Neutral Citation Number: [2009] EWCA Civ 32

Case No: A2/2008/1525

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT, CHANCERY DIVISION, COMPANIES COURT
MR JUSTICE NORRIS
[2008] EWHC (Ch) 1054

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/01/2009

Before :

LORD JUSTICE RIX
LORD JUSTICE TOULSON
and
LORD JUSTICE RIMER

- -

Between :

SECRETARY OF STATE FOR BUSINESS, ENTERPRISE AND REGULATORY REFORM	**Appellant / Claimant**
- and -	
AMWAY (UK) LTD	**Respondent / Defendant**

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Mr Mark Cunningham QC and Mr Andrew Westwood (instructed by **Treasury Solicitors**) for the **Appellant / Claimant**
Mr David Chivers QC and Mr Philip Gillyon (instructed by **Messrs Eversheds**) for the **Respondent / Defendant**

Hearing dates : Monday 8th, Tuesday 9th and Wednesday 10th December

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Judgment Approved by the court for handing down (subject to editorial corrections)

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Lord Justice Rix :

1. The trial judge, Norris J, exercising his jurisdiction under section 124A of the Insolvency Act 1986 to wind up a company in the public interest if he thinks it just and equitable to do so, refused the petition of the Secretary of State for Business, Enterprise and Regulatory Reform (the "Secretary of State") to wind up Amway (UK) Limited ("the company"). He did so because he considered that the company's new business model, which was already (in large part) in operation at the time of trial, eliminated the defects of the old business model; and also in the light of undertakings which the company offered, the Secretary of State had declined, but the judge accepted as a condition of his order. There is a dispute which this court will have to resolve as to the importance of the role of these undertakings for the judge's ultimate decision to refuse the petition to wind up. On the way to that ultimate decision the judge had made some strong findings about the old business model, albeit on a relatively narrow basis. He said that if the matter had stopped there, he would have wound up the company.

2. The factual position in a nutshell, necessarily over-condensed at this stage, is this. The company is part of an international group which operates a multi-level direct selling business in personal and home care products. At the time when the petition was sought the company had been turning over some £13 million per year, albeit unprofitably. Amway's business in the United Kingdom had been in existence for some thirty years. The selling was carried out by members of the public, so called independent business operators or IBOs, who in turn recruited other IBOs, although new IBOs could also be recruited directly via the company's website. Recruits earned bonus or commission on both their own sales and also the sales of all recruits in their downline (ie their recruits, or recruits of their recruits, and so on), but it was difficult for large sums to be earned by IBOs without long-term success in recruiting a motivated downline. The majority of IBOs merely self-purchased and earned nothing at all. Only a very small minority earned large sums by way of bonus. A new recruit paid £28 on recruitment (the cost to the company of a starting-up kit comprising brochures, order forms, price lists and the like) and thereafter a renewal fee of £18 per year. An IBO could leave at any time (on 30 days notice) and recover the purchase price of any products (less a handling charge of 7.5%) if returned in good condition.

3. The fault which the judge found against the company was essentially that it had failed to supervise and control the representations and promotional material used by its own IBOs in their own recruitment. The judge acquitted the company itself of any misrepresentation (by what he called a fine margin) but he criticised it severely for its failure to control its IBOs. Their misrepresentations (which the judge described at one point as false and deceptive) related to the recruitment process and consisted in the suggestion that it was easier to prosper as an IBO than was in fact the case. Some IBOs misrepresented their own income from bonuses. They were selling a dream, whereas the reality was different. The judge inferred that people bought into that dream and were thus deceived.

4. The Secretary of State had originally put his case on a much wider basis. It was alleged that the company's business was an unlawful lottery contrary to section 1 of the Lotteries and Amusements Act 1976 and/or an unlawful trading scheme contrary to section 120 of the Fair Trading Act 1973. It became common ground shortly before trial, however, that the new business model could not be so criticised on either score, if only because of the absence under the new model of any initial or annual renewal fee for an IBO. The judge found that the old business model was not an unlawful trading scheme, and that the new business model was not an unlawful lottery, but did not feel it necessary to deal in terms with whether the old business model was a lottery. It might be said that the judge's logic in dealing with the lottery issue (see paras 68/69) compelled a finding that the old business model could also be acquitted of the charge, especially as the judge had no need to make findings in respect of the new business model. That that was the judge's essential view is also suggested by his remark (at para 62) in asking himself how he should dispose of the petition "assuming the "lottery" and "fair trading" grounds are also not made out". But be that as it may, on this appeal the Secretary of State, by his respondent's notice, sought to raise again the allegations that the old business model was an unlawful lottery and/or unlawful trading scheme, and persevered in those submissions in his skeleton argument for this appeal. It was submitted that, even though it continued to be accepted that the new business model could not be attacked on either of these grounds, the unlawfulness of the old model would support the Secretary of State's broader case that the company should have been wound up. However, the Secretary of State did not persevere in those grounds at the hearing. Thus, there is no longer any allegation that the company's business is or has been unlawful under the 1973 or 1976 Acts.

5. On this appeal, the Secretary of State submits that the judge has fundamentally misunderstood his jurisdiction. If he considered, as he did, that the old business model was commercially unacceptable (or "inherently objectionable" to use a jurisprudential gloss which has been adopted as a form of label), then he had no effective option other than to wind up the company. To refuse to do so because of changes to the business model which were reactive to the Secretary of State's interest in the company was wrong in principle. It was also wrong in principle to accept any undertakings as a condition of the refusal of the petition in circumstances where the Secretary of State was not content with the acceptance of such undertakings. The decision in this case was "aberrant".

6. In response, the company submits that the judge acted within his jurisdiction and that the rest was an exercise of discretion which cannot be faulted. The judge was entitled to refuse the petition despite the finding that the company would have been wound up if it were still pursuing its old business model. The judge had to decide whether it was just and equitable at the time of trial for the company to be wound up. The judge was entitled to accept undertakings from the company, even if historically such orders were unusual in the absence of the Secretary of State's consent. In any event, the judge did not refuse the petition because he was willing to accept the company's

undertakings, but rather he accepted the undertakings because he was willing to refuse the petition.

7. The high point of the Secretary of State's case on the authorities consists in two extracts from respectively *Re Walter L Jacob & Co Ltd* [1989] BCLC 345 (CA) and *Re Bamford Publishers Ltd* (2 June 1977, unreported, Brightman J, cited with approval by Sir Andrew Morritt V-C in *Re Supporting Link Alliance Ltd* [2004] 2 BCLC 486).

8. In *Re Walter L Jacob* this court was dealing with a dishonest dealer in securities which had ceased business. Nicholls LJ said (at 360f/h):

> "Having regard to all these matters, I would have had no doubt, if the company had still been dealing in securities, that it was just and equitable that it should be wound up. Does the fact that the company ceased to carry on that business immediately before the petition was presented make a crucial difference? In my view it does not. It is, of course, an important factor to be taken into account. The investing public is no longer at risk from any future activities of the company. The company is no longer a member of FIMBRA. But it would offend ordinary notions of what is just and equitable that, by ceasing to trade on becoming aware that the net is closing around it, a company which has misconducted itself on the securities market can thereby enable itself to remain in being despite its previous history. The wishes of those who control such a company, that it should remain extant for other purposes will, normally, carry little weight in the balancing exercise. On the other hand, by winding up such a company, the court will be expressing, in a meaningful way, its disapproval of such misconduct. Moreover, in addition to being a fitting outcome for the company itself, such a course has the further benefit of spelling out to others that the court will not hesitate to wind up companies whose standards of dealing with the investing public are unacceptable."

9. In *Re Bamford*, dealing with the acceptance of undertakings, Brightman J said this (as set out in *Re Supporting Link* at 504b-g):

> "Quite clearly the company has been engaged in a disreputable system of trading. The company has offered a series of undertakings which are designed to secure that its future trading activities are free from objection. These undertakings are not acceptable to the petitioner. In case this matter goes to a higher court it may be helpful if I say something about the undertakings. First, the undertakings offered, assuming as I do they were implemented, would in my view make the company's trading activities free from legitimate complaint however useless those trading activities may be from the point of view of the public interest. The

> reason that I reject the undertakings is this. Petitions under s 35 of the Companies Act 1967 are common. Many petitions go by default. A few are opposed. If it were open to a company to oppose a petition under s 35 on the basis that undertakings are offered to regulate the future conduct of the company's business, the Department of Trade would end with a mass of delinquent companies on probation. It is not the function of this court, or at any rate of the Chancery Division, to police undertakings given to it except perhaps in the limited field of the welfare of infants. It is for the litigant to bring to the attention of the court, if he so wishes but not otherwise, any activity which he considers a breach of an undertaking given to the court. If this court accepted undertakings by a company, which is the object of a s 35 petition, there would be thrown upon the Department of Trade, and not upon the court, the obligation of policing those undertakings. That is not the function of the Department. I take the view that the court ought not to pay any attention to undertakings offered by a company, which is the object of a s 35 petition, relating to its future conduct owing to the burden which would thereby be thrown upon the Department of Trade, unless the Department is willing in a particular case that such undertakings should be accepted by the court; and I do not think that the Department is under the smallest obligation to exhibit such willingness."

10. The company does not dispute these citations but submits that they speak to their own material, namely of cases of essential dishonesty where the court could have no trust in the company concerned. It points out that Nicholls LJ himself accepted that the ceasing of an offending business "is, of course, an important matter to be taken into account", and submits that in the present case it was not simply a case of a business ceasing but one where a substantial and long-standing and lawful business, albeit with an important defect, could be and had been cured of that defect. As for undertakings, it emphasises the judge's observations that the new business model had not been subjected to a detailed critique by the Secretary of State nor had the company's witnesses been cross-examined, and that it was not through lack of trust that he accepted the company's undertakings but because he saw "no need to spurn them". It also emphasises other passages from the authorities to demonstrate that what the judge did could not be criticised in principle but only (and illegitimately) as a matter of discretion, or what Nicholls LJ had called "the balancing exercise". Thus it relies principally on the following two extracts.

11. The first is Sir Andrew Morritt V-C speaking in *Re Supporting Link* after reviewing the jurisprudence from *Re Bamford Publishers* onwards. He said:

> "[58] In my view unless the Secretary of State is content that the petition is disposed of on undertakings the court should be very slow indeed to accept them in preference to making a winding-up order. All the reasons given by Brightman J in *Re Bamford Publishers Ltd* remain as valid now as they were then. If the court is satisfied that the offending business has ceased and it is prepared to trust the existing management then it may be appropriate to dismiss the petition altogether.

> But if it is not so satisfied or does not trust the existing management then I find it hard to envisage a case in which it would be appropriate to dismiss the petition on undertakings as to the future conduct of the company's business."

The company submits that the present case is *a fortiori* the situation where the offending business has ceased: it is one where an essentially lawful business has been cured of its offending defect. It also submits that the judge was prepared to trust the company's management, and that his unwillingness to spurn the undertakings which had been offered did nothing to undermine his conclusion.

12. The second extract is from the most recent decision in this court on the nature of the section 124A jurisdiction, namely *Secretary of State for Trade and Industry v. Bell Davies Trading Ltd* [2004] EWCA Civ 1066, [2005] 1 BCLC 516. There Mummery LJ, presiding in a court which also contained Scott Baker LJ and Lawrence Collins J, in a judgment of the court described that jurisdiction as follows:

> "[110] A valuable review of the authorities on the proper approach of the court to s 124A public interest petitions, in general, and to the practice relating to the acceptance of undertakings, in particular, was carried out by Sir Andrew Morritt V-C in his judgment in *Re Supporting Link Alliance Ltd* [2004] EWHC 523 (Ch), [2204] 2 BCLC 486. The judge has a discretion whether or not to make a winding up order. As for undertakings, the court has a discretion whether or not to accept them if they are proffered and whether or not to make the giving of them a condition of dismissing the petition. In considering the exercise of his discretion the willingness or otherwise of the Secretary of State to accept undertakings, which have to be policed by the DTI, is an important factor.
>
> [111] Thus, in the exercise of his discretion, the judge is entitled (a) to dismiss the petition on undertakings if, for example, he is satisfied that the offending business has ceased or if the undertakings are acceptable to the Secretary of State; or (b) to dismiss the petition on undertakings, even if that course is opposed by the Secretary of State, although that will be unusual; or (c) to refuse to accept undertakings and to wind the company up, if, for example, he is not satisfied that those giving the undertakings can be trusted.
>
> [112] In our judgment David Richards J followed the correct approach in this case. There is no error in the exercise of his discretion to order that the dismissal of the petitions was conditional on undertakings.
>
> (1) In deciding whether it was just and equitable to wind up BDT and KDA he carried out the balancing exercise as to the reasons why, on the totality of the evidence, BDT and KTA should be compulsorily wound up and why they should not: see the judgment of Nicholls LJ in *Re Walter J Jacob Ltd* [1989] BCLC 345, cited in *Re Supporting Link Alliance Ltd* [2004] 2 BCLC 486 at [50] – [53].

(2) On the one hand, the judge's finding on the control issue meant that BDT and KTA were involved in the conduct of an unlawful scheme. On the other hand, there were, as the judge described them, 'significant factors against the winding-up order' as listed by him at para [68] of his judgment.

(3) One of those factors was that the activities of BDT And KTA did not involve deliberate wrong-doing; another was that the operation of the scheme, which he had held to be illegal, would cease. These conclusions were amply borne out by the evidence filed on behalf of BDT and KTA that it was their aim and intention to operate lawfully and in compliance with legal regulatory requirements; that they had not sought to conceal or disguise any of their activities; and that they had been open and constructive in their dealings with the DTI seeking a constructive and responsible dialogue concerning regulatory issues…

(6) The judge then considered the question of undertakings and concluded (para [69]), that, if undertakings were given which ensured that the scheme would cease to function, it would not be just and equitable to wind up either of BDT and KTA. The undertakings were given. The Secretary of State did not press for winding-up orders. The petitions were dismissed."

13. The *Bell Davies* case is a good illustration of the balancing exercise which the court has to perform in exercising its discretion under section 124A. It is reflected in other passages to which the judge also referred, with the agreement of counsel before him, as containing material guidance. Thus he cited the following dicta of Nicholls LJ from *Walter Jacob*:

"In considering whether or not to make a winding up order…the court has regard to all the circumstances of the case as established before the court at the hearing" (at 351i).

"A petition having been duly presented…the next stage is when the petition comes before the court. At this second stage the court is concerned with the whole of the evidence before it, and the submissions made thereon by the parties. The court is not concerned with what was the material before the Secretary of State at the earlier stage when he formed his opinion…the court's task…is to carry out the balancing exercise…having regard to all the circumstances as disclosed in the totality of the evidence before the court" (at 352i-353c).

"[This court must exercise its own discretion] in the light of the circumstances as they now are…" (at 357h).

The judge also referred to a passage in *Re Senator Hanseatische Verwaltungsgesellschaft mbH* [1996] 2 BCLC 562 at 606c where Millett LJ said:

> "The safeguard for the individual is that the decision to wind up the company is not left to the Secretary of State but to the court, which must consider whether it is just and equitable to do so. In reaching its decision the court will take into account the interests of all the parties, present members and creditors of the company and present participants in the scheme, as well as the interests of the public who may hereafter have dealings with the company."

The judge's appreciation of the law

14. The judge set out his references to the cases relied on by the Secretary of State as well as to other jurisprudence at paras 10 and 14 of his judgment. Relying on such jurisprudence, he said:

> "The Secretary of State is not a licensor of approved business models or a business design consultant and is under no obligation to approve or to police a scheme of undertakings relating to the conduct of an individual company's business. The basis for this view is to be found in the decision of Brightman J in *Re Bamford Publishers Ltd* (cited and commented upon by the Vice Chancellor in *Re Supporting Link Alliance Ltd* [2004] 2 BCLC at 503i-505d)."

It is not suggested by the Secretary of State that the judge erred in his appreciation of the law, only in its application.

15. The judge also referred to the statutory regulation relating to pyramid selling schemes. Thus he commented on the fact that Part XI of the Fair Trading Act 1973 was passed to address the problems created by –

> "Get rich quick schemes [operating] on the same basis as chain letters with each member recruiting further members. Members pay out large sums in the expectation of a high return…the forecasts are derived from…the principle of geometric progression leading to the theoretical levels of recruitment reward which, in reality, are impossible to achieve…"

He also referred to three sets of regulations which had been made to deal with pyramid selling schemes, in 1973, 1989 and 1997. The earlier regulations forbad the making of statements that a participant would during any period receive a specified financial benefit unless the promoter had evidence that the indicated sums had actually been obtained during the same period as a result of participating in the scheme. However, in the Trading Schemes Regulations 1997 the requirement to

substantiate financial benefits was removed: Parliament considered that sufficient protection would be afforded to prospective participants if advertisements and any resulting contract that they signed contained warnings, inter alia, "Do not be misled by claims that high earnings are easily achieved". The company's material contained the necessary statutory warnings.

The facts found relating to the old business model

16. The judge began by describing the company's own website, by which it sought to recruit new IBOs. The website referred to the "nearly 22 billion US dollars" which the international group (of which the company was a part) had paid out since its founding in 1959. It is not suggested that this figure is incorrect. The website also referred to the company's Rules of Conduct and Code of Ethics by which each IBO must agree to "present…the Amway business opportunity to…Prospects in a truthful and honest way…and only [make] such claims as are sanctioned in official literature". It stressed that –

> "Like any small business, it takes hard work to succeed in the Amway business, and that requires time and commitment, especially in the beginning…"

All IBOs agreed to be bound by the Rules of Conduct. The website also warned in a section devoted to "Training" that –

> "Amway does not guarantee success in business. Use of these training tools can assist you, but cannot guarantee your success. You should always use good judgment in purchasing training materials. Your expenditure for training materials should be in reasonable proportion to your earnings."

Similar warnings appeared in the company's printed promotional literature. The judge reminded himself not to be over-influenced by such warnings.

17. The judge next turned to promotional literature published by others, referred to as business support material or "BSM", of which the publications of two separate companies (not part of the Amway group) called Britt (UK) Ltd and Network 21 Support Systems Ltd comprised an important part.[1] The company's Rules of Conduct had rules regulating the use of such BSM, eg that no IBO might make representations

[1] The judge recorded that petitions had also been presented against Britt and Network 21 but that these "had been the subject of arrangements between the presentation of the petitions and the hearing of the Amway petition". I assume that those petitions had been compromised in some way.

about earnings from that IBO's business unless the amounts were based on verifiable personal experience. However, the judge had critical remarks about how such third party promotions worked in practice, sometimes citing material reviewed and approved by the company itself. Thus such third party material spoke of the possibilities of large earnings, of how "even a few hours a week can produce impressive results", of a testimonial from a medic who said his income "continues to climb to replace my full professional salary", of taking steps to "secure your financial future", of achieving lifestyle dreams. The Secretary of State's investigators (who conducted an investigation pursuant to section 447 of the Companies Act 1985) attended a meeting at which a presenter had spoken of the very large rewards which could be achieved in short periods and of how "the money we get for this is fantastic for what we do". The company's own surveys of its new IBOs' aspirations recorded the high percentage of them who referred to the importance of "earn[ing] an additional income" or "improv[ing] lifestyle". (Others however referred to non-financial considerations such as self-esteem and the opportunity to work at one's own pace.) The judge commented that it was necessary to deal in detail with the way in which IBOs were recruited because "it lies at the heart of the Secretary of State's case on inherent objectionability".

18. The judge also dealt in detail with the complex bonus structure, but it is unnecessary to go into the matter in depth. It was possible, but difficult, to earn large bonuses. The judge summed up his findings in the following passages at paras 42/43 of his judgment:

> "42…The case for the Secretary of State is that the reality of the Amway business is that the nature and rewards of becoming an IBO and participating in that business are such that only a very small number of IBOs make any significant money from their participation. In fact, the substantial majority of IBOs make no money and indeed by reason of their payment of the registration fee [£28] and the annual renewal fees [£18], lose money from their participation…For the period from 2001 to 2006 (a) 95% of all bonus income was earned by just 6% of the IBOs; and (b) 75% of all bonus income was earned by less than 1.5% of IBOs. In 2005-2006 there were 39,316 IBOs who shared a bonus pot of £3.427 million. But of this total, 27, 906 IBO (71%) earned no bonus at all, and 101 IBOs (0.25%) shared £1.954 million between them. That leaves a group of 11,309 IBOs to share a bonus pot of £1.473 million. Within that category there was a group of 7,492 IBOs…who between them shared £101,400. This gave them an average annual bonus of just over £13.50, a sum less than the annual renewal fee of £18…
>
> 43. The picture can be presented in a variety of ways: but it is consistent. Between 2001 and 2006 the proportion of IBOs not earning any bonus income varied between 69% and 78%. In year 2004/5 only 74 out of 24,342 IBOs earned over £10,000 by way of bonus. In that year only 4,076 IBOs earned enough bonus to cover the annual renewal fee: 21,266 did not even cover their most basic

> running cost from bonus payments (though there may be retail margin).[2] If very modest business expenses are factored in (say £100 on petrol or the purchase of BSM) the picture is even starker with only 1,820 IBOs making sufficient from bonus payments to cover those expenses and 23,521 IBOs failing to do so. In the period from 2000 to 2005 Chris and Sharon Farrier's bonus income ranged from £21,495 to £7,971 and averaged £12,850. Over the same period Dr Anup Biswas ranged from £137 to £433 abd averaged £306. These are the people whose testimonials said respectively that they were earning "the equivalent of good executive size income", or was deriving an income that "continue[d] to climb to replace my full professional salary"."

19. The judge added (as "Fairness requires") that there were individual cases which demonstrated that the norm was not the invariable rule. Thus one IBO of only six years standing had achieved 16th highest ranking with an income of £34,275 in 2004/5, another had achieved almost £29,000 in only three years; and there were other (but few) similar cases.

20. However, the company of course knew what the reality was. The judge described that reality (at para 47) in these terms –

> "The existing IBOs effectively act as gang masters, the gang master being rewarded under a system which rewards him or her more highly for the assembly of a gang…than for the direct selling of the product."

He continued (at para 48):

> "On the facts as I have so far found them I would have considered it just and equitable to wind Amway up. I would have done so on a narrow ground which it is necessary to identify."

He explained (at para 53):

> "What this case has been about is the disparity between the dream that is sold to and the reality of the opportunity that is gained by an IBO…"

[2] Retail margin represented the difference between a retail and wholesale price and was available even where the IBO self-consumed rather than on-sold products.

21. The judge then proceeded in a central paragraph of his judgment (para 54) to set out the main considerations which had led him to consider that the company should have been wound up if it had still been following its old business model. Among those considerations were the following: that the statistical evidence was compelling to suggest not merely the possibility but the probability that many IBOs were seduced by a dream, only to find that the reality turned out to be different from the expectation; that it was therefore to be inferred that the disparity between expectation and experience arose from "a failure to make a fair presentation of the actual (as opposed to the theoretical or exceptional) chance of success"; that IBOs were "sold a dream which in reality they have no genuine prospect of attaining"; and that the promotional material produced by the IBO organisations or spoken to at meetings contained substantial misrepresentations as to what was currently being achieved by IBOs or could realistically be achieved by new recruits: this was also described as serious misrepresentations as to a key part of the company's business. On the other hand, there was unchallenged evidence that over a fourteen year period not a single IBO had ever complained to the company about the manner in which he or she had been recruited; and the judge accepted that the material produced by the company itself could not be categorised as containing misrepresentations of such seriousness as to justify winding up. By a fine margin it had complied with its duty. Nevertheless, the consequences of the making of the third party misrepresentations would still have been visited on the company. Its own warnings, its Code of Ethics and policies on presentations, were ineffective and cosmetic: to some extent the offending literature had been approved by the company itself, and when it disapproved, it did not enforce its disapproval. It bore direct responsibility for such failings, and if this was more of a management failure than anything else, it was still one which could be criticised as a lapse in generally accepted minimum standards of commercial behaviour and be visited by a winding up in the public interest. As for submissions that the company could not be blamed for what it did not know, or for the faults of independent actors, or for failures below that of top management itself, the judge was unsympathetic. The company could not reap the benefit of misrepresentations without paying the price: "It permitted itself to be surrounded with a penumbra of impropriety, and took the advantages to its business thereby gained…Running a business in such a way that it encourages wrongdoing by others is a determining factor in the balance". The old business model had entailed "a risk of impropriety".

22. These the judge described as "provisional holdings on part only of the evidence" (at para 55), because he then turned to the new business model before conducting his ultimate balancing exercise.

The new business model and the company's undertakings

23. The company put its revised business model into effect in September or October 2007. Well before that it had begun to pull its socks up, but the judge was in "no

doubt that the real spur to action was the commencement of the Secretary of State's investigation". That investigation had begun in January 2006.

24. The company's evidence as to its new business model was, as the judge said (at para 56):

> "set out in detail in the evidence filed which was fully formulated, comprehensive, open and transparent. Amway submit and its evidence asserts that it is capable of effective and ongoing implementation without the supervision of either the Secretary of State or the court: but it offers undertakings to the court in any event."

Those observations by the judge picked up an earlier passage in his judgment (at para 11) which had quoted the Secretary of State's own test for such revisions. The judge there said this:

> "11. In my judgment the Department's officials exhibited an appropriate degree of caution in entering into any form of negotiation with the Amway management. However, given that the compulsory winding up of an active and established company is a very serious step to be taken, what is necessary is that the Department is explicit and exact as to its concerns, so as to enable the company against whom the petition is presented (should it so choose) to prepare a revised business model which is (to quote a letter sent by the Treasury Solicitor in this case) "fully formulated, comprehensive, open and transparent, and capable of effective and ongoing implementation without the supervision of either the Secretary of State or the court". I consider that to be an accurate statement of the standard that any revised business model must attain if it is to be worthy of consideration at the hearing of the petition as a significant matter to be weighed in the balance."

25. Those well-balanced and cautious comments were not attacked on this appeal by Mr Mark Cunningham QC, who appeared for the Secretary of State: indeed, it would have been difficult for him to have disparaged the Treasury Solicitor's own test. Nevertheless, Mr Cunningham did submit that as a matter of principle and authority any response to the Secretary of State's own investigations and petition was so far from being a mitigation as to amount to a cynical aggravation; and that no undertakings proffered which the Secretary of State was not himself willing to accept were of any avail.

26. The judge described the effective changes accomplished by the new business model as follows. (i) The company had recruited a senior management team, and in particular a general manager, to assert central control and to dilute the influence on

the organisation of the senior IBOs. (ii) The "retail margin" was abolished to discourage self-consuming sales. (iii) The basic level of recruit, designated a "retail consultant", now had a pure sales function and could not sponsor anyone to become an IBO, now renamed an Amway Business Owner or "ABO". (iv) A retail consultant with an established customer base could apply to become a "certified retail consultant". To qualify, the applicant would have to undergo mandatory personal training and complete an online certification test, aimed at ensuring a full understanding of the Amway business model. Only a certified retail consultant could recruit other ABOs. (v) A certified retail consultant could qualify as a "business consultant" on reaching a defined level of income. As such he or she could take on an enhanced role in training and supporting their downline. (vi) All BSM publications deployed by certified retail consultants and business consultants would be rigorously controlled, and could not be sold to generate income. (vii) Any new ABO would have to undergo a company orientation programme designed to eliminate any unrealistic expectations. (viii) No new recruitment would be permitted until the company was in a position, after operating the new model for six months, to publish earnings information. This is something which the US Federal Trade Commission has required since 1979, but is not undertaken by the company's direct selling competitors in the UK. At first the company resisted the idea that it should be required to do anything which its competitors did not do, but at trial the offer to produce such information was made the subject of an undertaking. Such material has now been published. Mr Cunningham submitted that it was unsatisfactory: but in my judgment it made entirely clear how few ABOs managed to earn large amounts, how the majority of ABOs earned no bonus at all, and how relatively modest the average earnings of the rest were. (ix) The initial registration fee of £28 and the annual renewal fee were no longer payable.

27. The judge commented as follows as to this new business model:

> "58. The Secretary of State did not subject the new business model to a detailed critique, nor was any suggested deficiency in it put to any Amway witnesses (none of whom was cross-examined). Mr Cunningham QC simply submitted that it was not very different from the old model and that I could not trust the Amway management. I reject the first submission: in my judgment the model makes radical changes, bringing into greater prominence the retail nature of the business, eliminating the attraction of recruiting self-consumers, asserting proper control over what is said, providing a mechanism for correcting any misstatements and not requiring any initial financial commitment. I do not consider the second submission open: I had been invited to accept the written Amway evidence at face value, and I have not seen any of the intended senior management give evidence and certainly cannot form an adverse view of them."

That is an important paragraph, but Mr Cunningham submits on this appeal that the judge was wrong to reject both those submissions: wrong, in other words, to say that the new business model was not subjected to a detailed critique, and wrong to say that

the Amway management could be trusted and that the contrary submission was not open to the Secretary of State. I shall consider those submissions below.

28. The judge then proceeded to consider in detail the Secretary of State's case based on the *Walter Jacob* and *Supporting Link* authorities to the effect that the new business model was in effect irrelevant, and to conduct a final balancing exercise. The judge reasoned the matter as follows (at para 61):

> "In my judgment I must reach a decision on the totality of the evidence as presented at the hearing…One aspect of the public interest that would be promoted by making a winding up order is to bring to an end a company which in the conduct of its business failed to maintain at least the generally accepted minimum standards of commercial behaviour. One such standard is to avoid inviting the public to participate in trading schemes on a false and deceptive basis…Insofar as Amway undertook that recruitment itself it did (on a fine balance) comply with the law. But it was a key part of its business model…that its existing IBOs should perform that function. In so far as it had in place machinery to control what was said by such IBOs to members of the public Amway failed to prevent false and deceptive descriptions being given of what its business opportunity offered…Amway understood that this was the burden of the petition presented by the Secretary of State…It has now taken steps ["so that no government ever sees the need to step in again"] by asserting control (so far as it can) over what may be said, and by seeking to correct (through an induction programme) any false and deceptive statements that may have been made. I place significant weight on the undertaking offered at trial to make proper income disclosure. These proposals are of course put forward by a management team that has failed properly to supervise the business in the past and instituted the present reforms largely under the spur of the petition. But its present management team has not been challenged upon any perceived deficiencies in the system or upon any inadequacies in the team itself. I do not consider that the fact that the reforms have only really taken place in response to the petition (though the problems that occasioned the petition were being considered by the management before the investigation) makes it an affront to justice to recognise them for what they are. There remains a degree of risk to the public that Amway will not conduct its business in a proper way: but it is not possible to eliminate all risk from commercial activity, and it may be possible to moderate the risk. To wind up an active lawfully trading company that now recognises and seeks to abide by the appropriate standards of commercial probity (and has endeavoured to engage with the Department to address any concerns of the regulator) is a serious matter: it has serious consequences for creditors (when Amway is seeking to trade out of its present insolvency) and for the significant number of present scheme participants who derive a main or additional income (albeit that this is a small proportion of the total IBOs). On the evidence there are people (over 7,000) who wish to continue to participate in the Amway business, and the business model itself is that now adopted by the majority of direct selling organisations. On balance I do not consider that the need to punish Amway for its past wrongs or the need to deter other multilevel companies from inducing the public to become purchasers

> and retailers of its products by misstatements requires that the serious consequences I have identified be visited on Amway: and as a result of the undertakings now offered (including that offered at trial) I consider a winding up order to be disproportionate. The Secretary of State's investigation and presentation of this petition are a sufficient salutary lesson to Amway and a clear warning to its peers that if the risks inherent in the multi-level model are not rigorously controlled then serious and expensive consequences followed."

29. Finally, the judge went on to consider the role of the proffered undertakings. The penultimate sentence just quoted, as well as the earlier reference to the "significant weight" that the judge placed on the undertaking relating to proper income disclosure, might suggest that the undertakings entered into the judge's balancing exercise as a reason to refuse the petition. However, in the following passage, the judge addressed the question of the undertakings directly. He said (at para 62):

> "The Court has a discretion whether or not to make a winding up order. The Court may simply dismiss the petition if satisfied that past wrongs have been remedied and the management can be trusted not to permit their recurrence (even if unconstrained by any undertakings). But the Court has power to accept undertakings as to future conduct, and a discretion as to whether to make the giving of undertakings a condition of dismissing the petition. The power will not be exercised (and undertakings will be refused) if those offering them cannot be trusted. The power to accept undertakings is likely to be exercised if that course is acceptable to the Secretary of State. If the Court considers that undertakings may be acceptable, it should nevertheless be slow to accept them if the Secretary of State is not willing to dispose of the petition in that way: but whilst the course may be unusual, the Court undoubtedly has power to do so if there are countervailing factors which outweigh the Secretary of State's opposition. In the instant case I could simply dismiss the petition: but undertakings are offered and I see no need to spurn them even if the Secretary of State shows no enthusiasm for their acceptance…"

30. In that passage the judge was apparently minded to dismiss the petition in any event: but, as undertakings had been offered, he was willing to accept them rather than spurn them, and so made them a condition of his order. The undertakings in question, set out in his judgment and ultimately scheduled to his order as a condition of it, are as follows:

> "1. Amway will maintain the present prohibition on the production, sale or promotion in the United Kingdom of Business Support Materials in connection with the Amway Business Opportunity that are not authorised and distributed by Amway.

> 2. Amway will not introduce a registration fee for new ABOs or a renewal fee for existing ABOs unless either the Secretary of State has consented or, in the absence of such consent, has obtained a declaration from the Court to the effect that such a fee is lawful.
>
> 3. Amway will not lift its moratorium on the registration of new Amway Business Owners ("ABOs") until it has published earnings data for the period from 1 October 2007 to the date of the lifting of the moratorium in accordance with the earnings disclosure policy set out in Schedule 2. Amway will thereafter publish on at least an annual basis earnings data covering the preceding 12 month period in accordance with the earnings disclosure policy. Earnings data will be included in official literature used to promote the Amway Business Opportunity and on the Amway website.
>
> 4. Subject to paragraph 3 above, Amway will operate and maintain an orientation programme for all new ABOs substantially in the form described in the witness statement of Mark Beiderwieden filed on behalf of Amway and referred to in the Judgment of Mr Justice Norris at paragraph 57(d)."

31. Undertaking (4) was part of the new business model by the time of trial, but was required by the judge in addition to the three undertakings proffered by the company. In proffering its undertakings, Mr David Chivers QC, on behalf of the company, indicated that they reflected the new business model which the company had developed and were intended "to meet objections…which Amway has tried to glean from the way in which the case has been put". In particular, the matter of earnings disclosure was raised in Mr Cunningham's opening as the "key" to the petition. It was submitted that the undertakings were not necessary, on the basis that the management could be trusted, but they were offered in case of any doubts as to future conduct. The judge did not express any doubts about the trustworthiness of the company's management, indeed he had said that the contrary submission was not open to the Secretary of State in the absence of cross-examination, but he did recognise that in the nature of things there was an element of risk and that it was "not possible to eliminate all risk from commercial activity", albeit it could be moderated.

Pre-trial history

32. It is necessary to say something about the discussions between the parties in the run-up to trial. The judge in his judgment had said both that the Secretary of State had "exhibited an appropriate degree of caution in entering into any form of negotiation" but also that it was open to a company to revise its business model to attempt to meet the gravamen of the Secretary of State's concerns, provided such a revised model met the test which the Secretary of State, through the Treasury Solicitor, had himself put

forward for such a revised model (at para 11). There is also a costs appeal and cross-appeal to which such matters are themselves relevant.

33. We have been shown relevant correspondence between the company's solicitors, Eversheds, and the Treasury Solicitor. On 1 May 2007 Eversheds wrote to the Treasury Solicitor to say that the company had made clear its intention to cooperate with the Department and wished to discuss its concerns with it. It also said it was willing to offer undertakings to reinforce its cooperative stance. It asked for a meeting. On the next day the Treasury Solicitor replied to arrange a prompt meeting, making it clear that this would be for listening only: the Department would then reflect on what had been heard and would respond in writing. In the meantime the Secretary of State was prepared, on the provision of undertakings, to adjourn by consent to the substantive hearing of the petition his application for the appointment of a provisional liquidator.

34. Following the meeting, on 9 May 2007 the Treasury Solicitor wrote as follows:

> "My client presents public interest petitions for 2 primary reasons. Firstly, to protect the public and secondly to inform the business place so that high standards of business practice are maintained. While your client may well be able to put remedies in place which, ultimately, may fully protect the public in future, this is unlikely to be sufficient to persuade my client to agree to the petition being set aside. This is because of the second of the two reasons for presenting public interest petitions.
>
> The message that will be sent to the market place, should my client consent to the setting aside of the petition on only the first reason being satisfied, is that a company can proceed on a basis unacceptable in the public interest until such time as it is found out and only then need to set its house in order, without risk of being wound up. Clearly, this is not the right message to send to the market place. Therefore, as matters stand, it is my client's intention that all 3 petitions will be fully prosecuted, notwithstanding any remedial action your client may take in respect of its business practices."

35. On 21 May 2007 the application for the appointment of a provisional liquidator was adjourned by consent on agreed undertakings.

36. On 19 July 2007 Eversheds sought a further meeting between the company and the Department to outline its future plans. That meeting took place on 8 August. On 17 August the Treasury Solicitor wrote as follows:

> "It will remain my client's intention to proceed to the November Trial unless and until you can either produce evidence and grounds demonstrating that the Petition is misconceived or Amway formulates open proposals, for the reform of its business, that would persuade him that, in all the circumstances, it would no longer be in the public interest for Amway to be wound up. It is emphasised that such proposals must be fully formulated, comprehensive, open and transparent, and capable of effective and ongoing implementation without the supervision of either the Secretary of State or the Court. It is for you, and not us, to formulate and advance such proposals. To date you have not done so, hence our intention to prosecute the Petition in the manner indicated."

That was the letter to which the judge referred at para 11 of his judgment.

37. On 21 September 2007 the Treasury Solicitor confirmed that with the dropping of an initial or annual renewal charge "there can be no lottery or unlawful trading scheme". It also repeated its test for the formulation of a revised business scheme by reference to its letter of 17 August, in advance of a meeting arranged for 26 September. On 25 September Eversheds wrote to the Treasury Solicitor a detailed letter setting out the company's new business model, which was due for introduction on 1 October. On 2 October the Treasury Solicitor replied, stating that it had held a lengthy meeting with counsel and the investigators but refusing to comment on the revised model. Instead it said that the Secretary of State had decided to "await your evidence in defence before commenting". In a subsequent e-mail dated 8 October the Treasury Solicitor explained:

> "My client has not yet made up his mind whether or not the new business model is objectionable. This is why we await your formal evidence. We should then be able to respond promptly, in an explanatory letter, prior to settling our own evidence."

38. On 26 October the Treasury Solicitor e-mailed Eversheds abruptly: "My client will proceed to trial with the petition". Eversheds responded with a complaint that in the light of previous communications it was not acceptable for the Secretary of State to be unable or unwilling to explain his position in relation to the new business model.

39. On 29 October 2007 the Treasury Solicitor replied by e-mail as follows:

> "Whilst not concurring with your assertion that the Secretary of State is under a present obligation to "…explain [his] position…", I nevertheless draw the

following points to your attention as warranting the Secretary of State proceeding with the Petition to trial:

(a) the Secretary of State is not satisfied that Amway's new business model constitutes a real and sufficient cessation of the offending business that is the subject of the Petition;
(b) the Secretary of State is not satisfied, having regard to Amway's management and the operation of the old business model, that it would be proper or appropriate to place reliance on the management of Amway to ensure that Amway's business would be properly run in the future;
(c) it is not the Secretary of State's function to police the undertakings that Amway would have to give in relation to the operation of the new business model, nor is the Secretary of State willing to assume such a function;
(d) it would offend ordinary notions of what is just and equitable if Amway were to escape the appropriate consequences of past misconduct by appearing to reform itself after and only in response to, the presentation of the Petition.

We will expand further on the continuing public interest in the winding up of Amway both in our evidence in reply and in our written and oral submissions.

Please note that it is not the Secretary of State's function or intention to become involved in a rolling dialogue with yourselves so as to redesigning Amway's offending business."

40. That brief response set the tone for the trial that followed a month later, and it was the judge's disagreement with that response which resulted in his refusal of the petition. In essence, the e-mail was a rejection of the adequacy of the company's new business model, without explaining what was inadequate about it, other than the comment that the company's management could not be relied upon to run the business properly in the future. It was suggested that the inadequacies could only be eliminated as a result of a "rolling dialogue" which the Secretary of State was unwilling to enter upon; and that he was equally unwilling to police the undertakings which would in any event have to be given.

41. It may be observed that during this correspondence the Secretary of State had shifted somewhat uneasily between two positions. One was that no remedies on the company's part could make up for the past; the Secretary of State's role as defender of the public interest was to be stern and censorious (see the letter of 9 May 2007). The other was that it would listen to the company's proposals to remedy its business model and would then respond: it gave notice of the test which it would apply to any such proposals (see the letter of 17 August and the e-mail of 21 September 2007). Ultimately, the Secretary of State took his stand on the inadequacy of the new proposals, so that even when sounding his censorious note (point (d) of the e-mail of 29 October 2007) its foundation was that reform was only an "appearing to reform".

The trial

42. The trial began on 26 November 2007 and lasted ten days.

43. In response to the company's evidence concerning its new business model the Secretary of State asked Mr Luke Steadman, a chartered accountant and one of his investigators, to make a supplemental affidavit dated 20 November 2007. It is this that Mr Cunningham relied on for gainsaying the judge's finding that there had been no detailed critique of the new business model. The court was asked to read it in advance of the appeal hearing, but was not taken to it in any sustained way in order to show the judge to have been mistaken. In my judgment, this affidavit does not amount to a detailed critique of the new business model. It emphasises how much of the business remained the same, but that would not be surprising about an overall account of the multi-level direct selling of personal and home care products. Its response to the new model, where relevant, was on the whole to say that the changes may help but that it was not possible to evaluate the company's enforcement going forward. It failed to focus, as the judge had to and did, on what was key to the Secretary of State's complaint and what the company had done and proposed to do to address those concerns in its new business model. Mr Cunningham's opening skeleton argument at trial was to much the same effect. There was a complaint that the business and the arrangements were essentially the same, while at the same time an acknowledgment that "there have been some changes and reforms" some of which "are positive": however, despite the company's senior management recognising their historic shortcomings with regard to enforcement, there remained a serious risk of uncertainty as to the future. It was not put so much in terms of lack of trust, more a matter of uncertainty. The judge, however, was satisfied that the new model "makes radical changes, bringing into greater prominence the retail nature of the business, eliminating the attraction of recruiting self-consumers, asserting proper control over what is said, providing a mechanism for correcting any misstatements and not requiring any initial financial commitment" (at para 58). Mr Cunningham did not seek to persuade us that the judge was wrong in those conclusions. I do not see how this court is in a position to say that he was wrong. It will be recalled that the company's witnesses were not cross-examined.

44. On the second day of trial the judge had to resolve an issue concerning relevant evidence. Objection had been taken by the company to part (chapter 6) of Mr Steadman's supplemental affidavit and to the witness statements of two new witnesses for the Secretary of State, where they sought to present evidence of complaints made against Amway world-wide. One witness, Mr Scheibeler, had written a book describing himself as a vocal critic of the Amway business model. The other, Mr Swedlund, was an attorney acting for IBOs who had commenced various actions in the United States. The Secretary of State had no case that there was a body

of justified complaints made against the company. He did not seek to establish the substance of the complaints about which he now wished to give evidence. He merely sought to balance what he took to be the company's case that it had a reputation as a responsible and successful company. The judge said that in general evidence as to reputation was not admissible in a civil case. He excluded the disputed evidence on two principal grounds: the first was that reputation was not relevant to the establishment of a civil wrong; the second was that Mr Chivers explained that the company did not seek itself positively to give evidence of a reputation for integrity (but it did not accept that it was not entitled to such a reputation). There was a third subsidiary ground that the Secretary of State's proposed material was all hearsay in connection with which the procedural requirements had not been complied with.

45. At this appeal Mr Cunningham has referred to this interim judgment of 27 November 2007 (which the Secretary of State did not appeal) as undermining the judge's reliance, in the absence of any reference to his interim judgment, on the absence of cross-examination of the company's witnesses at trial. Mr Cunningham submitted that such reliance was a serious procedural irregularity which subverted the safety of the judge's conclusions.

46. The decision not to cross-examine the company's witnesses was taken after the close of the Secretary of State's case on the fourth day of trial. The decision, which was unexplained, followed a challenge put down by Mr Chivers on the third day of trial, when he complained about Mr Cunningham's description of one of the company's witnesses' evidence as "weasel words". Mr Chivers said that it would have been better if such language had awaited cross-examination, which was then expected. It was not to be.

47. In my judgment, the matters in issue on the interim judgment and the question of trust in the company's senior management, all of whom gave evidence and made themselves available for cross-examination, were of a different order. As to the first, the judge was unwilling to have the substantive matters for debate at trial lost under a welter of irrelevant, hearsay evidence of unsubstantiated complaints. If that meant that the company was itself to be (voluntarily) restricted as to what it could say for itself on the matter of reputation, so much the better. That led to the refinement of the company's pleaded case and evidence. That, however, did nothing to remove or undermine the positive evidence that the company's witnesses did put forward, especially about accepting responsibility for past failings and promoting the new business model. All *that* evidence went unchallenged. The judge was justified in his comments. I do not think that he meant to say that a submission of lack of trust was not technically open, and if he had he would have been wrong, for there was material in the company's past misconduct to permit that submission. But I do think that such a submission was not effectively and realistically open in the absence of any cross-examination of the company's witnesses. There was a hollowness at the heart of the Secretary of State's opposition to the new business model. He came increasingly to

rely, as he did particularly in this appeal, on an approach in principle that said: winding up is the necessary consequence of past misconduct.

48. A third complaint about the judge's conduct of the trial was also connected with the subject of the undertakings. Mr Cunningham submitted that the judge had stopped him in the course of his closing speech when he was making the point that the petition must either be granted or refused, but that there was no half-way house in a refusal based on the taking of undertakings. Mr Cunningham relied on the following exchange:

> "*Mr Justice Norris:* I have got the clear view that the Secretary of State does not want undertakings and that the choice with which I am to be faced is either to wind the company up or dismiss the petition, there is no middle way.
>
> *Mr Cunningham:* I shall move on."

49. I have considered the passage in question carefully, but in my judgment the judge was merely indicating that he had Mr Cunningham's submission: he was not indicating that he agreed with it. On further consideration, Mr Cunningham appeared inclined to accept that that was at least a possible interpretation of the passage and that he might have misunderstood the position. He accepted that he could not rest on this argument by itself; but he submitted that, even if he had misunderstood this passage as a judicial indication in his favour, it might explain how and why the judge went wrong in this matter of the undertakings. As a result, the judge did not unfortunately have the help which he, Mr Cunningham, had been prepared to give by way of further submissions but which he had desisted from.

The costs judgment and the judge's permission to appeal

50. Following final judgment, the judge heard argument about costs and permission to appeal. What he said then throws further light on Mr Cunningham's submission that the giving of the undertakings was vital to the judge's decision to refuse the petition.

51. His decision on costs (see his judgment and order given on 9 June 2008) was to make the company pay the Secretary of State's costs down to 20 November 2007 and thereafter to make the Secretary of State pay the company's costs. On this appeal the Secretary of State submits that he should have all the costs of the petition. The

company accepts the essential justice of the judge's split order on costs, but had contended for an earlier date, and does so again by its cross-appeal.

52. The argument before the judge on behalf of the company, renewed in its cross-appeal, was that the Secretary of State should pay the company's costs from 3 October 2007. That date was submitted to be a reasonable period (one week) after the company had written to the Secretary of State on 25 September setting out in detail its new business model and had met with the Department on 26 September. It will be recalled that the Treasury Solicitor had replied (albeit it was only a holding reply) on 2 October. The Secretary of State's submission was and is that he should have the whole of his costs both as a salutary warning and deterrent against the past misconduct and because it was submitted that it was only the undertaking on income disclosure offered on the last day of trial which gave rise to the judge's ultimate decision in the company's favour.

53. What is important for present purposes are the judge's reasons for rejecting the Secretary of State's argument on costs. As to the first limb of that argument the judge said as follows:

> "I agree that it is not the Secretary of State's function to act as an approved licensor of business models but, as I pointed out in paragraph 11 of my judgment, the compulsory winding-up of an active and established company is a very serious step and it is important that the department should be explicit and exact as to its concerns so as to enable the company against whom the petition is presented to prepare a revised business model. Amway prepared a revised business model based on the concerns as set out in the Secretary of State's initial evidence…Whilst it is undoubtedly important to reinforce the regulatory arm of the Secretary of State, it is equally important not to discourage companies from seeking to respond to the criticisms in a coherent and effective way in an endeavour to maintain their businesses, which in this case was of long standing…"

54. As to the second limb of the argument relating to the undertakings, the judge pointed out that the company had said that it had been willing to offer undertakings in an initial letter of 1 May 2007. It had been a fundamental part of the company's approach to the petition from the outset. The undertakings, although offered in their final form in the course of Mr Chivers' final speech, were to operate a new business model which had been advanced in the company's evidence. The judge concluded:

> "In substance, I consider that the petition was determined on the basis of Amway's [new] business model as set out in its evidence and that evidence could

> have been and was considered on behalf of the Secretary of State by 20 November."

55. It seems to me that the judge's conclusion (that the petition was determined on the basis of the company's new business model) was correct and, what is more, reflected and is confirmed by the Secretary of State's own reaction to that business model as expressed in the Treasury solicitor's e-mail dated 29 October 2007 (see at paras 39/41 above). In other words, what was determinative for the judge was the new business model, not the undertakings. His decision on a split order for costs reflected that judgment. I leave on one side for the moment the precise question of how costs should have been allocated.

56. The basis of the judge's judgment was revisited later on the same day, 9 June 2008, when the judge gave a brief ruling on the Secretary of State's application for permission to appeal. He granted permission. As to the Secretary of State's first ground of appeal, whereby the judge was said to have made an "error of law in failing to follow the guidance set out in *Walter Jacob*…and so accepted undertakings where that course was opposed by the Secretary of State", the judge said as follows:

> "Although in the course of my judgment I endeavoured to make clear that on the evidence, as I found it, I could simply have dismissed the petition but instead decided to accept the offered undertakings rather than spurn them, I do not think that I can safely regard the grounds of appeal on this head as so without merit that they fail the threshold test for permission."

Discussion

57. In the course of this appeal Mr Cunningham's submissions have somewhat changed. His original three grounds of appeal were (i) that on his findings of fact, the judge erred in law, alternatively in the exercise of his discretion, in not winding the company up because of its past misconduct; (ii) that the judge's decision to dismiss the petition on the basis of the undertakings offered to the court was wrong in law or a wrong exercise in discretion; and (iii) that his decision was unjust on the basis of three serious procedural irregularities, namely (a) his incorrect holding that the Secretary of State did not subject the company's new business model to a detailed critique; (b) his holding that it was not open to the Secretary of State to submit that the court could not trust the company's management; and (iii) his indication in Mr Cunningham's final speech that he need not be addressed on the question of undertakings.

58. In advancing this appeal, however, Mr Cunningham understandably felt himself compelled to accept that his criticisms of the judge were essentially founded in errors in the exercise of the court's discretion. He conceded that even in the light of the authorities he chiefly relied upon the judge had a discretion in the light of changed circumstances to refuse to wind up a company which had been guilty of past misconduct which by itself would have justified a winding up; and also had a discretion to accept undertakings which the Secretary of State declined to accept. However, his burden was that, save possibly in an exceptional case, it was wrong in principle to exercise the court's discretion in favour of the company, and that the judge's decision was aberrant. In effect his submission was that a company which had once been guilty of past misconduct which would have made it just and equitable for the court to wind it up in the public interest must necessarily be wound up, despite the adoption of a new business model and even if such a business could be sold to a new company. This followed, he submitted, from the need to protect the public by deterrence: although he did not use the phrase, he might have said *pour encourager les autres*. That was, however, the burden of the Treasury Solicitor's letter dated 9 May 2007, which spoke of the "right message to send to the market place" and contemplated that even "remedies…which, ultimately, may fully protect the public in future" would not deter the Secretary of State from his petition. As the appeal went on, as indicated in Mr Cunningham's powerful reply, his burden was that the conduct of the company under the old business model had been so bad, on the findings of the judge himself, as to put out of the question any possibility of a court, acting properly, refusing the petition.

59. As for the undertakings, Mr Cunningham submitted that they were critical to the judge's decision not to wind up the company, and cited the language admittedly found in the judgment (and the order) which (a) made the undertakings a condition of the judge's decision, (b) spoke of the undertaking about income disclosure as carrying substantial weight with him, and (c) also said that even though future risks could not be eliminated they could be moderated by the taking of undertakings. That showed that the judge did not, at any rate fully, proceed on the basis that he trusted the company, whatever he said about a submission to the contrary not being open. In the light of Brightman J's and Sir Andrew Morritt V-C's dicta, it was wrong in principle to burden the Secretary of State with policing undertakings which he was unwilling to accept.

60. In this last connection, Mr Cunningham often sounded as though the Secretary of State's concern was that his Department lacked the resources to follow up on such undertakings. The court, he submitted, should be wary about imposing obligations on the Department which it lacked the resources to vindicate. The flood-gates were referred to.

61. The Secretary of State's third ground was no longer put forward as a separate ground in itself, but rather as supporting the other two grounds.

62. Mr Cunningham's excellent advocacy, albeit matched by Mr Chivers, did not however make a compelling case. I would seek to put my disagreement with his submissions as follows.

63. There is no disagreement as to the law to be applied, only as to its application. Mr Cunningham emphasised the seriousness of the findings made against the company with respect to its old business model, and it is true that they were serious enough to lead the judge to make the provisional finding that it would have been just and equitable to wind up the company if matters had stopped there. However, I do not agree that that is the end of the story. All the cases, even *Walter Jacob* itself, emphasise that matters have to be looked at as at the time of the hearing of the petition and as a whole. By that time in this case the company had responded, openly and radically as the judge found, to the concerns identified by the Secretary of State.

64. This case is in truth quite unlike *Walter Jacob*. There the defendant company was a dishonest dealer in securities, which had been in existence for only three years when the DTI took an interest in it, as a result of FIMBRA passing to it certain correspondence. It had a sole director and all but one of its shares were held by him. The thrust of the DTI's case against it, upheld by the court, was that the dealer had been preying on the public by advising clients to invest in American companies of dubious value, putting forward investment advice in a way that was misleading in that it gave the impression that it was giving disinterested advice on shares whereas it was the vendor of the shares, and failing to disclose its relationship with the American companies concerned or the fact that their shares could not be freely traded. As a result it had lost its FIMBRA licence and therefore had necessarily ceased business. As such, the dealer's continued existence was of no value or interest to anyone, even if for reasons of their own its proprietors preferred the petition to be refused rather than granted. That was the cesser of business which the dealer relied on as a reason for the court to dismiss the petition, and it can be of no surprise whatsoever that this court spoke disparagingly of the submission that the mere cesser of business was the critical fact in the case. As it is, Nicholls LJ said it was "an important factor to be taken into account": but there could be no doubt in that case that "it would offend ordinary notions of what is just and equitable that, by ceasing to trade on becoming aware that the net was closing around it, a company which has misconducted itself on the securities market can thereby enable itself to remain in being despite its previous history" (at 360g). I fully agree that the importance of maintaining acceptable standards of commercial dealing, of deterrence, of encouraging others, or of sending a message to the market place, as well as of the significance of the court itself expressing in a meaningful way, as Nicholls LJ put it, its disapproval of such misconduct, rate highly in the balancing exercise. However, in my judgment it is simply unrealistic and unjust to find in such considerations and in the dicta of that case an *overriding* imperative in favour of winding up, *however much* the circumstances of the defendant company, its business, and its reactions to the Secretary of State's concerns may differ from the facts of that case. That is simply to

abandon the exercise of discretion as to what is just and equitable in favour of a Procrustean bed.

65. In my judgment the present case is quite unlike that of the dishonest dealer in securities. Here the company was part of an international group which had been in business for a lengthy period of time. Amway's business in the United Kingdom had existed for some thirty years. It had conducted a lawful and substantial business, but had failed to control and supervise its IBOs and their recruitment activities as it should have done. It had not simply ceased business as a result of the Secretary of State's investigation, but had addressed itself to the concerns identified. Even though that was in large part a reaction to the Secretary of State's interest, it was not entirely so, for the company had begun to look to its responsibilities even before it was investigated. The judge did not accept the Secretary of State's submission that the new business model was just a cynical and diversionary exercise. On the contrary, the judge described its revisions as amounting to material and radical changes and its evidence about them as "fully formulated, comprehensive, open and transparent". The company's witnesses were not cross-examined on their evidence about these matters nor as to their sincerity and credibility in adopting and prosecuting their new model. As the judge said: "To wind up an active lawfully trading company that now recognises and seeks to abide by the appropriate standards of commercial probity (and has endeavoured to engage with the Department to address any concerns for the regulator) is a serious matter" (at para 61). The new business model "is that now adopted by the majority of direct selling organisations" (*ibid*).

66. Moreover, the submission now advanced has been imposed on the Secretary of State by his failure at trial to persuade the judge that the new business model was an inadequate exercise in appearances (see the Treasury Solicitor's e-mail of 29 October 2007 cited at para 39 above). That after all was the dominant line on the merits which the Secretary of State had adopted (even if he had earlier espoused the theme on which Mr Cunningham has now fallen back, namely that winding up was the necessary consequence of past misconduct, however successful a new business model might be – see the Treasury Solicitor's letter of 9 May 2007, cited at para 34 above). It is not effectively open on the judge's findings for the Secretary of State on this appeal to say any longer that the new business model fails as an inadequate exercise in appearances. Therefore, a rule of law, even if modified into a binding principle of discretion, must be adopted to the effect that past misconduct puts the company out of court. Alternatively, past misconduct must be represented as being so bad as to demand the application of that rule of law or principle of discretion.

67. I can find nothing in the bundle of authorities put before this court to support the Secretary of State's principal ground of appeal to that effect. I have already referred to the Secretary of State's linchpin case of *Walter Jacob*. In *Re Secure & Provider plc* [1992] BCC 405 Hoffmann J refused to grant the petition: exaggerated and wrong

misrepresentations had been made but in good faith and the allegations of fraud in the petition were not made out. Hoffmann J concluded (at 414G):

> "I think it would be unjust because it would be a grossly disproportionate response to the errors which have been proved against (and admitted by) Mr Tyzack. Counsel for Mr Tyzack offered a number of undertakings as to how the company's business would be conducted if it was not wound up, but the DTI indicated unwillingness to accept any undertakings. They invited me to make an all-or-nothing decision: the company should either be wound up or the petition dismissed. I have no difficulty in choosing the latter course."

68. In *Re Senator Hanseatische* [1996] 2 BCLC 562 (CA) the defendant company invited the public to become members of the "Titan Business Club" at a cost of £2,500. The club was in reality a "snowball" form of arrangement whereby a member only received a return on his investment if he recruited new members to the club. As such the scheme was bound to fail in the end, and was merely a device to enable a small number of early recruits to make large profits at the expense of the much larger number of persons recruited later. It had no other business purpose or virtue and was moreover an illegal lottery. As a scheme it was described as "pernicious". It was wound up.

69. *Re Alpha Club (UK) Ltd* [2002] EWHC 884 (Ch), [2002] 2 BCLC 612 (John Jarvis QC) was another similar pyramid selling scheme. The club membership here cost £2,650. It too was described as pernicious, and was also held to be illegal both as a lottery and as an unlawful trading scheme. It was wound up.

70. In *Re Equity & Provident Ltd* [2002] EWHC 186 (Ch), [2002] 2 BCLC 78 (Patten J) the defendant company sold on-line motor vehicle warranties which did not oblige it to pay claims. The terms of the warranty were not visible on the company's website. The company was only a few years old and had a single director. He was found to have been devious and dishonest and to have been willing to say or do anything to ward off the enquiries of the regulatory authorities. The only thing in the company's favour was that as a result of those enquiries its website had been restructured so as to make its warranty clearly visible there. Having considered *Walter Jacob* Patten J concluded as follows (at 102):

> "Although the failure to explain the terms and conditions on the website if taken in isolation might not justify a winding-up order in the light of changes in the company's current business practice the balance is tipped in favour of liquidation by a combination of two other factors: the quite unacceptable and deliberate refusal of the company through Mr Ghassemian to co-operate with the DTI

> investigation and the fact that no reliance can be placed on Mr Ghassemian to ensure that the business of the company is properly run in the future."

71. In *Re Addcom (UK) Limited* (unreported, 31 July 2002, Anthony Mann QC) the Secretary of State sought to wind up three companies who had "traded on the back of a misunderstanding of advertisers as to the nature and destination of the moneys they were paying…this misleading was known to and intended by the directors" (at para 45). The deputy judge ordered the winding up of two of those companies, saying that their business was "being run on the back of a fundamental misrepresentation of falsehood"). That fundamental misrepresentation was that the advertisers were making a contribution to charity. However, in the case of Addcom, the deputy judge, who directed himself principally by *Walter Jacob*, himself raised the question of undertakings in this passage:

> "48. The only reason that I hesitate in the case of Addcom is that Addcom has a very significant part of its business which is not affected by the same vice of the exploitation of charitable instincts. If I were to wind Addcom up then that business would perish too. On one level it might be said that that would be just…However, provided that the unjustifiable business and business practices can be stopped, it seems to me that it would be disproportionate in Addcom's case to wind it up. I therefore propose to invite the parties to agree, if they can, a form of undertaking which will bring about the cesser of Addcom's present support advertising business in the case of charities and the misleading of advertisers. If there is a dispute as to the form of undertaking I will, if necessary, rule on whether it is sufficient. When I canvassed the possibility of this course of action in argument, Mr Green pointed out that the policing of the undertaking would or might present problems. I can see that, but those problems are not sufficient to deter me from this course if sufficiently clear undertakings can be agreed. I can envisage that a form of undertaking might be difficult, and if it turns out to be too difficult then winding up will be inevitable, because in the absence of undertakings I will certainly wind up Addcom, but I would wish Addcom to have an opportunity of saving itself."

72. In the event Addcom was not wound up. In *Re Supporting Link* Sir Andrew Morritt V-C treated *Re Addcom* as a case ("only one case") where the court accepted undertakings instead of ordering winding-up "where that course has been opposed by the Secretary of State" (at [54]). I think that correctly expresses the essence of the matter, although it may be that in form the undertakings were ultimately agreed. Subsequently to *Re Supporting Link*, essentially the same outcome occurred in *Bell Davies* (see at paras 12 above and 75 below).

73. *Re Supporting Link Alliance* [2004] EWHC 523 (Ch), [2004] 2 BCLC 486 (Sir Andrew Morritt V-C) concerned a business which had been incorporated only in

September 2000 which used cold-calling telephone techniques to sell advertising space in its free publications (which were found to be of dubious value) on the basis that a portion of the cost of the advertising would be donated to charity. This was in breach of the Charitable Institutions (Fund-Raising) Regulations 1994 and the Telecommunications (Data Protection and Privacy) Regulations 1999 and involved scripted misrepresentations. Only 1% of turnover was donated to charity. The defendant company's witnesses were heavily criticised on their evidence. Moreover, the principal director, a Mr Simister, had deliberately sought to mislead the investigators by evasive and contradictory replies. The court was nevertheless asked to refuse the petition to wind up on the basis of undertakings as to the future conduct of the company. This was the context in which the Vice-Chancellor reviewed the jurisprudence in relation to the giving of undertakings starting with *Re Bamford* (see at [54]-[58]). That context was summed up in the following paragraphs at the end of the Vice-Chancellor's judgment:

> "[66] I am unable to accept either those submissions or the undertakings. The business of the company was founded and continued on the basis of deception. If, in accordance with the undertakings offered, the deception is removed it seems unlikely that the company would have any worthwhile business to carry on. Further the extent and nature of the undertakings and the past conduct of Mr Simister are such that it would be necessary for the Secretary of State, through his officers, to monitor due performance of the undertakings and to supervise the future conduct of the company's business. That is not his or their function.
>
> [67] The matters to which I have referred show, in my judgment, that it is just and equitable that the company should be wound up. The acceptance of undertakings from the company or Mr Simister instead of making that order would be an abdication, not an exercise, of the court's jurisdiction."

74. In the light of *Re Addcom*, where the business in question was of a similar nature although some of the surrounding factors were plainly different, the Vice-Chancellor may have been particularly concerned to give expression to the learning of *Re Bamford*: see the opening sentences of [55]. However, these cases demonstrate how the qualifications built into the relevant dicta reflect the surrounding circumstances in which the individual cases were decided.

75. *Secretary of State for Trade and Industry v. Bell Davies Trading Ltd* [2005] 1 BCLC 516 concerned a business which aggregated multiple applications for licences to import footwear and ceramics from China into the European Community. To evade the "related persons" restriction of the EC legislation, the defendant companies recruited members of the public to own quota companies which applied for the licences. The legal issue was whether the defendant companies had "control" of the quota companies. David Richards J and again on appeal this court decided that issue against the defendant companies. Therefore the business concerned was in breach of EC Regulations and unlawful. Nevertheless David Richards J was prepared to decline

to make winding-up orders, taking the view that the activities did not involve deliberate wrongdoing, that winding up would adversely affect the defendant companies' other business activities and that, if the unlawful scheme ceased, winding up would become unnecessary, *provided that* the defendant companies would give undertakings to desist from their scheme. This those companies did, albeit only because they were required to do so, and it was accepted by the Secretary of State and by this court that in those circumstances the giving of those undertakings was not a voluntary act which prevented an appeal by those companies. That appeal included the ground that the judge had erred in making the dismissal of the petitions conditional on the undertakings. In this case therefore it was the defendant companies which were relying on the jurisprudence relating to undertakings. The Secretary of State, although he had failed to achieve the windings up that he had sought and had had the matter of undertakings imposed on him in this way, had ultimately rested content with the judge's order. In this sense, the outcome was rather like the *Addcom* case. That was the context in which Mummery LJ set out the principles referred to above (at para 12). *Bell Davies* again illustrates how diverse can be the circumstances, and how subtle can be the considerations, which the court must balance in its overall pursuit of a just and equitable solution. It will be recalled that in his judgment Mummery LJ, who has had great experience of this jurisdiction, said that in the exercise of his discretion a judge is entitled "to dismiss a petition on undertakings, even if that course is opposed by the Secretary of State, although that will be unusual".

76. Finally, in *Re Abacrombie & Co* [2008] EWHC 2520 (Ch) (unreported, 23 October 2008) David Richards J wound up the defendant company which had been incorporated in 2002 and promoted itself as insolvency and bankruptcy experts. The judge found that the arrangements which the company advised brought no benefit to either clients or creditors, but were detrimental to the interests of both and subverted the proper functioning of the law and procedures of bankruptcy. The judge also found dishonesty in the use of sham and back-dated documents. The taking of excessive fees also subverted the proper administration of the debtors' bankruptcy. There was also a breach of section 221 of the Companies Act 1985 in the failure to maintain adequate accounting records. That was the context in which the company, through its director, Mr Buchanan, who had ultimate control of the company and represented it in court, nevertheless was willing to offer undertakings as to the future conduct of the business. Not surprisingly the Secretary of State was unwilling to accept such undertakings, and the judge gave the offer short shrift, citing *Re Bamford*, *Re Supporting Link* and *Bell Davies* for the proposition that "Unless acceptable to the Secretary of State…it will be an unusual case where the giving of undertakings will be an appropriate alternative to a winding-up order" (at para 63). It was sufficient for the judge simply to observe: "It would not be appropriate in this case" (*ibid*).

77. In my judgment, this review of the authorities demonstrates that the use which the Secretary of State seeks to make of admittedly important dicta in leading cases nevertheless does insufficient justice to the qualifications built into them, to the factual contexts of those cases, and to the individual circumstances of this particular

case. This is indeed an unusual case. It is quite unlike the typical example of a newly incorporated business whose raison d'être is to defraud the public and the dishonesty of whose controlling and often sole director is carried forward into the investigation and trial. Moreover, those are the cases which reach trial. The truly typical case, and as I understand the matter (from Mr Cunningham himself) the great bulk of cases, simply go by default. In this case, the business is of long standing and is currently being operated on a model which represents the industry standard, indeed, in the matter of earnings disclosure goes beyond the industry standard. Its fault, serious as it undoubtedly was and deserving of winding up if matters had stopped there, was essentially that of a failure to control rather than that of deliberate wrongdoing or dishonesty. The company admitted its fault, while resisting winding up. Their management engaged with the Department in seeking solutions to the problem. They were not discouraged in doing so, and the judge found that their proposals for change met the test which the Secretary of State imposed on them. (Although it is not a matter which the judge himself mentioned, we have been shown the unchallenged evidence in which the company's director of finance spoke to the itemised costs totalling about £5 million (excluding legal costs) which the company had devoted to its new business model and its relaunch.) The judge accepted that the senior management could be trusted in the operation of the company's new business model. The Secretary of State had declined to cross-examine them on their evidence. The undertakings offered were not simply as to the future conduct of the company, but as to the continuation of its present reformed conduct. (That conduct is now more than a further year down the line, and there is no new complaint against the company.)

78. Mr Cunningham's building blocks have not supported him. For the reasons given earlier in this judgment where I have dealt with each of the matters relied upon and have reviewed the judge's own findings and reasons, I do not accept that the judge underestimated the seriousness of the company's past misconduct nor do I accept Mr Cunningham's categorisation of it as so bad as to be irremediable. I do not accept that the judge was wrong to say that the new business model had not been subjected to a detailed critique. I consider that the judge was entitled to find that the Secretary of State was not in a position to say that the company's senior management, who had given, as the judge observed, fully formulated, comprehensive, open and transparent evidence concerning the revisions to the business but had not been cross-examined, could not be trusted for the future; and was also entitled to say that he could not form an adverse view of them without hearing them cross-examined.

79. Nor do I accept that Mr Cunningham was prevented from making any submissions he wanted about the allegedly unsatisfactory nature of the undertakings offered. The judge certainly had Mr Cunningham's point that, save in an unusual case, a petition to wind up which it would otherwise be just and equitable to grant should not be refused on the basis of the court's acceptance of undertakings which the Secretary of State was himself unwilling to accept. In any event, I do not agree that the judge would have granted the petition but for the undertakings. I consider that he would have refused the petition even without the undertakings, but was unwilling to spurn undertakings which were offered. He clearly considered that such undertakings met

the Secretary of State's own standard of being capable in essence of effective and ongoing implementation without the supervision of either the Secretary of State or the court. No doubt if that view was wrong we would have heard of it, even if, as Mr Cunningham put the matter to the court, the Secretary of State proceeds not proactively but in reaction to complaint. I consider that the judge was entitled in this exceptional case to think that the proof was in the pudding of the new business model, which had been put into operation, and to regard the undertakings as being, as it were, icing on the cake. That was why he attached importance to the undertaking as to the publication of earnings information, because that could not be assembled and published until spring 2008. It has now been published and we have seen it. It seems to me to be in any event useful, where a petition will be refused, following the balancing exercise, on the basis of a critical change of circumstances since the time of the past misconduct, that the essential elements of those changed circumstances should be identified and placed squarely at the responsibility of the surviving company and its proprietors or managers by means of clearly defined undertakings. There seems in any event to be no harm in that.

80. I do not intend in any way at all to detract from the observations of previous judges about the dangers of imposing the policing of undertakings given by delinquent companies on a Secretary of State who has no obligation to compromise his petition on terms which do not seem acceptable to him. Nevertheless, where exceptionally a judge considers that undertakings can perform a useful role, it seems to me that there is nothing in past jurisprudence to prevent a judge from accepting them, even if the Secretary of State does not consent, or, as in *Addcom* and again in *Bell Davies*, would not have consented but for the court's own intervention. Those of course were more difficult cases for the defendant companies, for the idea about undertakings came from the court and not from those companies and those judges made it clear that in the absence of such undertakings it would have proceeded to wind up the companies concerned. Nor has Mr Cunningham told us that, if unfortunately we were against his appeal, he would ask us to discharge the undertakings which have been given in this case.

81. In sum, I do not consider that Mr Cunningham has identified any error of law or principle, nor has he attempted in the event to identify any error in the balancing exercise, that is to say in the exercise of discretion, to be found in the judge's judgment. On the contrary, I consider that the judge has approached his fact finding assessment and his balancing exercise with shrewdness and fairness.

82. In conclusion, I would repeat that this is an unusual, indeed exceptional case. A review of the factual histories of the other authorities placed before us in the bundle shows that that is so. They also show the dangers and difficulties of trying to put into any single straightjacket the philosophy of section 124A petitions. Of course, the Secretary of State seeks to act in the public interest: and the court will continue to be conscious of the need to maintain and vindicate appropriate business standards, to

deter other wrongdoers, and to express its disapproval of dishonesty and other misconduct which would make it just and equitable to wind up companies, and to do so despite late and inadequate protestations of change from unreliable and untrustworthy owners, directors and managers. However, in my judgment the judge's solution in this case has not been in breach of that jurisprudence, but in fulfilment of it. I would therefore dismiss this appeal on the merits.

Costs

83. It remains to deal with the parties' appeal and cross-appeal on costs. I have set out the material above (at paras 51/54).

84. Mr Cunningham accepts that the Secretary of State, although acting in the public interest, has no specially favourable costs regime to rely on: see *In re Southbourne Sheet Metal Co Ltd* [1993] 1 WLR 244 (CA). He therefore faces the ordinary rules to be found now in CPR 44.3. Moreover, where a petition is properly brought, but ultimately fails because of a change in circumstances, the making of a split order on costs is supported by the decision of Harman J in *Re Xyllyx plc (No 2)* [1992] BCLC 378. There, the company was ordered to pay the Secretary of State's costs up to the date when he ought to have reacted to the change, and the Secretary of State was ordered to pay the company's costs after that date.

85. Nevertheless, Mr Cunningham appeals on the ground that the Secretary of State should have all his costs. He submits that otherwise the clear warning and salutary lesson of the properly founded petition is diluted. He relies again on his submission that the petition would not have been dismissed but for the undertakings, and points out that those undertakings were only offered in Mr Chivers' final speech; and that the judge required the giving of an additional undertaking.

86. However, in my judgment, these submissions cannot survive the failure of the Secretary of State's appeal on the merits. The undertakings were not crucial to the dismissal of the petition; and in any event they were in principle available from 1 May 2007. The judge was entitled to think that a split order for costs was appropriate here. The only question is where the split should occur.

87. The judge said that the relevant day was 20 November 2007, within one week of trial, on the basis that that was not long after the completion of service of the company's evidence and was the date of Mr Steadman's second affidavit on behalf of the

Secretary of State. Mr Chivers submits that the date should be put back to 3 October, a week after the letter and meeting which presented the company's new business model to the Department.

88. In my judgment, that date is too early. The Secretary of State was entitled to await the formulation of the company's evidence. There is something to be said for 29 October 2007, a month after the presentation of the new business model (and still a month before trial), by which time the Treasury Solicitor had formulated the Secretary of State's response in the e-mail of that date. In essence it would seem from that response that the die was cast, and the Secretary of State was resolved to take his stand on the inadequacy of the new business model. Moreover most of the company's evidence was dated in the ten days leading up to 18 October 2007. Nevertheless, that was not the focus of Mr Chivers' submissions. Moreover, on balance, I am, and would in principle be, reluctant to depart from the exercise of the judge's discretion as to the precise timing of the split. I see no sufficient reason for departing from the judge's ruling.

89. I would therefore dismiss both appeal and cross-appeal on the question of costs.

Conclusion

90. I would dismiss the Secretary of State's appeal on the merits and both parties' appeals on costs. The judge's order will therefore stand.

Lord Justice Toulson :

91. I agree. I would only add on the issue of costs, referred to by Rix LJ in para 83, that Mr Cunningham QC on instructions expressly disavowed any reliance on the line of authorities such as *Gorlow v Institute of Chartered Accountants* [2001] EWHC 220 (Admin), *Bradford MDC v Booth* (2001) 3 LGLR 8 and *Baxendale-Walker v The Law Society* [2007] EWCA Civ 233, which are cited in an editorial note in the 2008 White Book, Vol I, para 44.3.8.1. in support of the following proposition:

> "A regulator brings proceedings in the public interest in the exercise of a public function which it is required to perform. In those circumstances the principles applicable to an award of costs differ from those in relation to private civil litigation. Absent dishonesty or a lack of good faith a costs order should not be made against such a regulator unless there is good reason to do so. The reason must be more than that the other party has succeeded."

92. That is a markedly different approach from the decision *In re Southborne Sheet Metal Co Ltd* [1993] 1 WLR 244. In case it should be argued on a future occasion that there is no good reason to distinguish between the Secretary of State petitioning for the winding up of a company in the public interest and any other regulatory body taking steps in what it believes in good faith to be the public interest, and that the practice under *In re Southborne Sheet Metal Co Ltd* should be reconsidered in the light of more recent authorities, it should be noted that this case proceeded on a concession and that we have heard no argument on the point.

Lord Justice Rimer :

93. I also agree with Rix LJ's judgment.