Case No. D29/05

Profits tax – profits arising from sale of property – whether trade.

Panel: Patrick Fung Pak Tung SC (chairman), Gordon Kwong Che Keung and Herbert Tsoi Hak Kong.

Dates of hearing: 26 April and 13 June 2005.
Date of decision: 13 July 2005.
Date of decision on costs: 31 August 2005.

The taxpayer purchased a property known as 21/F, Building M (the property) in May 1993 at about $120,000,000, resold it at about $224,500,000 in April 1997 and thus making profits.

The taxpayer contended that the profits were not liable to profits tax as the property was purchased for the use of its parent company, Company A, as headquarters and hence not being for trading purpose.

It transpired that Company A also purchased 19/F and 16/F of Building M through its other subsidiaries in 1993 but resold them in December 1993 and March 1995 respectively at profits. These two properties had already been assessed to profits tax.

Held:

1. The Board found, inter alia, that the Company A did not state in its published document in 1993 that it intended to retain the property as its headquarters.

2. Besides, Mr D, the Chairman of Company A, had not even inspected the property.

3. Therefore, the Board was not satisfied that the property was for Company A's own use.

Appeal dismissed and costs order in the sum of $5,000 imposed.

Cases referred to:

Simmons v CIR [1980] 1 WLR 1196
All Best Wishes Ltd v CIR (1992) 3 HKTC 750
D54/98, IRBRD, vol 13, 314

Kenneth K M Ho Counsel instructed by Messrs Raymond T Y Chan, Victoria Chan & Co for the taxpayer.
Tse Yuk Yip and Chan Man On for the Commissioner of Inland Revenue.

Decision:

1. This is an appeal by the Appellant ('the Taxpayer') against a determination by the Respondent ('the Commissioner') dated 4 January 2005 whereby she acting by her Deputy confirmed an assessment for the year of assessment 1997/98 for profits tax against the Taxpayer in respect of net assessable profits of $97,399,527 (after set-off of loss brought forward of $428,642) with tax payable in the sum of $14,463,829.

The agreed facts

2. At the first hearing of the appeal, the Taxpayer and the Commissioner were able to agree on certain facts. A statement of agreed facts was handed to the Board which reads as follows:

> '(1) ([the Appellant]) was a private company incorporated in Hong Kong on 16 March 1993. At all relevant times, the Appellant' s issued and paid up share capital remained at $2. The Appellant was a wholly owned subsidiary of [Investment Company A], a public company incorporated and listed in Hong Kong. [Investment Company A] redomiciled to [Country B] in August 1996.
>
> (2) The following persons were appointed as directors of the Appellant on 25 May 1993:
>
> [Mr C]
> [Mr D]
> [Mr E]
> [Mr F]
> [Mr G]
> [Mr H]
>
> (3) The business address of the Appellant was located at [Address I] ('the Office').

(4) (a) The Office was rented by [Investment Company J], a related company, under a lease for a term of three years commencing from 1 May 1991 at monthly rental of $184,314 (with rent free period from 1 May 1991 to 30 September 1991).

(b) On 3 March 1994, [Property Agency Company K], a subsidiary of [Investment Company A], as tenant and the landlord of the Office entered into a lease in respect of the Office for a term of three years commencing from 1 May 1994 at monthly rental of $252,980.

(5) (a) By a preliminary agreement dated 28 May 1993 [A1, p.322-324], the Appellant purchased from [Company L] a property known as 21/F, [Building M] ("the Property") at a consideration of $119,555,400. The Property was purchased subject to and with the benefit of existing tenancies, details of which are as follows:

Suites	**Floor area**	**Tenant**	**Term of the lease**	**Monthly rental**
2101-2104	10,046 sq. ft.	[Company N]	1.6.1992 to 31.5.1996 (rent commencement date : 1.8.1992)	$272,560
2102-2103		[Company O] (subtenant)	1.6.1992 to 31.5.1996	
2104		[Company P] (subtenant)	1.6.1992 to 31.5.1996	
2105	3,696 sq. ft.	[Company Q]	1.3.1992 to 28.2.1998 (rent commencement date : 1.7.1992)	$100,280 (rent review date : 1.3.1995)

The tenant of Suites 2101-2104 was granted an option to renew the lease for a further term of 3 years by 31 March 1996 at market rent.

(b) By Memorandum dated 28 September 1995, the Appellant and [Company Q] agreed to increase the monthly rental to $199,000 with effect from 1 March 1995.

(c) By notice dated 28 March 1996 [A1, p.172], [Company N] exercised the option to renew the lease of Suites 2101-2104 for a further term of 3 years commencing from 1 June 1996. The monthly rental under the renewed lease was $473,800 (with rent free period from 1 June 1996 to 22 August 1996).

(6) By a provisional agreement dated 16 April 1997 [A1, p.433-440], the Appellant sold the Property subject to and with the benefit of the existing tenancies for $224,500,000. The sale was completed on 25 July 1997.

(7) In its Profits Tax returns for the year of assessment 1997/98, the Appellant declared assessable profits of $527,641 [B1, p.36]. In arriving at this figure, a sum of $97,300,528 being net surplus derived from the disposal of the Property was excluded.

(8) The Assessor was of the view that the gain on disposal of the Property should be assessable to tax and raised on the Appellant the following 1997/98 Profits Tax Assessment:

Profits per return	$ 527,641
Add : Profit on disposal of the Property	97,300,528
	97,828,169
Less : Loss brought forward and set-off	428,642
Net Assessable Profits	$97,399,527
Tax Payable	$14,463,829

(9) The Appellant, through [Accountant Firm R], objected to the 1997/98 Profits Tax Assessment on the ground that the gain on disposal of the Property was capital in nature and not assessable to tax.

(10) By determination dated 4 January 2005 [B1, p.6-66], the Deputy Commissioner of Inland Revenue confirmed the Profits Tax Assessment mentioned in Fact (8).

(11) By notice dated 3 February 2005 [B1, p.1-5], the Appellant appealed to the Board of Review against the Deputy Commissioner' s determination.'

Other relevant facts

3. It will be noted that the statement of agreed facts does not set out all the facts relevant to the case. It basically only sets out information directly relating to the purchase and sale by the Taxpayer of the Property, that is, the 21st Floor of Building M, and the particulars of the tenancies therein.

4. It transpired that the main business of the parent company of the Taxpayer, Investment Company A, was and is that of a building contractor. It also makes investments in real property in Hong Kong. As an example, it owns through subsidiary companies two blocks of high-class residential buildings on District S which are let out to tenants.

5. In 1993, Investment Company A decided to purchase three floors of office premises in Building M, the 16th, 19th and 21st Floors. It decided to use one subsidiary company to hold each of the these floors as follows:

(i) the 16th Floor – Company T;

(ii) the 19th Floor – Company U;

(iii) the 21st Floor (the Property) – the Taxpayer.

All three floors were tenanted. The particulars of the tenancies in the Property are already set out in the statement of agreed facts.

6. In 1994, Investment Company A purchased through another subsidiary company yet another floor in Building M, the 8th Floor.

7. The purchase of the three floors in 1993 was partly with the financial assistance of the Bank V ('the Bank'). By a Loan Agreement dated 8 June 1993 ('the Loan Agreement') and made between the Bank of the one part and Company T, Company U and the Taxpayer as 'the Borrowers' of the other part, the Bank agreed to make available to each of the Borrowers a loan of $70,000,000, making a total of $210,000,000 ('the Loans'), to be applied by them respectively towards the purchase of the 16th Floor, the 19th Floor and the Property. The Loans were guaranteed by Investment Company A. The relevant part of clause 3.1 of the Loan Agreement provided that 'the Borrowers shall repay the Loans in one lump sum on the ____ day of June 1996 ('the Repayment Date').'

8. By a provisional agreement dated 23 December 1993, Company U agreed to sell the 19th Floor with existing tenancies for $188,952,500, which was at a substantial profit. Completion took place on 23 June 1994. Company U was assessed to profits tax and objected to the same. A determination was issued by the Commissioner confirming the assessment and Company U did not appeal to the Board of Review.

9. By a provisional agreement dated 2 March 1995, Company T agreed to sell the 16th Floor for $164,640,000, again at a substantial profit. Completion took place on 10 July 1995. Company T was assessed to profits tax and objected to the same. The Commissioner issued a determination to confirm the assessment. Company T appealed to the Board of Review but the appeal was dismissed.

10. By a provisional agreement dated 16 April 1997, the Taxpayer agreed to sell the Property subject to and with the benefit of the existing tenancies for $224,500,000. Completion took place on 25 July 1997.

11. There then followed the assessment against the Taxpayer which led to the present appeal.

The law

12. There is no dispute between the parties on the law.

13. Section 14(1) of the Inland Revenue Ordinance ('IRO'), reads as follows:

> *'Subject to the provisions of this Ordinance, profits tax shall be charged for each year of assessment at the standard rate on every person carrying on a trade, profession or business in Hong Kong in respect of his assessable profits arising in or derived from Hong Kong for that year from such trade, profession or business (excluding profits arising from the sale of capital assets) as ascertained in accordance with this Part.'*

14. Section 2(1) of the IRO defines 'trade' to include every trade and manufacture, and every adventure and concern in the nature of trade.

15. The law is well-established that in determining whether a property was acquired by a taxpayer for trading or for long-term investment, one has to ascertain the intention of the taxpayer at the time of acquisition. In Simmons v CIR [1980] 1 WLR 1196, Lord Wilberforce said, at page 1199:

> *'Trading requires an intention to trade : normally the question to be asked is whether this intention existed at the time of the acquisition of the asset. Was it acquired with the intention of disposing of it at a profit, or was it acquired as a permanent investment? Often it is necessary to ask further questions : a permanent investment may be sold in order to acquire another investment thought to be more satisfactory; that does not involve an operation of trade, whether the first investment is sold at a profit or at a loss. Intentions may be changed. What was first an investment may be put into the trading stock –*

> *and, I suppose, vice versa. If findings of this kind are to be made precision is required, since a shift of an asset from one category to another will involve changes in the company's accounts, and possibly, a liability of tax : see Sharkey v Wernher [1956] A.C. 58. What I think is not possible is for an asset to be both trading stock and permanent investment at the same time, nor to possess an indeterminate statue – neither trading stock nor permanent asset. It must be one or other, even though, and this seems to me legitimate and intelligible, the company, in whatever character it acquires the asset, may reserve an intention to change its character. To do so would, in fact, amount to little more than making explicit what is necessarily implicit in all commercial operations, namely that situations are open to review.'*

16. The actual intention of a Taxpayer can only be determined upon the whole of the evidence and surrounding circumstances, including things said and things done at the time, before and after. Mortimer J (at he then was) in All Best Wishes Ltd v CIR (1992) 3 HKTC 750 said at page 771:

> *'This is a decision of fact and the fact to be decided is defined by the Statute – was this an adventure and concern in the nature of trade? The intention of the taxpayer, at the time of acquisition, and at the time when he is holding the asset is undoubtedly of very great weight. And if the intention is on the evidence, genuinely held, realistic and realizable, and if all the circumstances show that at the time of the acquisition of the asset, the taxpayer was investing in it, then I agree. But as it is a question of fact, no single test can produce the answer. In particular, the stated intention of the taxpayer cannot be decisive and the actual intention can only be determined upon the whole of the evidence. Indeed, decisions upon a person's intention are commonplace in the law. It is probably the most litigated issue of all. It is trite to say that intention can only be judged by considering the whole of the surrounding circumstances, including things said and things done. Things said at the time, before and after, and things done at the time, before and after. Often it is rightly said that actions speak louder than words.'*

17. The Board in D54/98, IRBRD, vol 13, 314 considered the relevant legal principles and stated, at page 319, that:

> *'9. The relevant legal principles are not in dispute. The principle to be applied on the question of ascertaining intent is well settled and cannot be doubted. In Marson V Morton [1986] 1 WLR 1348, Sir Nicholas Browne-Wilkinson VC said (at page 1348 of the report):*

"It is clear that the question whether or not there has been adventure in the nature of trade depends on all the facts and circumstances of each particular case and depends on the interaction between the various factors that are present in any given case. The most that I have been able to detect from the reading of the authorities is that there are certain features or badges which may point to one conclusion rather than another."

10. The learned Judge then went on to list out (at page 1348 to 1349 of the report) some of these features or badges, which are of course by no means exhaustive:

(a) Whether the transaction was a one-off transaction?

(b) Was the transaction related to the trade which the taxpayer otherwise carries on?

(c) What is the nature of the subject matter?

(d) What was the way in which the transaction was carried out?

(e) What was the source of finance of the transaction?

(f) Was work done to the items purchased before it was resold?

(g) Was the item resold in one lot or broken down into saleable lots?

(h) What were the purchasers' intentions at the time of purchase? and

(i) Did the item provide enjoyment for the purchaser?

In approaching these questions, common sense must be applied.'

and at page 321 as follows:

'13. It follows that the way in which a company keeps its accounts though admissible to show what, in the view of the company's directors and auditors at that time was the intention of the company, is not conclusive evidence by any means. That evidence must be weighed against other evidence available; see for example, Shadford V. H Fairweather & Co Ltd [1966] 43 TC 291, at page 299 per Buckley J. If the financial

statements of the company are by no means conclusive it must follow that board minutes are in no better position. One must look at all the circumstances to see if that self-declaration of intent is bore out by the facts.

14. Equally, it is of some importance to test the declared intention of the company by reference to its financial ability : was it within its power to hold a property for long term purposes? In Board of Review Decision D11/80, IRBRD, vol 1, 374 it was stated (at page 378):

"when an owner of land exploits it by the development and construction of a multi-storey building and in the course of construction or shortly thereafter he sells units in the building, the inference that would be drawn is that the building was not erected for retention as an investment but for the purpose of resale. If the owner's case is that he intended to retain the property as a long term investment but supervening events outside his control forced him to dispose of the property, then before such a claim can succeed he must satisfy the Board that it was his intention to keep it as an investment or capital asset. "Intention" connotes an ability to carry into effect. It is idle to speak of "intention" if the person so intending did not have the means to bring it about or had made no arrangements or taken any steps to enable such intention to be implemented."'

18. Section 68(4) of the IRO provides that the burden of proving that the assessment is excessive or incorrect is on the appellant.

The case of the Taxpayer

19. The case of the Taxpayer can be summarized as follows:

(i) The Taxpayer was used as a vehicle of Investment Company A to purchase and hold the Property. Thus, in reality, Investment Company A's position should be considered.

(ii) At the time of purchase of the Property, Investment Company A had the intention of acquiring it as a long-term investment for its own use as an office – the headquarters of itself, so as to enhance its reputation and stature as a listed company.

(iii) At the time of purchase, Investment Company A was fully aware of the option for renewal for three years from 31 March 1996 granted to the tenant of Suites

2101-2104, that is, Company N. It was however persuaded by the estate agent that, if a hefty increase in rental was to be demanded for the renewed term, it was very unlikely that the tenant would exercise the option especially when the tenant's parent company had an office block into which the tenant could move.

(iv) When Company N decided and did exercise the option to renew in 1996, Investment Company A decided to sell the Property because it then became not viable for Investment Company A to move into the Property itself as the timing was all wrong.

(v) Investment Company A did not consider using the 16th Floor or the 19th Floor as its own office instead of selling those floors because it had decided upon moving into the Property (which was on the 21st Floor) only and nothing lower than the 21st Floor.

(vi) Thus, Investment Company A had to sell the Property because of a change in circumstances. This however did not render its original intention to purchase and keep the Property as a long-term investment invalid or untrue.

(vii) The following factors show that Investment Company A was not a 'speculator' in the property market:

(a) The purchase of the Property was on a mortgage of only 60% whilst Investment Company A paid 40% of the purchase price.

(b) The Taxpayer collected rental on the Property for about four years before selling it.

(c) A valuation was carried out on the Property every year.

(d) The Property was treated as an investment property in the accounts of Investment Company A.

(e) The Inland Revenue Department had always granted a re-building allowance to the Taxpayer and hence an estoppel has arisen against the Commissioner.

(f) The sale price was one which Investment Company A as a prudent business organization could not resist because the profit to be earned from the sale would be equivalent to about 39 years' rental to be derived from the Property.

(g) Investment Company A had other rental properties held for a long time as long-term investments.

(viii) In any event, on this appeal, the Board should not take into consideration the matters regarding the 16th Floor and the 19th Floor.

Our finding

20. Having considered all the evidence and the submissions on behalf of both parties carefully, we have come to the conclusion that the Taxpayer fails in this appeal. We set out our reasons below.

21. We agree that in reality the position of Investment Company A rather than that of the Taxpayer which was just a vehicle used by Investment Company A to purchase and hold the Property should be considered.

22. On the other hand, we take the view that the matter must be looked at in the context of all three properties, namely, the 16th Floor, the 19th Floor and the Property, instead of just the Property itself. Furthermore, account should also be taken of the purchase and use of the 8th Floor.

23. It is to be noted that the first three properties were purchased at about the same time and financed under one single Loan Agreement by the Bank. The Loans totalling $210,000,000 were for a term of only three years and repayable as one lump sum. There was of course a re-arrangement of the loan structure after the sale of the 19th Floor and the 16th Floor.

24. It is particularly noteworthy that, in the 'Discloseable Transaction' document published by Investment Company A on 21 June 1993 as required by the Listing Rules of the Stock Exchange, the three properties were dealt with together without any distinction between them. Under the heading 'Reasons For The Acquisition' it is said:

> 'The directors of the Company believe that the Acquisition represents a good investment opportunity for the Company. The directors of the Company intend to finance the Acquisition by internal resources and bank borrowings.'

We would think that if the intention had been formed to retain the Property or a major part thereof for use as the headquarters of the Investment Company A Group, it would, to say the least, have been appropriate, if not indeed necessary, for that to be mentioned here for the benefit of the shareholders at large. On the Taxpayer's case, that intention had already been formed by that stage because it seeks to rely on a minute signed by two directors of the Taxpayer, namely, a Mr C and a Mr E, at a board meeting held in Country W on 7 June 1993 which says : 'IT WAS RESOLVED that the Property be held for own use but before such the same will be used for rental income.'

25. We do not feel that we can place any or much weight on that Country W minute for the following reasons:

(i) It seems strange that only two directors out of a board consisting of eight directors and not including the chairman and managing director should suddenly pass a resolution in Country W that 'the Property be held for own use but before such the same will be used for rental income' when such a board resolution would not seem to serve any purpose at all (except to support the present allegation by the Taxpayer that Investment Company A had already formed the necessary intention at the time of purchase).

(ii) Those two directors have not given evidence in this appeal. If they had come forward to give evidence, they would of course have been subject to cross-examination and questioning about the circumstances leading to and surrounding and the reasons for holding the meeting and passing the resolution.

(iii) The resolution containing such an explicit declaration of intention is not contained or reflected in any of the public documents of Investment Company A.

26. So far as the description of 'investment properties' and the annual valuation go, they apply to all the three properties purchased in 1993. Further, as pointed out in case D54/98 above, such matters are not conclusive and have to be judged together with the other circumstances in the case.

27. If all the three properties purchased in 1993 have been treated by Investment Company A in its conduct on the same footing and since the purchase and sale of the 16th Floor and 19th Floor have both been found to be subject to profits tax, the burden on the Taxpayer and Investment Company A to show that the Property should be treated on a different footing is all the more distinct and onerous.

28. It is right and fitting for us to examine the actual conduct on the part of Investment Company A and the Taxpayer in relation to the Property to see whether such conduct lends support to the alleged intention.

29. According to Mr D, a director of the Taxpayer and the chairman and managing director of Investment Company A, who gave evidence, he and his companies were determined to have the Property (the 21 Floor) for their own use. They could not consider the 19th Floor or the 16th Floor as being suitable because they were lower than the 21st Floor. The estate agent, Mr X, who helped in the acquisition of the three properties said in evidence that he had not been inside any of the three properties and he did not arrange for Mr D to see the same. He did say however that

Mr D informed him that he did or would go inside the Property to see it. On the other hand, Mr D in his evidence or any his witness statements nowhere said that he had been inside the Property at any stage.

30. We would have expected that if Mr D were to be so strong on the Property as opposed to the 19th Floor or the 16th Floor for own use, emphasis would have been put along the lines that Mr D had inspected all three properties and that there was no way that the 16th Floor or the 19th Floor could compare with the Property. Yet such evidence is absent. In these circumstances, we think that it is reasonable for us to draw the inference that Mr D or anyone else in his companies had not inspected the properties before purchase. If that is so, the assertion by Mr D that only the Property and not the 19th Floor or the 16th Floor would be considered appropriate for own use is very considerably undermined. This in turn strikes at the genuineness of the allegation that it was the intention on the part of Investment Company A to have the Property for own use at the time of purchase.

31. The allegation of intention for own use is based on the premise that in 1993 Investment Company A was planning on expansion and eventual use of much more office space. On the evidence before us, we do not find that Investment Company A actually expanded much over the period between 1993 – 1998. As it turned out, in 1999, they moved into the 8th Floor of Building M (a much lower floor), and only a part of it (Unit 801) with an area of 3000 odd square feet which is about the same as their original office in Address I. This is a long way away from using the whole of the Property with a total gross floor area of 13,742 square feet or of 10,046 square feet just for Suites 2101 – 2104. In this regard, as pointed out by Ms Tse for the Commissioner, it seems strange that when giving evidence Mr D did not appear to have calculated the gross or net floor area of the Property.

32. On the question of Company N exercising the option to renew in 1996, we make the following observations:

(i) If at the time of purchase Investment Company A was intent on keeping the Property or the major part thereof for own use when the lease for Suites 2102 – 2104 were to expire in 1996, it is strange for Investment Company A not to have at least asked the tenant about its intention but only relied on the speculation of the estate agent that the tenant would most likely not renew.

(ii) Again, if Investment Company A was keen to get back Suites 2101 – 2104 for own use in 1996, it is strange that it did not make a serious effort to negotiate for a settlement with the tenant.

(iii) Furthermore, if there was really an eagerness to get back possession of Suites 2101 – 2104, it does not seem to be very logical for the Taxpayer to have agreed to a rent-free period of two months in the renewal term.

33. Further, as pointed out by Ms Tse in cross-examination of Mr D, Investment Company A could always have waited till 1999 to get back the entirety of the Property for own use. Moreover, after selling the Property, Investment Company A did not purchase a replacement property in actual fact.

34. Mr Ho on behalf of the Taxpayer submits that Investment Company A is not a 'speculator'. In the context of investment in real property, on the one end of the scale you have the true speculators, those who sign a provisional agreement for sale and purchase, pay a small deposit and then quickly re-sell as confirmor and make a profit and on the other end of the scale you have the true long-term investors who buy property to hold for 30 or 50 years for rental income before selling or re-developing the same. There are, however, the people in between. It is a matter of degree. Section 14 of the IRO does not impose a charge on profits made by speculators; it creates a charge on 'profits arising in or derived from … trade, profession or business'. In law we do not need to find a person to be a 'speculator' on the extreme end of the scale before we can say that he is chargeable to tax.

35. We do not rule out the possibility that Investment Company A at the time of the purchase of the three properties might have contemplated the contingency of one day in the future utilizing one of the three properties or part of them as its headquarters, depending on subsequent circumstances. That however, is very far from the situation where at the time of purchase a firm intention was formed to use the Property as its headquarters and as a long-term investment.

36. We do not think that there is anything in the estoppel point. The Taxpayer has not shown how it has relied on the acceptance by the Commissioner to its own detriment.

37. In all the circumstances, we are not satisfied that the Taxpayer has discharged its burden under section 68(4) of the IRO.

Conclusion

38. Accordingly, we dismiss the appeal of the Taxpayer and confirm the determination by the Commissioner and the original assessment.

39. We also make an order nisi that the Taxpayer do pay the costs of the Board in the sum of $5,000 pursuant to section 68(9) of the IRO. Unless we receive representations to the contrary through the Clerk to the Board from either or both parties within seven days from the date of this decision, the order will automatically become absolute.

Decision on costs:

1. In our decision dated 13 July 2005, we dismissed the appeal of the Taxpayer and made an order nisi that the Taxpayer should pay the costs of the Board in the sum of $5,000 pursuant to section 68(9) of the Inland Revenue Ordinance ('IRO').

2. The Taxpayer solicitors by their letter to the Clerk to the Board dated 18 July 2005 submitted that the Board should not make absolute the costs order nisi. They say that costs 'are usually ordered against those appellants who do not have valid grounds of appeal or that the appeal being vexatious' (sic).

3. Section 68(9) of the IRO reads as follows:

> '*Where under subsection (8), the Board does not reduce or annul such assessment, the Board may order the appellant to pay as costs of the Board a sum not exceeding the amount specified in Part I of Schedule 5, which shall be added to the tax charged and recovered therewith*'.

There is nothing in the statutory provision to support the argument on behalf of the Taxpayer.

4. Furthermore, the amount involved on the appeal was very substantial. The tax payable is in the sum of $14,463,829. The Taxpayer was able to afford the services of professional people. Indeed, on looking at our findings, we feel that the appeal was bordering on being frivolous. The costs of the Board in hearing the appeal far exceeds the sum of $5,000 ordered.

5. We hereby make absolute the costs order nisi.