Excellent Petroleum to Imperial at the end of September was the sum of R6, 819, 392.68, and the amount due and payable by Imperial to Excellent Petroleum R1, 861, 738.30. Set-off was applied and the indebtedness owed by Excellent Petroleum amounted to R4, 957, 654.38. It appears that Imperial on occasion still supplied Excellent Petroleum with fuel during the months October and November 2005, although, it is common cause, Total became its principal supplier. The further supply of fuel by Imperial increased Excellent Petroleum's outstanding indebtedness to it by nearly a million rand. Excellent Petroleum paid Imperial an amount of R3, 500, 000.00 on 31 October 2005. Mr Rudman testified that it had been the usual business practice of Imperial to

contact its debtors two or three days before month end to press for payment. It is reasonable to accept that Excellent Petroleum was also telephonically contacted from time to time and pressed for payment. Excellent Petroleum paid to Imperial an amount of R250, 000.00 on 11 November 2005, an amount of R100, 000.00 on 16 November 2005, an amount of R800, 000.00 on 8 November 2005, and an amount of R50, 000.00 on 23 November 2005.

[10] By letter dated 1 December 2005, a formal demand in terms of s 345(1) of the Companies Act was made upon Excellent Petroleum to pay its outstanding indebtedness to Imperial in the sum of R1, 006, 859.73 plus interest thereon and the letter concludes by recording that a copy thereof would '... be forwarded to the surety in respect of this indebtedness, Ms. Dailina Benita Valentyn.' Mr Rudman testified that he participated in the decision to send this letter to Excellent Petroleum. The purpose of the letter was to bear pressure for payment and to 'frighten' Mrs Valentyn. This letter of demand was followed by further payments from Excellent Petroleum to Imperial of R20, 000.00 on 22 December 2005, of R100, 000.00 on 9 January 2006, of R20, 000.00 on 9 February 2006, and of R20, 000.00 on 8 March 2006.

[11] A formal demand dated 16 January 2006 in terms of s 345 of the Companies Act was also made on behalf of Total upon Excellent Petroleum for payment of an amount of R2, 205, 975.65. It appears that the amount owing to Total was for petroleum products purchased by Excellent Petroleum from it at a total purchase price of R2, 205, 975.65, which amount in terms of the agreement between Excellent Petroleum and Total became due and payable on 31 December 2005. In reply to this letter of demand the attorneys for Total were advised that Excellent Petroleum had sold its Worcester depot, that transfer thereof would be effected on 31 May

2006, that the indebtedness owing to Total would be paid out of the proceeds of that sale, and monthly payments of R50, 000.00 were offered in the interim. An application for the winding up of Excellent Petroleum was issued by Total on 3 April 2006.⁸

[12] An amount also remained outstanding and owing to Imperial. On 16 August 2006, Imperial issued summons against Mrs Valentyn as surety in favour of Imperial for the outstanding indebtedness owed to it by Excellent Petroleum. An application for the winding up of Excellent Petroleum was also issued by Imperial on 18 May 2006.⁹ Excellent Petroleum was, however, placed under winding up pursuant to the earlier application of Total.

[13] I now turn to the first issue whether or not the plaintiff has discharged the *onus* in proving on a preponderance of probabilities that Excellent Petroleum's liabilities exceeded the value of its assets at the time of each payment.¹⁰ Mr Johan Andre Gerber, a partner of Greenwoods Chartered Accountants in Cape Town, gave evidence of an expert nature on the financial position and solvency of Excellent Petroleum as at 30 September 2003, 30 September 2004, 30 September 2005, and 31 October 2005.¹¹ The plaintiff, through the evidence and opinions of Mr Gerber,

8 This application was issued out of the Cape of Good Hope Provincial Division.

9 This application was issued out of the North Gauteng High Court.

10 See: *Lipschitz and Another NNO v Landmark Consolidated (Pty) Ltd* 1979 (2) SA 482 (WLD), at p 494D

11 See: Plaintiff's Notice in terms of Rule 36(9)(a) and (b) in respect of Mr Johan Andre Gerber.

attempted to establish that Excellent Petroleum was uninterruptedly insolvent since the year 2003 until the commencement of its winding up on 3 April 2006, and that its insolvency had been increasing throughout this period until it was ultimately wound up.

[14] The audited financial statements in respect of Excellent Petroleum's financial years ending 30 September 2003 and 30 September 2004 reflect that the liabilities of Excellent Petroleum exceeded its assets by R697, 285.00 as at the former date and by R198, 568.00 as at the latter one. Based on the entries contained in a creditors' statement dated 25 September 2004, which originates from Imperial, Mr Gerber expressed the opinion that the financial statements for the year ending 30 September 2004 understate Excellent Petroleum's creditors and its accumulated loss by R180, 000.00. Mr Gerber accordingly adjusted the accumulated loss reflected in these financial statements to an amount of R378, 568.00 (R198, 568.00 + R180, 000.00).

[15] Only draft financial statements were prepared for Excellent Petroleum's financial year ending 30 September 2005. They reflect accumulated profits (retained income) of R3, 681, 674.00. Based on the entries contained in Excellent Petroleum's general ledger, Mr Gerber expressed the opinion that the draft financial statements overstate its accumulated profits since the amount representing its total purchases for that financial year only account for eleven months. Based on the entries contained in a creditors' statement dated 25 December 2005, which also originates from Imperial, Mr Gerber expressed the opinion that the draft financial statements wrongly reflect the balance in respect of Excellent Petroleum's creditors. The draft financial statements should, in the opinion of Mr Gerber, be corrected and

adjusted to reflect that the liabilities of Excellent Petroleum exceeded its assets by R2, 599, 796.00 as at 30 September 2005.

[16] Mr Gerber determined the financial position of Excellent Petroleum as at 31 October 2005 by using the draft financial statements for the year ending 30 September 2005 as adjusted by him as a starting point and by taking into account Excellent Petroleum's transactions for the period 1 – 31 October 2005. Based on certain assumptions and calculations made by him, Mr Gerber expressed the opinion that as at 31 October 2005 the liabilities of Excellent Petroleum exceeded its assets by R2, 734, 253.00.

[17] Mr Gerber did not investigate and was unable to express any opinion on the solvency of Excellent Petroleum after 31 October 2005. The summary of the evidence and the reasons for the opinion of Mr Glaum, who is a qualified chartered accountant and co-liquidator of Excellent Petroleum, is admitted as evidence.¹² Mr Glaum is of the opinion that Excellent Petroleum was insolvent at the date of the commencement of its winding up on 3 April 2006. In terms of the first liquidation and distribution account its total assets amounted to R2, 363, 417.29, its total liabilities to R6, 461, 017.62, and hence a shortfall of assets compared to liabilities of R4, 097, 600.33. Concurrent claims amounted to R5, 805, 023.08.

[18] The nature of the business of Excellent Petroleum was to purchase fuel at wholesale prices and to resell it at retail prices. Its income statements reflect a gross profit (gross income minus total costs of purchases) equivalent to 9.93% on its costs of purchases for its financial year ending 30 September 2003, and of 11.63% for its

12 See: Notice in terms of Rule 36(9) dated 31 August 2010, and annexure 'A' thereto.

financial year ending 30 September 2004. Its draft financial statements reflect a gross profit percentage of 17.21% for its financial year ending 30 September 2005. In adjusting the draft financial statements for the financial year ending 30 September 2005, Mr Gerber left its gross income amount of R45, 639, 100.00 undisturbed and adjusted its costs of total purchases amount upwards to an amount of R45,383, 689.00, leaving it with a gross profit percentage of only 0.56%.

[19] The average gross profit percentage for Excellent Petroleum's financial years ending 30 September 2003 and 30 September 2004 according to its financial statements was 10.51%. I find Mr Gerber's determination and opinion of a dramatic shrinkage in the gross profit percentage of Excellent Petroleum to a mere 0.56% for its financial year ending 30 September 2005 without explanation to be unrealistic and improbable. Its gross income for its financial year ending September 2005 was more than double that of its previous financial year, but yet its gross profit was a mere R255, 411.00 in terms of the adjustments made by Mr Gerber as opposed to its gross profit of about R2,3 mil for its previous financial year ending 30 September 2004. If the average of 10.51% for its financial years ending September 2003 and 2004 is applied to its financial year ending 30 September 2005, it would translate into a gross profit of R4, 795, 483.00. Mr Gerber conceded that even if a lesser gross profit margin is applied in respect of this financial year and for the period 1 – 31 October 2005, Excellent Petroleum would have been solvent as at 30 September 2005 and 31 October 2005. Mr Rudman, who is experienced in the diesel industry, testified that a 10% - 11% gross profit margin for the sale of diesel was reasonable and a relatively low profit margin.

[20] Mr Gerber conceded that he did not verify the correctness of the audited financial statements for the financial years ending 30 September 2003 and 30 September 2004. His adjustments to the financial statements for the financial year ending 30 September 2004 were only based on a creditors' statement dated 25 September 2004 that originated from Imperial. Mr Gerber's verification of the draft financial statements for the financial year ending 30 September 2005 was essentially limited to an inspection of the ledger for the relevant period and a creditor's statement dated 25 December 2005, which originated from Imperial without an inspection of the relevant source documents. His determination of the financial position of Excellent Petroleum for the period 1 – 31 October 2005 was premised on the draft financial statements for the financial year ending 30 September 2005 as adjusted by him as well as an inspection of the ledger, invoices, creditors' statements, and bank statements of Excellent Petroleum.

[21] Mr Gerber's opinion that Excellent Petroleum had a trend of growing insolvency since the year 2003 until the commencement of its winding up on 3 April 2006 is, in my view, not supported by the evidence presented at this trial. The evidence does not permit such an extrapolation of continuous and growing insolvency. The audited financial statements of Excellent Petroleum reflect insolvency as at 30 September 2003 and 30 September 2004, but such insolvency cannot be extended to that which existed at the time of its demise since the financial position of Excellent Petroleum changed dramatically during its financial year commencing on 1 October 2004 as a result of the exponential growth in its sales of fuel. I consider solvency on the part of Excellent Petroleum as at 30 September 2005 and as at 31 October 2005 on the evidence presented more probable in the light of Excellent Petroleum's average gross profit percentage of 10.51% for its

financial years ending 30 September 2003 and 30 September 2004, which percentage was on the uncontroverted evidence reasonable and a relatively low profit margin for the sale of fuel, and the dramatic increase in its turnover after 30 September 2004. The plaintiff has accordingly not proved that the liabilities of Excellent Petroleum exceeded its assets immediately after the making of the payment of R3, 500, 000.00 on 31 October 2005. Any finding on whether or not Excellent Petroleum's liabilities exceeded its assets immediately after the making of the payments during the month November 2005 will be based on mere speculation and dubious reasoning.

[22] In assessing where the balance of probabilities lies on a review of the whole of the evidence, I, however, consider insolvency on the part of Excellent Petroleum immediately after each payment that was made during the period December 2005 until March 2006 to have been established on a preponderance of probabilities. Continuous and increasing insolvency of Excellent Petroleum throughout this period until the commencement of its winding up on 3 April 2006 is the ineluctable inference to be drawn from the extent by which its liabilities exceeded the value its assets at the time of its winding up,¹³ its inability to have complied with its contractual payment obligations owed to Imperial and to Total throughout this period, its neglect to have paid to Imperial the sum of R1, 006, 859.73 plus interest thereon or to have secured or compounded for it to the reasonable satisfaction of Imperial within the statutory prescribed period after service upon it of Imperial's demand dated 1 December 2005 in terms of s 345(1) of the Companies Act, its payments of only the sums of R20, 000.00 on 22 December 2005, of R100, 000.00 on 9 January 2006, of R20, 000.00

13 See: *Ensor, N.O. v. New Mayfair Hotel* 1968 (4) SA 463 (NPD), at pp 464H – 465A

on 9 February 2006, and of R20, 000.00 on 8 March 2006 to Imperial following the statutory demand, and its neglect to have paid to Total the sum of R2, 205, 975.65 or to have secured or compounded for it to the reasonable satisfaction of Total within the statutory prescribed period after service upon it of Total's demand dated 16 January 2006 in terms of s 345(1) of the Companies Act.

[23] Having arrived at the foregoing conclusion it is now necessary to consider whether Imperial has discharged the *onus* of proving that each payment made to it on 22 December 2005, on 9 January 2006, on 9 February 2006, and on 8 March 2006 was made in the ordinary course of business without intending to prefer it over the other creditors.

[24] The test whether or not the dispositions were made 'in the ordinary course of business' is concisely thus stated by Griesel J in *Gore and others NNO v Shell South Africa (Pty) Ltd*:¹⁴

'While it is clear from the authorities that there can be no comprehensive definition of the expression, it is equally clear that the test in this regard is an objective one. The Court must ask itself whether, given all the circumstances under which the disposition was made, it is in accordance with ordinary business methods followed by solvent men of business. The transaction must not be seen in isolation; it must be considered in the light of all the surrounding circumstances, including the actions of both parties to the transaction. The fact that one of the parties to the transaction was insolvent at the time is, however, to be excluded from the circumstances that are relevant.'¹⁵

14 2004 (2) SA 521 (CPD), para [9].

15 I have omitted the footnote at the end of this passage.

[25] In *Cooper and Another NNO v Merchant Trade Finance Ltd*,¹⁶ Zulman JA said this:

‘The best formulation of the test, in my view, is that of De Villiers JP in *Malherbe’s* case, where the learned Judge put the matter succinctly as follows:

‘... (W)hether the disposition is in accordance with ordinary business methods and principles obtaining amongst solvent men of business; that is to say a disposition, in order to be in the ordinary course of business, must be one which would not to the ordinary man of business appear anomalous or un-businesslike or surprising.’¹⁷

[26] The payments under consideration that were made to Imperial were in the performance of obligations arising from a pre-existing contract. Such contract, I accept, is not one which is unusual or unbusinesslike. Also, payment different from that provided for in a contract is not necessarily out of the ordinary course of business.¹⁸ However, a consideration of all the surrounding circumstances and the actions of both Excellent Petroleum and those of Imperial to which I have alluded earlier on in this judgment, and particularly the sporadic few payments of varying and relatively small amounts that were made to Imperial following its s 345(1) of the Companies Act demand dated 1 December 2005, make each disposition inevitably one outside the ordinary course of business. The payments made to and received by Imperial on 22 December 2005, on 9 January 2006, on 9 February 2006, and on 8 March 2006 were not in accordance with ordinary business methods followed by solvent men of business. They, in my view, would ‘appear anomalous or un-businesslike or surprising’ to ‘the ordinary man of business’,

¹⁶ 2000 (3) SA 1009 (SCA), para [29].

¹⁷ The reference of *Malherbe’s* case is *Malherbe’s Trustee v Dinner and Others* 1922 OPD 18 at 22.

¹⁸ *Fourie’s Trustee v Van Rhijn* 1922 OPD 1.

[27] The general principles applicable to the second leg of the enquiry - an intention to prefer - were set out by Zulman JA in the *Cooper* judgment.¹⁹ The relevant principles that may be extracted from that judgment were summarised as follows by Griesel J in the *Gore* judgment.²⁰

'The Court must weigh up all the relevant facts and circumstances in order to determine what, on the probabilities, was the 'dominant, operative or effectual intention in substance and in truth' of the debtor for making the disposition.

The test with regard to intention is a subjective one and can only be present if the debtor actually applied its mind to the matter.

The mere fact that the debtor who made the disposition does not give evidence does not *ipso facto* mean that one must infer that there was an intention to prefer. As far as inferences are concerned, however, the plaintiff is aided by the natural inference that arises where the debtor, knowing that liquidation is substantially inevitable, selects for payment out of a number of creditors one who has no right to such selection. In those circumstances, the inference from its conduct is a fair one, namely that the debtor intended to prefer such creditor above the rest, to disturb in the creditor's favour the proper distribution of its assets in insolvency.

An intention to prefer requires that the debtor must, at the time of the disposition, have been in a position to exercise a free choice. Thus, where a debtor pays a creditor out of turn under great pressure, for example to shield himself from prosecution, an intention to prefer will not be proved. It is not any pressure or coercion, however, which will displace the free will or intention to prefer, but rather pressure which is akin to duress or undue influence, or what has been described in the cases as 'an overwhelming sense of imminent peril'; 'great pressure'; or even 'severe or terrifying pressure'.²¹

[28] An inference from the proved facts of an intention to prefer as far as the payments on 22 December 2005, on 9 January 2006, on 9 February 2006, and on 8

¹⁹ Paras [3] – [16].

²⁰ Para [24].

²¹ I have omitted the footnotes to this passage.

March 2006 are concerned, is, in my view, on a balance of probabilities, the most probable one to be drawn. It is established by ineluctable inference that Excellent Petroleum knew that it was insolvent and that liquidation was substantially inevitable on the occasions when it made these payments. It accordingly follows, in the absence of evidence to the contrary, that Excellent Petroleum intended, in making the payments, that Imperial should benefit above creditors who were not paid. Moreover, Ms Valentine had a strong motive to prefer Excellent Petroleum. She was reminded of her personal surety and subsequently sued on it.

[29] Finally, the matter of costs. Counsel, Adv J Muller SC for the plaintiff and adv PF Rossouw SC for the defendant, did not deal with the issue of costs should the plaintiff only be successful in having the payments that were made during the period December 2005 until March 2006 set aside. Such payments constitute an amount of R160, 000.00 of the plaintiff's claim of R4, 860, 000.00. I accordingly consider it appropriate to reserve the issue of costs in order to permit the parties to address me thereon, either by means of written heads of argument only or by means of both written heads of argument and oral address should they so elect.

[30] In the result the following order is made:

1. The payment of R20, 000.00 made on 22 December 2005, of R100, 000.00 made on 9 January 2006, of R20, 000.00 made on 9 February 2006, and of R20, 000.00 made on 8 March 2006 by the plaintiff to the defendant, are hereby set aside in terms of s 29(1) of the Insolvency Act 24 of 1936 read with s 340 of the Companies Act 61 of 1973.

2. The defendant is ordered to pay to the plaintiff the sum of R160, 000.00 plus interest thereon at the rate of 15,5% per annum from date of service of the summons to the date of payment in full.
3. The costs of suit are reserved for determination at a date and time to be arranged with my clerk.
4. The parties are ordered to file heads of argument on the matter of costs within fifteen days of the date of this order._

P.A. MEYER
JUDGE OF THE HIGH COURT

16 May 2011