[2016 Gib LR 113]

IN THE MATTER OF MG ENGINEERING AND CONSULTANCY LIMITED

COURT OF APPEAL (Rimer and Smith, JJ.A., and Dudley, C.J.): April 21st, 2016

Companies—liquidators—remuneration—£1,000 fee under Liquidators Scheme of Appointment only applies when company has no assets or assets less than £1,000—if court orders remuneration under Scheme but liquidators recover more than £1,000, may apply under Companies Act 1930, s.238(2) for order for appropriate remuneration as from date of appointment

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

The applicants were appointed as liquidators of a company. At the time of their appointment, the Chief Justice 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 went on to recover almost £1m. of assets, which was much more than expected, and applied to vary the Chief Justice's order retrospectively to provide for remuneration based on their usual hourly rates as from the date of their appointment. On this basis, they would be entitled to fees of more than £200,000.

The Supreme Court (in proceedings reported at 2015 Gib LR 354) increased the liquidators' remuneration with prospective effect, but held that it had no power to vary retrospectively the orders of a court of concurrent jurisdiction.

On appeal, the applicants submitted that the Supreme Court had misinterpreted the purpose of the Liquidators Scheme of Appointment, the correct interpretation being that the £1,000 fee only applied in cases in which the company had no assets or assets of less than £1,000, and the liquidators' remuneration in the present case therefore ceased to be limited to £1,000 once it became clear that the company's assets exceeded that amount.

Held, allowing the appeal:

The court had jurisdiction under s.238(2) of the Companies Act 1930 to order that the liquidators be remunerated at an appropriate rate (exceeding £1,000) in respect of the work they had done since the date of their appointment, and the question of the quantum of their remuneration would be referred to the Registrar of the Supreme Court. The £1,000 fee stipulated by the Liquidators Scheme of Appointment was only applicable to cases in which the company had no assets or assets of less than £1,000 and therefore did not apply in the present case. Once it became clear that the company had assets of more than £1,000, the Scheme was superseded and the liquidators were entitled to apply to the court under s.238(2) for an order for appropriate remuneration. This application did not seek to vary the Chief Justice's initial order, made before the quantum of the company's assets was known, since that order did not purport to make provision for remuneration in the event of the company having assets of more than £1,000. The question of whether the court had jurisdiction under s.238(2) to make a retrospective order for remuneration that had the effect of varying a prior order of a court of concurrent jurisdiction did not arise and would not be decided (paras. 12–15).

Case cited:

(1) *Greycaine Ltd., In re*, [1946] Ch. 269; [1946] 2 All E.R. 30, considered.

Legislation construed:

Companies Act 1930, s.238(2): The relevant terms of this sub-section are set out at para. 7.

C. MacEvilly and *C. Wright* for the appellant.

1 **RIMER, J.A.:** This is an appeal against an order of Jack, J. dated December 2nd, 2015 by which, in substance, he refused to vary an order made by Dudley, C.J. on April 26th, 2012 providing for the terms of remuneration of the liquidators of MG Engineering & Consultancy Ltd. ("MG"), a company incorporated in Gibraltar.

2 The background is a fraud alleged to have been carried out by Paul Bell, although I should record, as did the judge, that Mr. Bell denies any wrongdoing. One company he is alleged to have used in the fraud is Heywood Engineering Ltd. ("Heywood"), which is incorporated in England and Wales. On May 12th, 2010, the English Companies Court ordered Heywood to be compulsorily wound up on the petition of the Commissioners for Her Majesty's Revenue and Customs based on debts exceeding £1.7m.

3 Prior to its liquidation, Heywood had made substantial payments to MG, of which almost £1.5m. was paid after the presentation of the Heywood winding-up petition. Section 127 of the English Insolvency Act

1986 rendered these payments void and led in turn to the presentation by Heywood on November 2nd, 2011 of a winding-up petition against MG in Gibraltar. The petition was presented under the provisions of the Companies Act 1930.

4 The petition came on for hearing before Dudley, C.J. on April 26th, 2012. Counsel appeared respectively for Heywood, MG, Mr. Bell and the Official Receiver. The hearing resulted in two orders: first, an order for the winding up of MG; and secondly, on the Official Receiver's application, the appointment of Ms. Lindsey Cooper and Mr. Ian Collinson of Baker Tilly (Gibraltar) Ltd. as joint liquidators of MG with "all the duties of the Official Receiver." That order included the following provisions, namely:

> "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]."

5 Jack, J. explained that the Scheme referred to is a document that was negotiated between insolvency practitioners in Gibraltar and Her Majesty's Government in Gibraltar. The need for it had arisen from the circumstance 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, which Jack, J. said was generally done on a cab-rank basis. He described the attraction of the Scheme to insolvency practitioners as being that the Official Receiver guarantees payment of £1,000 in fees to the appointed liquidator whether the insolvent company has assets or not. The duties of liquidators under the Scheme are described in a set of "guidance notes" produced by the Official Receiver "on the actions to be undertaken by the liquidators who, on appointment, in addition to his [*sic*] duties as liquidator, shall be deemed to be, and to have all the duties of, the Official Receiver." Neither the Scheme nor the guidance notes which describe it are made under any enabling legislation.

6 Paragraph 1 of the notes provides for the appointment of the liquidator to be "made with reference to [the Scheme]." The Scheme sets out the various tasks the liquidator should perform when accepting the role. Paragraph 10 requires him to write to Land Property Services to ascertain whether the company owns any leasehold or freehold interests. Paragraph 11 requires him to take into his custody or control all property and things in action to which the company is or appears to be entitled. Paragraph 12 requires him to establish whether the company holds any funds and, if it does, for those funds to be transferred to the liquidator's specific account for the liquidation. More materially, the notes then provide:

"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."

7 Jack, J. explained that, after they had taken up their appointment, the liquidators started to realize assets and that to date they had been successful. They had recovered about £900,000 worth of assets. There is also the prospect of the recovery of further assets via litigation that Jack, J. had authorized to be brought in the Chancery Division of the English High Court. The application before Jack, J. was one issued by the liquidators on November 16th, 2015 asking for a variation of the order for their appointment on April 26th, 2012 "to allow their salary and remuneration to be paid on a time spent basis in accordance with the rates outlined in the affidavit of Mr. Keith Algie sworn on September 7th, 2015." The jurisdiction the liquidators were asking the court to exercise was that provided by s.238(2) of the Companies Act 1930, which reads:

> "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."

8 Jack, J. explained that, had the liquidators been entitled to charge for their services at their usual rates, the amount they would have been entitled to between April 26th, 2012 and February 27th, 2015 would have been at least £272,120.90. He continued (2015 Gib LR 354, at para. 10):

> "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. [Counsel for the liquidators] accepted that, unless the court was able to vary that order with retrospective effect, the sum payable to the liquidators for that work would indeed be limited to £1,000."

9 Jack, J. then proceeded to consider whether the 2012 order could be varied with retrospective effect. In particular, he considered whether he could make an order under s.238(2) providing for the remuneration of the liquidators as from the date of the 2012 order in an amount over and above the £1,000 provided for by the Scheme. He held, however, that s.238(2) gave him no such jurisdiction. He was influenced in that conclusion by the decision of the English Court of Appeal in *In re Greycaine Ltd.* (1). That concerned an application under s.309 of the English Companies Act 1929, which provided:

> "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 . . ."

10 The question for the court was whether s.309 conferred jurisdiction retrospectively to vary the remuneration payable to receivers of the property of the company which had been fixed by the debenture trust deed under which they had been appointed. In the absence of an appellate challenge to the judge's decision on the point, Morton, L.J., who delivered the lead judgment, assumed, without deciding, that the court had power under s.309 to fix the receivers' remuneration, notwithstanding that it had been duly fixed on the receivers' appointment. The main question was as to the date from which the court could fix it. Morton, L.J. held that the key words "to be paid" in s.309 were words of futurity and meant that the court could not make an order the effect of which was to take away from the receivers remuneration that they had earned in pursuance of their earlier bargain. The court could only make orders as to their future remuneration. Bucknill and Cohen, L.JJ. agreed.

11 Jack, J. rightly recognized that the language of s.238(2) of the 1930 Act differs from that of s.309 of the 1929 Act (in particular, the former contains no equivalent words of futurity). But he said the point about retrospectivity was equally valid in relation to s.238(2). If, for example, an earlier order of the court had fixed a high level of remuneration for the liquidator, s.238(2) could not be interpreted as entitling a later order to vary it adversely to the liquidator. Jack, J. did not, therefore, regard s.238(2) as empowering him retrospectively to vary the 2012 order. Nor could he identify any other basis for varying it, as it was one made by a judge of coordinate jurisdiction. As Jack, J. said, there are only limited circumstances in which such a variation may be made, and this was not one of them. The normal basis on which a judge's order is sought to be changed is by way of an appeal. He held, however, that s.238(2) did at least entitle the court to fix the liquidators' remuneration prospectively, which he proceeded to do by ordering remuneration on an hourly rate.

12 With respect to Jack, J.'s careful judgment, I consider that he embarked upon the problem from the wrong starting point. Whilst counsel before him apparently agreed with what he said was the most natural interpretation of the sense of the guidance as to the working of the Scheme, Mr. MacEvilly, who has argued the liquidators' case before us today, submits that that interpretation was wrong. I agree. I regard it as clear that the purpose of the Scheme is limited. It is to provide a maximum guaranteed fee of £1,000 in those cases in which the liquidator does all the necessary work required to wind the company up and dissolve it but in which the company has either no assets at all, or assets of less than £1,000. If it has no assets, the liquidator will be paid a fee of £1,000 for all his work in winding up the company's affairs. If it has assets of less than

£1,000, the liquidator will be entitled to have recourse to such money as it has towards satisfaction of a £1,000 fee, and the Accountant General pays him the balance. The Scheme also covers the case in which the company has no assets, but in which the liquidator considers that further investigation into its affairs is required as a matter of public interest. In such a case, para. 16 enables the liquidator to apply to the Minister of Finance for further funding to carry out the work.

13 The case which the Scheme does *not* cover is the case in which the liquidator finds that the company does have assets and then proceeds to recover assets in excess of £1,000. That is this case; and to date the liquidators have discovered and recovered assets of nearly £1m. It is obvious that the £1,000 fee scheme is not directed at cases of that sort. Once the liquidation morphs into one in which a material recovery of assets is achieved, the Scheme, including the £1,000 fee which it guarantees, is superseded. In such a case, the remedy of the liquidators is to apply to the court under s.238(2) for an appropriate order for their remuneration in respect of their work done in the liquidation. Such an application does not ask for the variation of an order such as the 2012 order in this case. That order did not purport to make provision for remuneration for the work that, in the events that have happened, the liquidators are entitled to. Any order for their remuneration for their work since their original appointment will, therefore, be the first such order.

14 In my judgment, therefore, this is a case in which it was open to Jack, J. to exercise the jurisdiction conferred by s.238(2) to order that the liquidators be remunerated at an appropriate rate not just in respect of their work subsequent to the date of Jack, J.'s order, but also in respect of their work done as liquidators of MG since the date of their appointment. This does of course mean that, contrary to the view of Jack, J., I would interpret s.238(2) as enabling the court to make a remuneration order in respect of work done prior to the order. I can see no reason why s.238(2) should not be so interpreted in the present case. To do so is not to deploy it to vary a prior order of the court. The essence of my reasoning is that, in the events that have happened, there is no prior order of the court dealing with the liquidators' remuneration. I express no view on whether s.238(2) empowers the court to make a retrospective order for remuneration that has the effect of varying a prior order. That question does not arise in this appeal.

15 I would therefore allow the appeal. Jack, J.'s order deals with the liquidators' remuneration as from the date of his order. Had he held that he could make an order providing for the liquidators' remuneration as from the date of their appointment down to the date of his order, he would have referred the question of amount to the Registrar. That is what I would order.

16 By way of further clarification, Jack, J.'s order was in a form varying para. 3 of Dudley, C.J.'s order of April 26th, 2012, with Jack, J.'s order proceeding to provide as follows. Paragraph 1 provided for the future remuneration of the liquidators as from the date of Jack, J.'s order, which was December 2nd, 2012. Paragraph 2 refused the liquidators any remuneration for the period from April 26th, 2012 up to the date of Jack, J.'s order. Paragraph 3 provided that Jack, J.'s order was without prejudice to the liquidators' entitlement to recover £1,000 pursuant to the order of April 26th, 2012. There is no need to refer to paras. 4 and 5.

17 Since, for the reasons I have given, I would regard the outcome of the appeal as not involving any variation of the order of April 26th, 2013, I would simply make an order which (i) leaves intact para. 1 of Jack, J.'s order; (ii) remits to the Registrar of the Supreme Court the determination of the remuneration to which the liquidators are entitled for the period from their appointment to December 2015; and (iii) directs that the £1,000 provided for by the order of April 26th, 2012 is not recoverable as remuneration in addition to that ordered by Jack, J.'s order and the order of this court.

18 **SMITH, J.A.** and **DUDLEY, C.J.** concurred.

Appeal allowed.