

[1988-90 Gib LR 218]

IN THE MATTER OF BARROWAY HOLDINGS LIMITED

SUPREME COURT (Alcantara, A.J.): February 16th, 1990

Companies—liquidators—appointment—court has limited discretion in appointment of liquidators under Companies Ordinance, s.167(3)—appointment to be made on application by Official Receiver if court satisfied that proposed liquidator “fit and proper person” to fulfil Official Receiver’s duties—once appointment made, unnecessary to serve Official Receiver with liquidators’ applications for directions

Companies—liquidators—powers and duties—appointment of agents—liquidators have wide power under Companies Ordinance, s.177(2) to appoint professional/other agents to assist in winding up of company—unnecessary for court to make order authorizing appointments

Companies—liquidators—powers and duties—bank accounts—court lacks statutory power to dispense with requirement that liquidators bank at Government Savings Bank—precedent justifies order allowing account to be maintained at commercial bank

Companies—liquidators—powers and duties—joint exercise of duties—liquidators at liberty to act jointly or severally as liquidators—to act jointly in capacity as official receiver if appointed jointly by Official Receiver

Companies—liquidators—remuneration—court may order payment on time-spent basis when usual percentage basis produces unsatisfactory result—court lacks discretion to vary order of priority of payments on liquidation set out in Companies (Winding-Up) Rules 1929, r.192—liquidators to submit bills to Registrar for consideration before payment—Registrar has discretion under r.192 to allow reasonable and uncomplicated charges to be paid without taxation—court lacks discretion to make similar order

Liquidators applied for orders in the winding up of a company.

The company was put into liquidation, and joint liquidators were appointed in place of the Official Receiver, with all the powers and duties of the Official Receiver in the winding up, and for all purposes of the Companies Ordinance.

The liquidators sought orders that (a) they be at liberty to act jointly or

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severally in the execution of their duties; (b) they be at liberty to open bank accounts at banks other than the Government Savings Bank as they saw fit, dispensing with the requirements of the Companies Ordinance, s.180(1); (c) the security already provided by the liquidators in their liquidation of Barlow Clowes Intl. Ltd. be extended to cover the present matter; (d) the liquidators be free to appoint Messrs. Marrache & Co. as solicitors, and to remunerate them accordingly; (e) they be at liberty to employ such professional or other agents as they thought fit to assist them in the winding up of the company; (f) they be remunerated monthly out of the assets of the company, and that their remuneration be assessed on the basis of time spent on the liquidation; and (g) they be at liberty to remunerate their solicitors and agents without needing to have their bills taxed.

They submitted that (a) the Companies Ordinance, s.174(4) conferred on the court a discretion to allow the joint liquidators to act jointly or severally; (b) the court had a discretion to waive the requirements of s.180(1) of the Companies Ordinance; (c) the court had a discretion under r.57 of the Winding-Up Rules 1929 to extend the application of security provided by liquidators to more than one matter, and, given that the liquidators had already provided security for the connected liquidation of Barlow Clowes, it would be expedient for the discretion to be exercised in this way; (d) they required the assistance of a solicitor in the liquidation of the company; (e) they required (or might require) the assistance of professional or other agents in the liquidation of the company; (f) the liquidators' work in the present matter was exceptional, and that other methods of assessing remuneration would be inappropriate; and (g) the court had a discretion to make the order sought.

The Official Receiver submitted that there was no need for him to be served with a copy of applications for directions by liquidators appointed as receivers under the Companies Ordinance, s.167(3), as they were acting in his place.

Held, making the following orders:

(1) The court had only a very limited discretion in the appointment of liquidators under s.167(3) of the Companies Ordinance; as long as the court was satisfied that the person proposed was a "fit and proper person" to fulfil the Official Receiver's duties, it had to make the appointment. Once such a person had been appointed, it was no longer necessary to serve the Official Receiver with any application for directions made by the liquidators acting in his stead (paras. 5–7).

(2) The liquidators were at liberty to act jointly or severally in their duties as liquidators, but were to act jointly in the execution of their duties as official receiver. The Companies Ordinance, s.174(4) required the court to declare whether joint liquidators were required to act jointly or severally in the execution of their duties; since they had been appointed jointly by the Official Receiver, they would be required to act jointly when acting as official receiver (paras. 9–10).

(3) The liquidators would be at liberty to open and maintain accounts at the National Westminster Bank, Gibraltar, in place of the Government Savings Bank. The court had no power either inherent in its jurisdiction or under the Companies Ordinance enabling it to dispense with statutory requirements such as s.180(1); however, as it had allowed liquidators to maintain accounts at banks other than the Government Savings Bank in the past, it would do so in the present case (para. 12).

(4) The security already provided by the liquidators for their liquidation of Barlow Clowes would be extended to the present matter, in accordance with the discretion provided to the court by the Companies (Winding-Up) Rules 1929, r.57 (paras. 13–14).

(5) The liquidators had the sanction of the court to appoint Messrs. Marrache & Co. to assist them in the execution of their duties, as this was a proper case for the appointment of a solicitor (para. 15).

(6) No order would be made sanctioning the appointment of professional or other agents in the winding up of the company. The liquidators already had wide powers under the Companies Ordinance, s.177(2) to appoint agents to assist as necessary in the winding up of the company; an order was therefore unnecessary (para. 16).

(7) The liquidators were to be remunerated on the basis of time spent, as this was appropriate to the exceptional work in the current winding up, and other methods of assessing remuneration were inadequate for the purposes of the present liquidation. However, no order would be made or directions given as to the monthly payment out of the company's assets; the order of priority of payments on the liquidation of companies was set out in the Companies (Winding-Up) Rules 1929, r.192(1) (paras. 18–19).

(8) No order would be made allowing the payment of the liquidators' agents' bills before taxation, as the court had no discretion to make such an order. The Companies (Winding-Up) Rules, r.192(2) required that bills be submitted to the Registrar for consideration before payment was made; while in some cases he had a discretion to allow charges to be paid without taxation if they were reasonable and uncomplicated, the court had no such discretion, and accordingly no order could be made in this respect (paras. 20–21).

Cases cited:

- (1) *Barlow Clowes Intl. Ltd., In re*, Supreme Ct., Case No. 1988 B. No. 104, unreported, referred to.
- (2) *Guaranteed Perm. Bldg. Socy., In re*, 1988–90 Gib LR 165, considered.
- (3) *Intl. Invs. Ltd., In re*, Supreme Ct., Case No. 1984 I No. 94, April 3rd, 1985, unreported, applied.

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Legislation construed:

Companies Ordinance (1984 Edition), s.167: The relevant terms of this section are set out at para. 4.

s.173: The relevant terms of this section are set out at para. 13.

s.174(4): The relevant terms of this sub-section are set out at para. 8.

s.177(2): The relevant terms of this sub-section are set out at para. 16.

s.180(1): "Every liquidator of a company shall, in such manner and at such times as the court may direct, pay the money received by him into the Government Savings Bank to the credit of a separate account to be opened and kept by the liquidator in his official name and any interest receivable in respect of the account shall be part of the assets of the company, and the Savings Bank shall open and keep such an account."

Companies Act 1929, s.180: The relevant terms of this section are set out at para. 4.

Companies (Winding-Up) Rules 1929 (S.R. & O. 1929, No. 612), r.57: "In the case of a . . . Liquidator other than the Official Receiver, the following provisions as to security shall have effect, namely:—

- (1) The security shall be given to such officers or persons, and in such manner as the Board of Trade may from time to time direct.
- (2) It shall not be necessary that security shall be given in each separate winding-up; but security may be given either specially in a particular winding-up, or generally, to be available for any winding-up in which the person giving security may be appointed, either as Liquidator or Special Manager . . ."

r.192(1): The relevant terms of this sub-rule are set out at para. 19.

r.192(2): The relevant terms of this sub-rule are set out at para. 20.

I. Marrache for the liquidators;

K.W. Harris, Attorney-General, for the Official Receiver.

1 **ALCANTARA, A.J.:** This is an application by the joint liquidators of the above company for a number of orders or directions.

2 Mr. Marrache for the joint liquidators has challenged, as a preliminary point, my ruling in the case of *In re Guaranteed Perm. Bldg. Socy.* (2), about the need to serve notice of application on the Official Receiver. This is what I said in that case (1988–90 Gib LR 165, at para. 2):

"The present application seeks directions from the court on a number of points. Counsel for the applicant has taken a very wise course. He has served the summons now before me on the Registrar of Building Societies. I commend this practice not only in the case of building societies (which are few and far between) but also in the case of companies which are in the process of being wound up. In this latter

case the Official Receiver (not just the person appointed to do the work of the Official Receiver) should be served. The Official Receiver or the Registrar might consider adopting the practice of being represented in chambers by the Treasury Solicitor (Crown Counsel in Gibraltar) in all applications, except very simple and straightforward ones, whether they oppose the application or not. The assistance of the Treasury Solicitor can be invaluable to the judge in making the right order.”

3 On October 20th, 1989, the Attorney-General (on behalf of the Official Receiver) obtained an order that Michael Jordan and Kenneth Alan Robinson be appointed jointly as liquidators of the company and have all the powers and duties of the Official Receiver in the winding up of the company and for all the purposes of the Companies Ordinance. Mr. Marrache argues that the joint liquidators are the official receivers (I shall use lower-case letters when I refer to them in contradistinction with the Official Receiver) and that consequently the Official Receiver has no status in this application, and need not be served. The Attorney-General supports this contention, although as Attorney-General he is always willing to appear as *amicus curiae* if the court so desires or intimates.

4 They have both referred me to the Companies Ordinance, s.167. Sub-section (1) states that “the term ‘official receiver’ means an officer appointed for the purpose by the Governor.” Sub-section (2) provides for security to be given by the Official Receiver. Sub-section (3) reads as follows:

“Notwithstanding anything to the contrary in this Ordinance contained, the court shall, at any time after the presentation of a petition for the winding up of a company and upon the application of the official receiver, appoint a fit and proper person as liquidator and any such liquidator so appointed shall in addition to his duties as liquidator, be deemed to be, and to have all the duties of, the official receiver in the winding up of such company for all the purposes of this Ordinance.”

In the marginal note to s.167 there is a reference to s.179 of the Companies Act 1929, but it is significant that in the English Act, there is nothing equivalent to sub-s. (3). This is a local product. In the English Act the Official Receiver is an officer appointed by the Board of Trade or, under s.180 of the Act, some other officer appointed by the court “with a view to securing the more convenient and economical conduct of the winding up.” This gave the court in England a wide discretion under the 1929 Act as to the appointment of an Official Receiver.

5 The Attorney-General has argued that the discretion of the court in Gibraltar is a very limited one. Once the Official Receiver makes an application under s.167(3), the court must make the appointment provided

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the court is satisfied that the person put forward is a “fit and proper person.”

6 I feel I must agree with the Attorney-General, and I am compelled to agree with Mr. Marrache that once there has been an appointment under s.167(3) it is no longer necessary to bring to the attention of the Official Receiver any application for directions which the liquidators may care to make. The official receiver has now taken over, and the Official Receiver no longer has any status.

7 In certain circumstances there might be a conflict of interest, but on a strict interpretation of the law which I have been persuaded to adopt, there is no need to bring the Official Receiver into the picture when there is an official receiver. It is with some regret that what I said in *In re Guaranteed Perm. Bldg. Socy.* (2) about the assistance of the Treasury Solicitor need no longer apply.

8 Now as to the various directions asked for, on which the Attorney-General has not taken part or asked to take part either as representing the Official Receiver or as *amicus curiae*. The first direction or order asked for by the joint liquidators is as follows: “[T]hat the liquidators be at liberty to act either jointly or severally in the execution of their duties.” Mr. Marrache has drawn my attention to s.174(4) of the Companies Ordinance, which provides that “if more than one liquidator is appointed by the court, the court shall declare whether any act by this Ordinance required or authorized to be done by the liquidator is to be done by all or any one or more of the persons appointed.”

9 In the case of this winding up, which forms part of the *Barlow Clowes* (1) debacle, I think it is quite proper that the joint liquidators be at liberty to act either jointly or severally, except in the execution of their duties as official receiver, when they must act jointly.

10 There is just a thought on this particular direction. The Official Receiver appointed the liquidators to act jointly, yet later the liquidators and the official receiver seek to act jointly and severally without the need of the Official Receiver being notified or made a party. The first order will read: “[T]hat the liquidators be at liberty to act either jointly or severally in the execution of their duties as liquidators, but jointly in the execution of their duties as official receiver.”

11 The second direction asked for is “that the liquidators be at liberty to open, operate and maintain such bank account(s) as they shall see fit and that the requirements of s.180(1) of the Companies Ordinance be dispensed with.”

12 If strict interpretation were to be the order of the day, the answer to the above would be “No.” There is no power under the Companies Ordinance that I am aware of that would empower me to dispense with a

statutory provision. Nor can I think of any inherent power. The most that I can do, which has been done in other cases, is to give the liquidators liberty to bank at a commercial bank instead of at the Government Savings Bank, and this too is still borderline. The order will be: “[T]hat the liquidators, in compliance with s.180 of the Companies Ordinance, be at liberty to use the National Westminster Bank, Gibraltar in lieu of the Government Savings Bank.”

13 The third order or direction sought is “that the security already provided by the Liquidators in their capacity as joint liquidators in the matter of *Barlow Clowes Intl. Ltd.* be extended to include this matter.” Have I power to accede to this request? Section 173 of the Companies Ordinance states that—

“where in the winding up of a company by the court a person other than the [O]fficial [R]eceiver is appointed liquidator, that person—

- (a) shall not be capable of acting as liquidator until he has notified his appointment to the Registrar and given security in the prescribed manner to the satisfaction of the court . . .”

The above provision applies because the joint liquidators are persons other than the Official Receiver.

14 What is the prescribed manner? The prescribed manner is to be found in r.57 of the Companies (Winding-Up) Rules 1929, which applies to Gibraltar. Taking into account that this case arises out of the *Barlow Clowes* affair (1), and assuming that security has been properly given in that action, I am prepared to accede to the third direction as prayed. I accordingly so order.

15 The fourth direction sought is “that the liquidators have the sanction of this court to appoint Messrs. Marrache & Co. of 5 Cannon Lane, Gibraltar, to assist them in the performance of their duties and to remunerate them as provided in para. 7 below.” I am satisfied that this is a proper case for the appointment of a solicitor and accordingly I sanction the appointment *simpliciter*, the order to read with the deletion of all the words after “duties.”

16 The fifth direction asks “that in addition to the powers conferred by para. 4 hereof, the liquidators may be at liberty to employ such professional or other agents as they think fit to assist them in the winding up of the company and to remunerate them as provided in para. 7 below.” I am not convinced about the necessity for this direction, as the liquidators have very wide powers in this respect. That power is contained in s.177(2) of the Companies Ordinance, the relevant part of which reads:

“The liquidator in a winding up by the Court shall have power—

. . .

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- (g) to appoint an agent to do any business which the liquidator is unable to do himself; [and]
- (h) to do all such other things as may be necessary for winding up the affairs of the company and distributing its assets.”

I accordingly make no order, as I consider it unnecessary.

17 The sixth direction sought is in relation to the remuneration of the liquidators. It is divided into two sections: (a) basis of remuneration, and (b) source and method of remuneration. Insofar as (a) is concerned, this is what is being asked: “[T]hat the liquidators be remunerated on the following time-expended basis, that is to say by adopting their normal charge rates.”

18 Remuneration on a time-spent basis has been approved by the Court of Appeal in *In re Intl. Invs. Ltd.* (3) for difficult cases where the liquidator’s work is exceptional. I am prepared to accept that such is the case here. The order will read: “[T]hat the liquidators be remunerated on a time-spent basis.”

19 I am not prepared to make any order or give any directions as to the source and method of remuneration, wherein the liquidators seek monthly payment out of the assets (if any) of the Company. The matter is statutorily regulated and dealt with in r.192(1) of the Companies (Winding-Up) Rules 1929, to which I draw the attention of the applicants. I will set it out in an abbreviated form:

“The assets of a Company in a winding-up by the Court, remaining after payment of the fees and expenses properly incurred in preserving realising or getting in the assets . . . shall . . . be liable to the following payments, which shall be made in the following order of priority, namely:—

First.—The taxed costs of the petition . . .

Next.—The costs and expenses of any person who makes or concurs in making, the Company’s statement of affairs . . .

Next.—The necessary disbursements of any Liquidator appointed in the winding-up by the Court . . .

Next.—The costs of any person properly employed by any such Liquidator.

Next.—The remuneration of any such Liquidator . . .”

20 The seventh order or direction sought is that the liquidators be at liberty to remunerate, without the need of having the bills taxed, their solicitors and agents. This is contrary to r.192(2) of the Winding-Up Rules, the relevant part of which reads:

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“No payment in respect of bills or charges of solicitors, managers, accountants, auctioneers, brokers, or other persons, other than payments for costs and expenses incurred and sanctioned under Rule 54, and payments of bills which have been taxed and allowed under orders made for the taxation thereof, shall be allowed out of the assets of the Company without proof that the same have been considered and allowed by the Registrar.”

21 This means taxation before payment, except that in *In re Guaranteed Perm. Bldg. Socy. (2)*, already referred to in a different context, I interpreted the above rule in such a way that in certain cases it was discretionary for the Registrar to allow such fees or charges, without actual taxation, if he considered them reasonable and uncomplicated. I am unable to accede to the application of the liquidators in this respect. Direction No. 8 does not arise in the circumstances. The liquidators are to have the costs of this application.

Orders accordingly.