[2015 Gib LR 354]

IN THE MATTER OF MG ENGINEERING AND CONSULTANCY LIMITED

SUPREME COURT (Jack, J.): December 2nd, 2015

Companies—liquidators—remuneration—variation—may vary order for liquidator's remuneration with prospective effect under Companies Act 1930, s.238(2) but not with retrospective effect

The applicant liquidators applied to vary the order of their appointment.

The applicants were appointed as liquidators of a company. The Supreme Court made an order providing that they would be remunerated in accordance with the Liquidators Scheme of Appointment, under which they were entitled to a fixed fee of £1,000. They were much more successful in realizing the company's assets than expected, and they therefore applied to vary the Supreme Court's order retrospectively to provide for remuneration based on their usual hourly rates. On this basis, they would be entitled to fees of £272,120.90 for their work between the date of the Supreme Court's order and the hearing of the present application.

The liquidators submitted that (a) limiting their remuneration to £1,000 would be unfair and unjust in light of the volume of assets recovered and the Supreme Court's order should be varied retrospectively to remedy this; and (b) to facilitate this, the Civil Procedure Rules, r.3.1(7), which gave the court a general power to vary or revoke orders, should be applied by analogy through the court's inherent jurisdiction to prevent injustice.

Held, allowing the application in part:

(1) The court had the power under the Companies Act 1930, s.238(2) to vary the Supreme Court's order as to the liquidators' remuneration with prospective effect. Changes of circumstances could render inappropriate the level of remuneration originally ordered, and s.238(2) would therefore be read as allowing "such salary or remuneration . . . as the court may direct *from time to time*." The court would use this power to vary the Supreme Court's order so as to authorize remuneration for the liquidators at their standard hourly rates as from the date of the present judgment (para. 14; para. 37).

(2) However, the court could not vary the Supreme Court's order to increase the liquidators' remuneration with retrospective effect. It had no statutory or common law power to vary retrospectively the orders of a court of concurrent jurisdiction: (a) s.238(2) did not confer such a power

as this would make the section unacceptably penal in a case in which the court initially fixed a high remuneration and a liquidator accepted the appointment on that basis but the court then retrospectively reduced his remuneration; (b) the Companies (Winding-up) Rules 1929 made no provision for the court to vary any orders; (c) CPR, r.3.1(7) could not assist the liquidators because neither the 1929 Rules nor the Supreme Court Rules 2000 applied the CPR to insolvency proceedings under the 1930 Act; (d) the court may have a common law power to make orders *nunc pro tunc* (*i.e.* backdating the order), but it was only applicable in a small number of very specific situations; and (e) there could be no general common law power enabling the court to vary retrospectively the order of a court of concurrent jurisdiction because, if such a power existed, no court order could ever be final (paras. 18–20; para. 23; paras. 30–31; para. 35).

(3) Even if the court had the power to do so, it would not increase the liquidators' remuneration with retrospective effect. They were experienced professionals with access to legal advice, and there was therefore no injustice in holding them to the terms of the Supreme Court's order (para. 36).

Cases cited:

(1) *Black* v. *Green* (1854), 15 C.B. 262; 139 E.R. 422, referred to.
(2) *Bremer Vulkan Schiffbau & Maschinenfabrik* v. *South India Shipping Corp. Ltd.*, [1981] A.C. 909; [1981] 2 W.L.R. 141; [1981] 1 All E.R. 289; [1981] 1 Lloyd's Rep. 253; [1981] Com. L.R. 19; [1981] E.C.C. 151, considered.
(3) *Greycaine Ltd., In re*, [1946] Ch. 269; [1946] 2 All E.R. 30, followed.
(4) *Hemming* v. *Batchelor* (1875), L.R. 10 Ex. 54, referred to.
(5) *Hill Ins. Co. Ltd., In re*, Supreme Ct., January 24th, 2013, unreported, referred to.
(6) *Jonesco* v. *Beard*, [1930] A.C. 298, referred to.
(7) *Lemma Europe Ins. Co. Ltd., In re*, Supreme Ct., Action No. 2012 Comp. No. 25, unreported, referred to.
(8) *Regent Centre, In re*, 2015 Gib LR 30, applied.
(9) *Webb* v. *Taylor* (1843), 1 Dow. & L. 676; 13 L.J.Q.B. 24; 8 Jur. 39; 2 L.T.O.S. 106, referred to.

Legislation construed:

Companies Act 1930, s.238(2): The relevant terms of this sub-section are set out at para. 13.

C. Wright and *N. Cruz* for the liquidators;
T. Rocca as *amicus curiae*.

1 **JACK, J.:** This is an application by the joint liquidators of MG Engineering & Consultancy Ltd. ("MG") to vary the order of their appointment made on April 26th, 2012 retrospectively to allow their salary

and remuneration to be paid on a "time spent" basis in accordance with a list of rates set out in the affidavit in support of the application. The amount sought to be recovered is £272,120.90 plus VAT and some other sums. If the application is not granted, the amount recoverable will be limited to £1,000.

2 The background of this matter is a substantial fraud said to have been committed by Mr. Paul Bell ("Mr. Bell"), a resident of the Isle of Man. In March of this year, he was arrested in England in connection with an alleged VAT fraud and associated money laundering. He is said to have used a complex web of companies to carry out the fraud. Total losses are said to exceed £40m. One of the companies involved is MG, a company incorporated in Gibraltar. Mr. Bell was the sole director and shareholder. It is right to record that Mr. Bell denies any wrongdoing.

3 Another company used in the alleged fraud was Heywood Engineering Ltd. ("Heywood"), a company incorporated in England and Wales which was also controlled by Mr. Bell. On February 18th, 2010, the Commissioners of H.M. Revenue and Customs petitioned the English Companies Court to wind Heywood up in respect of debts owed to the Revenue totalling £1,723,679.75. The petition was granted on May 12th, 2010. Ms. Lindsey Cooper ("Ms. Cooper") of Baker Tilly Restructuring and Recovery LLP in Manchester was appointed as liquidator jointly with a colleague, Mr. Cash.

4 Prior to the liquidation, Heywood had made very substantial payments to MG. These payments included a total of £1,498,710.42 transferred to MG after the presentation of the winding-up petition against Heywood. These payments were void under s.127 of the Insolvency Act 1986 (UK) and formed the basis of a winding-up petition presented by Heywood on November 2nd, 2011 against MG in this court under the provisions of the Companies Act 1930.

5 The petition against MG came before Dudley, C.J. on April 26th, 2012. Counsel appeared for Heywood and for MG and Mr. Bell. In addition, Mr. Rocca appeared for the Official Receiver. Dudley, C.J. made two orders that day. First, on the petition, he made an order winding MG up with orders in respect of the costs of the petition and the costs of an adjournment, the latter to be paid by Mr. Bell personally. Secondly, on the Official Receiver's application, he appointed Ms. Cooper and Mr. Ian Collinson (of Baker Tilly (Gibraltar) Ltd.) as joint liquidators of MG with "all the duties of the Official Receiver."

6 This second order went on to provide:

> "3 That the joint liquidators be remunerated in accordance with the Liquidators Scheme of Appointment.

4 That the costs of the joint liquidators be paid out of the assets of [MG].”

7 The Liquidators Scheme is a document negotiated between insolvency practitioners in Gibraltar and Her Majesty’s Government of Gibraltar. The need for it arises from the fact that the Official Receiver in Gibraltar does not have the resources to investigate companies himself, so that it is more convenient to farm insolvencies out to insolvency practitioners (generally on a cab-rank basis). The attraction of the scheme to insolvency practitioners is that the Official Receiver guarantees payment of £1,000 in fees to the appointed liquidator whether the insolvent company has assets or not.

8 The Liquidators Scheme sets out the various tasks the liquidator should perform when accepting the role. It then states:

> “15 The liquidator must, as soon as practicably possible, prepare a preliminary report, in accordance with s.233 of the Companies Act, and submit the same to the Supreme Court. In cases where the company has no assets and no further action is required on the part of the liquidator the report should include the final accounts, made in duplicate . . .
>
> 16 In addition to the preliminary report, the liquidator may make a further report to the court in accordance with s.233(2) of the Companies Act. Where the liquidator considers that, even though the company does not hold any assets, further investigation is desirable on grounds of public interest, an application for further funding must be submitted to the Minister for Finance to include the following:
>
> > A copy of the preliminary report;
> >
> > A full explanation of the public interest factors that make further investigation necessary; and
> >
> > A breakdown of the estimated fees showing the man hours likely to be applied with the corresponding hourly rate of remuneration, together with an estimate of any other disbursements.
>
> 17 Following the duties required by the liquidators under the Scheme . . . the liquidation process, where relevant, shall continue as directed by the court in accordance with the Companies Act.
>
> 18 Once the Registrar [of the] Supreme Court returns the final accounts which have been audited by the principal auditor, the liquidator may proceed with the final creditors meeting and submission of the final report together with the application to the court for his release as liquidator of the company and the dissolution of the company . . .

19 The fee payable under the Liquidators Scheme for compulsory liquidations is £1,000. This fee covers all the duties and costs of the liquidator up to the preliminary report and the final report, in the cases where there are no assets and no further action is required on the part of the liquidator. This fee also covers all the duties and costs in relation to the liquidator's release and dissolution of the company.

(i) The fee payable under the Scheme is to be met out of the company's assets; and

(ii) In the cases where the company has insufficient assets to meet this fee, the liquidator must submit to the Accountant General:

- An undertaking stating that the company has no assets to cover the liquidation fees; and
- A request for the payment of the £1,000 fee or the balance thereof."

9 After taking the appointment, the liquidators started to realize assets. They have to date been quite successful. About £900,000 has been recovered. There is a reasonable prospect of still further moneys being obtained through litigation which I have, by an earlier order, authorized to be brought in the Chancery Division of the English High Court.

10 If the liquidators were entitled to charge for their services at their usual rates, the amount to which they say they would have been entitled between April 26th, 2012 and February 27th, 2015 inclusive would have been at least £272,120.90. The difficulty they face is that, on the most natural construction of the Liquidators Scheme, the order of Dudley, C.J. provides for them to receive £1,000 only. Ms. Wright and Mr. Cruz accepted that, unless the court were able to vary that order with retrospective effect, the sum payable to the liquidators for that work would indeed be limited to £1,000.

11 They submit that limiting the liquidators' remuneration to £1,000 would be quite unfair and unjust. The question arises, though, as to what powers the court has to vary Dudley, C.J.'s order.

12 This problem is unlikely to arise in the future. Under s.467(1) of the Insolvency Act 2011, a liquidator's remuneration is fixed "after the conclusion of the insolvency proceeding." (Section 467(3) makes provision for interim payments to the liquidator in the course of an insolvency.) Under the transitional provisions to the 2011 Act, however, the current liquidation continues to be governed by the Companies Act 1930 and the Companies (Winding-up) Rules 1929, which were the rules in force in England in 1930: see reg. 8(1) of the Insolvency (Transitional Provisions) Regulations 2014.

13 Section 238(2) of the 1930 Act provides:

> "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, and, if more such persons than one are appointed liquidators, their remuneration shall be distributed among them in such proportions as the court directs."

14 A preliminary point can be dealt with quite simply. There is no indication in this subsection that the court's direction as to remuneration should be a once-and-for-all determination. It is easy to imagine cases where circumstances change, so that what may have been a perfectly reasonable order when the court made it originally later becomes inappropriate. Accordingly, in my judgment, the subsection should be read as allowing salary or remuneration "as the court may direct *from time to time*." This reading is consistent with *In re Greycaine Ltd.* (3).

15 *Greycaine* is an authority under the Companies Act 1929 (UK) (on which the 1930 Act was modelled) as regards whether an order can be made with retrospective effect. Section 309 of the 1929 Act (which corresponds to s.339 of the 1930 Act) provides:

> "The Court may, on an application made to the court by the liquidator of a company, by order fix the amount to be paid by way of remuneration to any person who, under the powers contained in any instrument, has been appointed as receiver or manager of the property of the company . . ."

16 In *Greycaine*, a debenture allowed the trustee of the debenture holder to appoint a receiver of some mortgaged property. The remuneration to which the receiver was entitled under the debenture was extremely high. After a compulsory winding-up order was made, the liquidator sought to have the remuneration reduced. The English Court of Appeal proceeded on the basis that it had a power to vary the remuneration payable from the date of its order, but it held that it had no power retrospectively to change the remuneration to which the receiver was entitled under the deed of debenture under which he was appointed.

17 Morton, L.J. said ([1946] Ch. at 280):

> "Turning again to the section, I think one must bear in mind that there has ex hypothesi been an appointment of a receiver before the court exercises its power. The section refers only to any person who has been appointed as receiver under the powers contained in an instrument, so that the section is dealing with a case in which there has been a bargain between the company and the trustee for the debenture holders, and between the trustee and the receiver. I think it is not unfair to describe it, as Mr. Upjohn [for the deceased receiver's

estate] did, as a penal section, if the effect of it is that the court can take away from the receivers remuneration which they have already earned in pursuance of their bargain."

18 The court proceeded to hold that it could only make orders as regards future remuneration. It is quite true that s.309 is in different terms to s.238(2) of the 1930 Act. However, the point on retrospectivity is equally valid. Suppose a case where the court initially fixes a very high remuneration under s.238(2) and the liquidator takes the appointment on that basis. If the court could retrospectively reduce the remuneration, then the section would be just as penal as s.309. This part of the reasoning in *Greycaine* (3) therefore applies to s.238(2). (In the United Kingdom, the effect of *Greycaine* in relation to s.309 was reversed by statute in the Companies Act 1948 (UK), s.371(2), but the legislative change was never mirrored in Gibraltar.)

19 A power to vary a court order with retrospective effect must, in my judgment, be sought elsewhere. The 1929 Rules make no express provision for the court to vary—still less vary retrospectively—any orders. Nor do the 1929 Rules incorporate any external procedural rules such as the Rules of the Supreme Court in the form which was then current in England and Wales for ordinary civil litigation.

20 The (Gibraltarian) Supreme Court Rules 2000 do not assist either. As I said in *In re Regent Centre Ltd.* (8) (2015 Gib LR 30, at para. 17):

> "So far as the Supreme Court Rules 2000 are relevant, the parts of r.7 which apply English insolvency rules have been repealed. Rule 6(1) of the Supreme Court Rules provides that 'the rules of court that apply for the time being in England in the High Court shall apply to all original civil proceedings in the court.' Insolvency proceedings would not generally be considered 'original civil proceedings,' and the existence of the old (unamended) r.7 shows that that was the legislator's understanding too."

Whilst I did not need to make a final determination to that effect in that case, the logic, in my judgment, is correct and I hold that the SCR do not apply the CPR to insolvency proceedings under the 1930 Act.

21 Ms. Wright and Mr. Cruz argued that CPR, r.3.1(7), which gives a general power to the court to vary or revoke orders, should be applied. Since neither the 1929 Rules nor the SCR apply the CPR to insolvency matters under the old Act, the CPR cannot have direct effect. Ms. Wright and Mr. Cruz instead argued that CPR, r.3.1(7) should be applied, effectively by analogy, because the court has an inherent jurisdiction to do what is necessary in order to prevent injustice.

22 They relied on a passage in Lord Diplock's speech in *Bremer Vulkan Schiffbau & Maschinenfabrik* v. *South India Shipping Corp. Ltd.* (2), where he said ([1981] A.C. at 977):

> "The High Court's power to dismiss a pending action for want of prosecution is but an instance of a general power to control its own procedure so as to prevent its being used to achieve injustice. Such a power is inherent in its constitutional function as a court of justice. Every civilised system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access in the role of plaintiff to obtain the remedy to which he claims to be entitled in consequence of an alleged breach of his legal or equitable rights by some other citizen, the defendant. Whether or not to avail himself of this right of access to the court lies exclusively within the plaintiff's choice; if he chooses to do so, the defendant has no option in the matter; his subjection to the jurisdiction of the court is compulsory. So, it would stultify the constitutional role of the High Court as a court of justice if it were not armed with power to prevent its process being misused in such a way as to diminish its capability of arriving at a just decision of the dispute."

23 *Bremer Vulkan* was a case where a respondent in arbitration proceedings was seeking to argue that an arbitrator had the power to strike out an arbitration for want of prosecution. The passage cited is directed to showing the difference between court proceedings (which are generally non-consensual) and arbitral proceedings (which are consensual). Lord Diplock's *obiter* comments cannot, in my judgment, be interpreted to give the court a free-standing power to set aside or vary earlier orders made by it. Such a power would be inconsistent with the way the procedure rules have developed: see the discussion in 1 *Civil Procedure*, at para. 3.1.9 (2015 ed.) and the way the limited powers in RSC, O.24, r.17, O.16, r.4(5) and O.38, r.6 were rolled into the more general CPR, r.3.1(7).

24 A general power, if it exists, must, in my judgment, be sought in some separate and identifiable common law power. There was a common law power to make orders *nunc pro tunc* (*i.e.* backdating the order). This was recognized in the first civil procedure rules, the Hilary Rules 1834, r.3, and was repeated (with minor drafting amendments) in r.56 of the Hilary Rules 1853, which provided that—

> ". . . all judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day; but it shall

> be competent for the court or a judge to order a judgment to be entered nunc pro tunc."

25 Pollock, B. in *Hemming* v. *Batchelor* (4) (L.R. 10 Ex. at 58) said:

> "I refer to this rule [rule 56] for the purpose of drawing attention to the word 'competent.' This word is explained by what was the practice before any such rule of court existed. It was then the practice of the courts, if either party died pending the time taken for argument on a motion in arrest of judgment or for a new trial, to enter judgment as of the term in which judgment would otherwise have been given. This judgment nunc pro tunc was a fiction of which the Courts availed themselves for the purpose of aiding the party whom they thought entitled to judgment."

26 The backdrop to this fiction was the rule of substantive law that personal actions died with the plaintiff (*actio personalis moritur cum persona*). (The rule has been abolished, save in respect of defamation, in Gibraltar: Contract and Tort Act 1960, s.12(1).) If a case was tried at *nisi prius* and the jury gave judgment for the plaintiff, then there might be a substantial delay before any motions brought by the defendant were heard by the full court in Westminster. If the defendant's motions were unsuccessful but the plaintiff had died in the meantime, it was considered unjust not to allow the judgment to be backdated to the time when the plaintiff still lived.

27 Rule 56 was carried over into the RSC. In the RSC's last iteration in 1999, RSC, O.42, r.3(2) provided that the court could order a judgment or order "to be dated as of some other earlier or later day, in which case it shall be dated as of that other day." This procedural provision did not survive into the CPR: see CPR, rr. 40.7(1) and 40.2(2)(a).

28 There do seem to have been some other limited circumstances in which the courts gave judgment *nunc pro tunc.* In *Webb* v. *Taylor* (9), the Act of Parliament under which a bank was incorporated provided that the bank could not sue in its own name but rather had to sue in the name of its "public officer." The action had been begun in the name of the appropriate officer, but by the time judgment had been recovered he had been replaced by another man. The problem only came to light when the defendant (who had been arrested for the debt under a writ of *capias ad satisfaciendum*) took the point. The Court of Queen's Bench allowed the second officer's name to be substituted with the order backdated *nunc pro tunc* to the date of the judgment, thereby validating the writ of *capias ad satifaciendum.* The rationale appears to be that the real plaintiff throughout was the bank; the misnomer of the public officer was an immaterial procedural matter which could and should be rectified.

29 Under s.11 of the Common Law Procedure Act 1852, a plaintiff could apply to renew an originating writ within the period of six months, but there was an issue as to whether the day of renewal was to be counted within or without the six-month period. In *Black* v. *Green* (1), the Master refused to renew a writ on the ground that it was one day out of time. The Court of Common Pleas, on a renewed application, considered the Master was wrong not to have renewed, but by the time the matter came before the full court, the six months had on any view expired. In those circumstances, the court ordered that the order be backdated as the only way to do justice.

30 Whether this common law power to backdate orders still survives is not a matter I need to determine. (Arguably the power is a matter of substantive law, which the CPR cannot alter. If there were a split trial of liability and quantum in a libel claim and the claimant died between the two trials, it might be necessary as a matter of substantive law to backdate the judgment on quantum.) However, regardless of whether the common law power to backdate orders still exists, it is, in my judgment, limited to these very specific types of cases. None of these includes cases where the court (as here) is being asked to vary the order of a judge of concurrent jurisdiction. I hold that there is no general power at common law to permit judgments and orders to be backdated.

31 Were the law otherwise, it would mean that no final order would ever be final. The usual way of challenging an order of the court is by an appeal to a higher court. The circumstances in which a court can set aside an order of a court of concurrent jurisdiction are extremely limited, for example by bringing a fresh action alleging that an earlier judgment had been obtained by fraud: *Jonesco* v. *Beard* (6). None of these circumstances applies here.

32 For completeness, I should mention one other (to modern eyes, extremely unusual) power to backdate court documents. There was an ancient common law requirement that in order to obtain a judgment by default in certain types of action, including actions for trespass, it was necessary first to "outlaw" the defendant. In order to do this, it was necessary to issue an originating writ addressed to the sheriff of the county where the defendant resided to summons the defendant to attend court in Westminster. If the defendant did not answer, the process needed to be repeated and after many steps the defendant would be declared an outlaw. At that point, the plaintiff could obtain a judgment by default and seek to arrest the defendant.

33 In fact, however, the procedural steps to outlaw a defendant were habitually ignored and the originating writ was never issued at all. Instead, the plaintiff proceeded to make his declaration (the equivalent of the particulars of claim, and the *de facto* commencement of the action) and,

after default by the defendant, went straight to judgment and arrest. Now the defendant could bring a writ of error against the default judgment on the ground that there had never been an originating writ in the first place, so that he was never properly outlawed. However, if the defendant did issue such a writ of error, then there was an established procedure whereby the plaintiff could petition the Master of the Rolls (who was the Lord Chancellor's deputy and had responsibility for authorizing the passing of the great seal over writs) to authorize the issue of a writ returnable at some date sufficiently in the past to justify the outlawry and the default judgment: see 1 *Tidd's Practice*, 3rd ed., at 103–104 (1803) for a precedent of the petition.

34 *Tidd* comments that defendants rarely took this point. The reason, I think, must be that, due to the fees payable to the holders of sinecures associated with the great seal, the cost of obtaining a writ was very high. (The sinecures were abolished by the Lord Chancellor's Pension Act 1832, but only on the death of the holder of the office: see ss. 1 and 2. In 1833, the holders of the sinecures of chaff wax and of the sealer received fees of £1,272. 15s. 5d. and £797. 16s. 9d. respectively: VI House of Commons Committee Reports, *Report of the Committee on Sinecures*, Appendix 1 (1834).) If a defendant took the point and the plaintiff rectified the matter by obtaining a backdated writ, the defendant was merely increasing the costs he was going to have to pay. I do not consider that this oddity of procedural history assists the liquidators in the current case.

35 Accordingly, I hold that I have no power to backdate my order for remuneration or to vary the order of Dudley, C.J. with retrospective effect.

36 I should add that, even if I were wrong in my reading of *Bremer Vulkan* (2), and the court does have a general power to "control its own procedure so as to prevent its being used to achieve injustice," this would not be a case in which to exercise such a power. The way the order of Dudley, C.J. has worked is undoubtedly harsh. The liquidators, though, are experienced professionals. They had access to expert legal advice. There is, in my judgment, no injustice in holding them to the terms of an order of which they should have been well aware.

37 The order I shall make will authorize higher remuneration for the liquidators as from the date of this judgment. The liquidators seek remuneration on an hourly rate. I have been shown two orders made by Prescott, J. on January 24th, 2013 in *In re Hill Ins. Co. Ltd.* (5) and *In re Lemma Europe Ins. Co. Ltd.* (7) where she authorized remuneration on such a basis. Such orders are normal in England and I consider this basis of remuneration is appropriate in the current case.

38 In case the matter goes further and the Court of Appeal holds that the court does have a power to make a retrospective order, then I should indicate what order I would have made. I have already commented that the

order of Dudley, C.J. has proved a harsh one. The liquidators have done a good job. The failure to appreciate the terms of Dudley, C.J.'s order is likely to have been an oversight on the part of the liquidators or their advisors. My refusal to make a retrospective order has the effect of giving the creditors of MG a windfall. If I had a discretion, I would have exercised it in favour of the liquidators. The authorization of the precise amounts claimed would stand to be referred to the Registrar. In the event, however, the liquidators can recover only £1,000 for their work to date.

Orders accordingly.