[1991–91 Gib LR 303]

IN THE MATTER OF FORTRESS MANAGEMENT LIMITED

IN THE MATTER OF BAROQUE LIMITED

SUPREME COURT (Kneller, C.J.): May 8th, 1992

Companies—liquidators—remuneration—under general discretion as to costs under Rules of the Supreme Court, O.62, r.2(4), court may order petitioner in winding up to pay balance fees and expenses of court-appointed liquidator not met from company's assets—official receiver's expenses may also be paid from assets

Companies—liquidators—remuneration—payment on time-spent basis at normal charge-out rate to be authorized only on application supported by affidavit showing exceptional nature of winding up and/or that no one else will undertake work

Companies—liquidators—legal assistance—court will authorize liquidator's recruitment of solicitor to assist in winding up only on application supported by affidavit specifying who and why needed

The official receiver applied for orders in the winding up of two companies.

Following the making of an order for the winding up of two companies, the official receiver obtained, under ss. 167(3) and 173 of the Companies Ordinance, the usual orders that a local insolvency practitioner be appointed as liquidator in his place and that he give security for the due performance of his duties.

The official receiver also applied on behalf of the liquidator for orders that the liquidator be remunerated on a time-expended basis at his normal charge-out rate, that the liquidator be authorized to appoint solicitors to assist him, that his own taxed costs be paid out of the company assets, and that the liquidator's fees be paid by the petitioners if the company had insufficient assets to meet them. The petitioners opposed the application.

The official receiver submitted that (a) the court had a discretion under s.174(2) of the Ordinance to direct that the liquidator receive appropriate remuneration by way of percentage or otherwise, and had in the past ordered that liquidators be paid on a time-spent basis under r.157(1) of the English Companies (Winding-up) Rules 1929; (b) under s.197 of the Ordinance, the court had a discretion, when the companies' liabilities

exceeded their assets, to order that the liquidation costs be paid from the assets in whatever order it thought just; (c) it would not be just for the official receiver or his appointee to incur costs as a result of the companies' insolvency, since, under s.159(1), the court could not refuse to wind up a company with inadequate assets; the petitioners had probably been aware of the companies' financial position when they applied; and the official receiver had no funds with which to meet the liquidator's claims not met from the assets; (d) this was reflected by r.209 of the English Rules, under which the Board of Trade's approval was required there before such costs could be incurred; (e) the role of the official liquidator and his appointee were similar to that of the Admiralty Marshal on the arrest of a ship, and the petitioners, like an arresting party, should be required to reimburse them for unpaid costs; and (f) the costs of a solicitor to assist the liquidator were contemplated by the list of priorities for the payment of liquidation expenses in r.192(1) and the provisions for approval by the Taxing Officer in r.192(2).

The petitioners submitted in reply that (a) the liquidator should apply at a later date with affidavit evidence in support, for an order for remuneration on a time-expended basis, since such orders should be made only if the liquidator's task was an exceptionally complex one or he had brought particular expertise or experience to it; (b) it would be unjust for them to be required to meet the fees of the liquidator in so far as they exceeded the companies' assets, since the Government had previously in other cases agreed to meet them, and the official receiver was required under s.167(2) of the Ordinance to give security, to the Governor's satisfaction, for the performance of his duties; (c) furthermore, they had not sought the liquidator's appointment, they had no control over the way he performed his duties or the costs he incurred (unlike the official receiver), and they had already incurred a debt which they were petitioning to recover; (d) an order that they pay the official receiver's and the liquidator's excess costs would negate the effect of the existing order that their own costs be met from the companies' assets; (e) the official receiver was not an officer of the court like the Admiralty Marshal, who did not have to give security and was funded by the arresting party; and (f) in the interest of the creditors, the liquidator should also justify by affidavit the need to appoint a solicitor to aid him.

Held, making the following orders:

(1) Although there was no power under the Companies Ordinance, the Companies (Winding-up) Rules or at common law to order that the petitioners pay the liquidator's fees to the extent that the company's assets might be insufficient to do so, the court could make such an order under its wide discretion as to costs in the Rules of the Supreme Court, O.62, r.2(4). However, the circumstances of this case did not justify doing so at the outset of the winding-up proceedings (para. 26; para. 32).

(2) The official receiver's expenses would be paid from the assets of the company. By applying for the appointment of the liquidator and

supervising his work, he was safeguarding the interests of creditors and all others dealing with the company. No order would be made at this stage regarding payment in the event that the company's assets were inadequate to meet his expenses. His position was different from that of the Admiralty Marshal, whose expenses were provided for by the arresting party under the Rules of the Supreme Court (paras. 27–29).

(3) The court would not order that the liquidator be paid on a time-spent basis at his normal charge-out rate unless he applied with affidavit evidence that the winding up would be an exceptional one and/or that no one would otherwise undertake the job. Similarly, no order would be made sanctioning the appointment of a solicitor to assist the liquidator unless he satisfied the court by affidavit evidence that he would need one, and specified who he wanted for the job (paras. 22–25; paras. 30–31).

Cases cited:

(1) *Aiden Shipping Co. Ltd.* v. *Interbulk Ltd.*, [1986] A.C. 965; [1986] 2 All E.R. 409, applied.
(2) *Clandown Colliery Co., In re*, [1915] 1 Ch. 369, referred to.
(3) *Great W. (Forest of Dean) Coal Consumers Co., In re* (1882), 21 Ch. D. 769; 51 L.J. Ch. 743, referred to.
(4) *Guaranteed Perm. Bldg. Socy., In re*, Supreme Ct., Civ. Action G. No. 44A of 1984, May 23rd, 1989, unreported, applied.
(5) *Intl. Invs. Ltd., In re*, Supreme Ct., Civ. Action No. 194 of 1984, unreported, considered.
(6) *Melson (Alfred) & Co., In re*, [1906] 1 Ch. 841; (1906), 75 L.J. Ch. 509, referred to.
(7) *Rycote Intl. Ltd., In re*, Supreme Ct., May 4th, 1990, unreported, applied.

Legislation construed:

Companies Ordinance (1984 Edition), s.155: The relevant terms of this section are set out at para. 14.
s.159(1): The relevant terms of this sub-section are set out at para. 14.
s.167(1): The relevant terms of this sub-section are set out at para. 15.
(2): The relevant terms of this sub-section are set out at para. 8.
(3): The relevant terms of this sub-section are set out at para. 15.
s.172: The relevant terms of this section are set out at para. 15.
s.174(2): The relevant terms of this sub-section are set out at para. 16.
s.177(1): "The liquidator in a winding up shall have power with the sanction . . . of the court . . .—

. . .

(*c*) to appoint a solicitor to assist him in the performance of his duties . . ."

s.197: The relevant terms of this section are set out at para. 17.
s.269: The relevant terms of this section are set out at para. 18.
s.270: The relevant terms of this section are set out at para. 19.

Companies (Winding-up) Rules, 1929 (S.R. & O. No. 612), r.157(1):

> "The remuneration of a Liquidator, unless the Court shall otherwise order . . . shall be in the nature of a commission or percentage . . ."

r.192(1): The relevant terms of this paragraph are set out at para. 21.

(2): The relevant terms of this paragraph are set out at para. 21

r.209: The relevant terms of this paragraph are set out at para. 21.

Rules of the Supreme Court, O.62, r.2(4):

> "The powers and discretions of the Court under section 51 of the Act (which provides that the cost of and incidental to proceedings of the Supreme Court shall be in the discretion of the Court and that the Court shall have full power to determine by whom and to what extent the costs are to be paid) and under the enactments relating to the cost of criminal proceedings to which this Order applies shall be exercised subject to and in accordance with this Order."

O.75, r.9: "Where the solicitor of a party to an action in rem fails to comply with a written undertaking given by him to any other party or his solicitor to acknowledge issue or service of the writ in the action, give bail or pay money into court in lieu of bail, he shall be liable to committal."

r.10(3): The relevant terms of this paragraph are set out at para. 27.

P. Dean, *Senior Crown Counsel*, for the official receiver;
J. Nuñez and *A.E. Dudley* for the receiver of Reliance Ins. Ltd. and IWP Intl. Ltd., the petitioners.

1 **KNELLER, C.J.:** On April 3rd, 1992, this court, on the unopposed petition of the receivers of Reliance Ins. Brokers Ltd. and IWP Intl. Ltd., found it just and equitable to order that Fortress Management Ltd. and Baroque Ltd., respectively, should be wound up by this court under the provisions of the Companies Ordinance, and those orders went forth. The companies were shown to be insolvent and unable to pay their debts.

2 Then up rose Mr. Dean, Senior Crown Counsel, on behalf of Mr. Richard Garcia, the official receiver, who applied under s.167(3) of the Ordinance for orders that—

(a) Mr. Kenneth Robinson of Messrs. Ernst & Young, Gibraltar, be appointed liquidator and have all the duties of the official receiver in the winding up of each company for the purposes of the Ordinance; and

(b) the liquidator, pursuant to s.173 of the Ordinance, give security to the satisfaction of the Registrar.

Those were unopposed, were deemed proper by the court and duly granted. They are also "familiar" orders.

3 The official receiver applied at the same time for others, namely, that—

(c) the liquidator be remunerated on a time-expended basis, at his normal charge-out rate;

(d) the liquidator have the sanction of the court to appoint solicitors to assist him in the performance of his duties;

(e) the costs of the official receiver be taxed if not agreed and paid out of the assets of the company; and

(f) the fees and disbursements of the liquidator be paid by the petitioners if the company has no or insufficient assets to meet them.

These were opposed by Mr. Nuñez and Mr. Dudley, for the petitioners. I have consolidated the applications for the purpose of this ruling.

4 The official receiver was appointed by His Excellency the Governor for the purposes of the Ordinance. He is, among other things, Deputy Registrar of the Supreme Court of Gibraltar, Clerk of the Court of First Instance, and an honours graduate of Birmingham University in Spanish and English studies. But, as he would be the first to point out, he is not a chartered accountant or licensed insolvency practitioner, and has no staff or funds to carry out the duties of the official receiver. So, when a winding-up order is made he applies to the court for his replacement by a liquidator and the "familiar" or usual orders.

5 The liquidator of these companies, Mr. Robinson, is a chartered accountant, experienced in the arcane work of winding up insolvent companies and he has the staff to help him. His fees and disbursements are paid out of the assets of the company in liquidation in priority to some other proven claims. So far so good.

6 Who is to pay those fees if they exceed the available assets? He asked the official receiver to apply to the court to authorize the Government to do so. I think he meant *order* the Government to do so because the court does not authorize or prohibit the Government's lawful expenditure. The official receiver must have been denied a vote for this possible claim by the liquidator (and other liquidators in the future) and warned that the Government would not meet the liquidator's claim if his fees and disbursements exceeded the available assets of the company in liquidation. Hence the official receiver's application for the other orders.

7 On what grounds did Mr. Dean urge the court to grant them? There was nothing, he said, in the Ordinance or the UK Companies (Winding-Up) Rules 1929 to prohibit the making of such orders. There was a discretionary power vested in the court to award costs, which was not limited by any rule-making authority or decision of any court to the effect that costs could only be ordered to be paid by the parties to the proceedings: see *Aiden Shipping Co. Ltd*. v. *Interbulk Ltd.* (1). The petitioners were likely to know if and what assets the company had before

it asked the court to wind it up. Gibraltar had no Board of Trade to which the official receiver could refer for permission or advice on whether or not to wind up the company, as his UK counterpart could (see r.20). There were no funds available for the official receiver to meet the liquidator's claims if they exceeded the assets of the company in liquidation.

8 The sum of the objections of the petitioners submitted by Mr. Nuñez and Mr. Dudley was that the Government had hitherto paid the fees and disbursements of liquidators when they exceeded the company's assets. The petitioners had not applied for a liquidator to replace the official receiver; it was the consequence of the official receiver's application. The official receiver had to "give security for the due performance of his duties in such sum and in such manner as the Governor [thought] fit" (see s.167(2) of the Ordinance). He was not an officer of the court as were the Registrar, Deputy Registrar, Admiralty Marshal and Bailiff, who consequently did not have to give security.

9 The petitioners have already incurred a loss, namely, the debt. There may be other creditors who will prove their claims later. There was, according to Mr. Nuñez and Mr. Dudley, no reason why the petitioners should pay the liquidator's fees, disbursements and expenses, especially as they were not able to control the liquidator's work and the official receiver was, and indeed had to do so.

10 The court had already made an order that the petitioners' costs should be paid out of the companies' assets, so an order that the petitioners should pay the costs of the official receiver and the liquidator if those of one or both exceeded the assets of the companies would, in a sense, cancel the earlier order.

11 The applications for orders that the liquidator should be remunerated on a time-expended basis, at his normal charge-out rate, and that he have the sanction of the court to appoint solicitors to assist him in the performance of his duties should be made by him later, with an affidavit in support justifying them. The court should examine at the dissolution what work the liquidator had done and what would be reasonable remuneration for it, and that might not be, on a time-expended basis and at his normal charge-out rate. He might not need a solicitor to help him at the outset or at all. If he does he should set out why and specify which one he wishes to employ.

12 The orders sought were not in the best interests of the creditors, for they gave the liquidator the opportunity to charge what he liked irrespective of the work he did and to engage a solicitor without the need to do so.

13 The opposition to the official receiver's costs being taxed if not agreed and paid out of the assets of the companies was muted; and all that

could be said against that part of the application was that they should be limited to the cost of his summons, the affidavit in support and Mr. Dean's appearance before the court.

14 We cannot do better, in my view, than begin at the beginning in dealing with these applications. The Supreme Court is invested by the legislature with "jurisdiction to wind up any company registered in Gibraltar" (see s.155 of the Ordinance). The court may not refuse to wind up a company because it "has no assets" or they "have been mortgaged to an amount equal to or in excess of" its assets (see s.159(1)).

15 The official receiver is "an officer appointed for the purpose" of carrying out "the winding up of companies by the court" (see s.167(1)). ". . . [T]he 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 . . ." (s.167(3)). It has been the practice of the official receiver to apply for such an appointment as soon as a winding-up order is made, but it would seem that he should "summon separate meetings of the creditors and contributories of the company for the purpose of determining whether or not an application is to be made to the court for appointing a liquidator in the place of the official receiver . . ." (s.172(*b*)) and if one is not appointed "the official liquidator shall be the liquidator of the company . . ." (s.172(*d*)) or "during any vacancy" in the position of liquidator (s.172(*e*)).

16 "Where a person other than the official receiver is appointed liquidator, he shall receive such salary or remuneration by way of percentage or otherwise as the court may direct . . ." (s.174(2)).

17 Suppose the company's assets are insufficient to satisfy its liabilities? The court may "make an order as to the payment out of the assets of the costs, charges and expenses incurred in the winding up in such order of priority as the court thinks just" (s.197).

18 Under s.269—

> "the Chief Justice may make rules of court—
>
> (*a*) prescribing the fees, percentages and costs to be charged in respect of proceedings under this Ordinance, and the remuneration to be allowed to the official receiver and other officers of the court; and
>
> (*b*) generally for carrying into effect the provisions of this Ordinance."

They have to be approved by the Governor.

19 "The Governor shall direct whether any and what remuneration is to be allowed to any person performing any duties under this Ordinance, and

may from time to time vary, increase or diminish such remuneration" (s.270).

20 The English Companies (Winding-Up) Rules 1929, as amended in 1929, 1931, 1933 and 1937, apply in this court *mutatis mutandis* and so far only as the circumstances of Gibraltar may permit. In their interpretation, where the context permits, the Principal Auditor of Gibraltar is substituted for the Board of Trade in England when it comes to verifying the accounts, requiring them to be completed, amended or explained and the enforcement of any such requirement.

21 The assets of a company in a winding up by the court are paid out according to a list of priorities set out in r.192(1) "after payment of the fees and expenses properly incurred in preserving, realizing or getting in its assets." "The necessary disbursements of any Liquidator appointed in the winding-up by the Court" are sixth on the list. "The costs of any person properly employed by [him]" are seventh. His remuneration is eighth. "The Taxing Officer shall before passing the bills or charges of a solicitor, satisfy himself that the appointment of a solicitor to assist the Liquidator in the performance of his duties has been duly sanctioned" by the court (see r.192(2)). If a company against which a winding-up order has been made has no available assets, "the Official Receiver shall not be required to incur any expense in relation to the winding-up without the express directions of the Board of Trade" (r.209).

22 There have been four decisions of the courts of Gibraltar on some of these matters. On April 3rd, 1985, Alcantara, A.J. held in *In re Intl. Invs. Ltd.* (5), that liquidators should be paid on a percentage basis and not a time basis, but on the special facts of the case, allowed the liquidator's remuneration on the results of his work, which cut down his claim from £29,105 to £10,000. The liquidator appealed on October 10th, 1985 and the Court of Appeal said:

> "We think it is quite clear that a percentage basis would be totally inappropriate in the circumstances of this case. The amount claimed in the fee note seems very high but we accept that the liquidator's task was an exceptional one. We think there is no other way in which we can fairly and properly assess the fee."

23 On May 23rd, 1989, the learned judge in *In re Guaranteed Perm. Bldg. Socy*. (4), held that payment on a time basis was for difficult cases, and fixed the liquidator's remuneration on that basis because the case before him was a difficult one.

24 On May 4th, 1990, in *In re Rycote Intl. Ltd.* (7), a case involving three companies in liquidation, I sanctioned the appointment of the liquidators' choice of solicitors to assist them in the performance of their duties under s.177(1)(*c*), because the alternative sanction of the

committee of inspection was not available—there being no such committees in those cases—and because the solicitors named by the liquidators were well versed in the law relating to the duties liquidators perform in a winding up. Their battle initiation had been the local winding up of Barlow Clowes.

25 In the same application I held that a commission or percentage basis for the remuneration of the liquidators would be inappropriate in the circumstances, and I otherwise ordered (under r.157(1)) that they should be paid on a time-spent basis, at their normal charge-out rates. The cases were exceptional: they were connected with the Barlow Clowes liquidation; 50–60 people might be working on them at any one time; the records of the assets were scanty or did not exist; and the liquidators were exposed to the risk of actions for negligence.

26 No Ordinance or Rules, statute or regulations, or any decision of a court was cited as authority for an order that the petitioners should pay the liquidator's fees, costs and disbursements if the assets of these companies were insufficient to meet them. It has not been ordered before. The court, in appropriate cases, has a discretion to make any just order as to costs, including against a third party, *e.g.* where there is a triangle of parties, shipowners, charterers and sub-charterers: see *Aiden Shipping Co. Ltd.* v. *Interbulk Ltd.* (1).

27 The Admiralty Marshal or her agent do not make any moves, it is true, unless the applicant funds them beforehand or its solicitor undertakes in writing "to pay on demand the fees of the marshal and all expenses incurred by him or on his behalf," but that is provided for by legislation: see the Rules of the Supreme Court, O.75, r.10(3). The solicitor is liable to committal if he fails to comply with the undertaking (O.75, r.9).

28 Here, the legislature has provided for the winding up by the court of insolvent companies. It has created the office of the official receiver and laid down his duties, which include applying for the appointment by the court of a liquidator whose work he must superintend. This must be, among other things, to prevent the creditors, contributories, directors, staff and other interested people from taking the matter into their own hands and resorting to the clash and clamour of conflict outside the court. The whole machinery is, among other things, designed to protect the interests of all who deal or dealt with these companies, especially the innocent unsecured creditors: see *In re Alfred Melson & Co.* (6) ([1906] 1 Ch. at 844); *In re Great W. (Forest of Dean) Coal Consumers Co.* (3); and *In re Clandown Colliery Co.* (2) ([1915] 1 Ch. at 373, *per* Astbury, J.).

29 The upshot is that I shall make one further order at this stage, namely, that the fees of the official receiver be taxed if not agreed and paid out of the assets of the companies.

30 There will not be an order that the liquidator be remunerated on a time-expended basis at his normal charge-out rate until he applies with an affidavit in support which persuades the court that it is justified either because the winding up will be exceptional and/or because it is believed that otherwise no one will undertake the winding up.

31 There will be no order that the liquidator has the sanction of the court to appoint solicitors to assist him in the performance of his duties without his application with a supporting affidavit satisfying the court that he will need one and stating which solicitor he wishes to help him.

32 There will be no order that the liquidator's fees and disbursements will be paid by the petitioners if the companies have no or insufficient assets to meet them. The Ordinance and the applied Rules do not permit it to be made (yet) and the overall discretion vested in the court under the Rules of the Supreme Court, O.62, r.2(4) to make it should not, in my judgment, be exercised in favour of the official receiver and liquidator against the petitioners at this stage.

33 The costs of the official receiver shall be taxed if not agreed and paid out of the assets of the company. The petitioners' costs of and occasioned by this application are to be paid by the official receiver, to be taxed if not agreed.

Order accordingly.