[2016 Gib LR 121]

IN THE MATTER OF TASMANIA INVESTMENTS LIMITED

COURT OF APPEAL (Rimer and Smith, JJ.A., and Dudley, C.J.): April 22nd, 2016

Companies—Register of Companies—restoration to Register—if company struck off Register before November 1st, 2014 under Companies Act 1930, s.267A, may apply to be restored under s.332 after repeal of 1930 Act (see Interpretation and General Clauses Act 1962, s.33(2) or Insolvency (Transitional Provisions) Regulations 2014, reg. 8)—Companies Act 2014, ss. 414–415 inapplicable if struck off under 1930 Act, not 2014 Act

The appellant applied to be restored to the Register of Companies.

The appellant had been struck off the Register of Companies in 2002 under s.267A of the Companies Act 1930. In 2015, it applied to the Supreme Court under s.415 of the Companies Act 2014 to be restored to the Register.

Prior to November 1st, 2014, the Companies Act 1930, s.332(15) had conferred on companies struck off the Register under s.267A the right to apply to the Registrar of the Supreme Court to be restored. On November 1st, 2014, s.332 of the 1930 Act was replaced by ss. 414–415 of the Companies Act 2014, which provided an equivalent right for companies struck off under ss. 411–413 of the 2014 Act.

The Supreme Court refused the appellant's application to be restored to the Register on the ground that it only had jurisdiction under ss. 414–415 to restore a company struck off under ss. 411–413 of the 2014 Act, whereas the appellant had been struck off under s.267A of the 1930 Act.

On appeal, the appellant submitted, *inter alia*, that it was entitled to apply to be restored to the Register under ss. 414–415 of the 2014 Act on the ground that these sections should be construed purposively to enable a company struck off under s.267A of the 1930 Act, as the predecessor to s.411 of the 2014 Act, to apply to be restored.

The Attorney-General, intervening, submitted that the appellant was entitled to apply to be restored to the Register under s.332 of the 1930 Act, notwithstanding the repeal of that Act in 2014, on the grounds that (a) upon being struck off, it had acquired a right under s.332 to apply to be restored and that right was preserved by s.33(2) of the Interpretation and General Clauses Act 1962 (which provided that the repeal of one statute by another would not generally affect a right acquired under the repealed statute); or (b) s.332 of the 1930 Act should be treated as analogous to the

provisions on winding up in that Act and therefore should continue to apply to the appellant by virtue of reg. 8 of the Insolvency (Transitional Provisions) Regulations 2014 (which provided that the "former law" would continue to apply to the winding up (or, by analogy, the striking off) of a company commenced before November 1st, 2014).

Held, allowing the appeal:

(1) The appellant was entitled to apply to be restored to the Register of Companies under s.332 of the Companies Act 1930, rather than ss. 414–415 of the Companies Act 2014. Since it had applied under s.415, it would be given the opportunity to amend its application to one under s.332, and if it did so, its amended application would be remitted to the Registrar of the Supreme Court for consideration in accordance with s.332(15). As a result of being struck off the Register under s.267A of the 1930 Act, the appellant had acquired a right under s.332 of the 1930 Act to apply to be restored and s.33(2) of the Interpretation and General Clauses Act 1962 operated to preserve that right notwithstanding the repeal of the 1930 Act. However, neither the Supreme Court nor the Registrar of the Supreme Court had jurisdiction to hear its application brought under ss. 414–415 of the 2014 Act because it had been struck off under s.267A of the 1930 Act rather than ss. 411–413 of the 2014 Act (para. 16).

(2) The same conclusion could be reached by an alternative route, namely reg. 8 of the Insolvency (Transitional Provisions) Regulations 2014. Section 332 of the 1930 Act was located within Part VI of the 1930 Act (entitled "Winding Up"), Section (E) (entitled "Provisions applicable to every mode of winding up"), which gave rise to the inference that the provisions for striking off and restoring a company to the Register in ss. 267A and 332 were analogous to the provisions on winding up and would therefore be regarded as part of the "former law" "in relation to the winding up of a company" for the purposes of the Insolvency (Transitional Provisions) Regulations, reg. 8. Since reg. 8 provided that this "former law" would continue to apply to the winding up (or, by analogy, the striking off) of a company commenced prior to November 1st, 2014, s.332 continued to apply in relation to the striking off of the appellant from the Register in 2002 (para. 16).

Cases cited:

(1) *B* v. *B (Children: Periodical Payments)*, [1995] 1 W.L.R. 440; [1995] 1 FLR 459; [1995] 1 F.C.R. 763; [1995] Fam. Law 233, referred to.

(2) *Pepper (Inspector of Taxes)* v. *Hart*, [1993] A.C. 593; [1992] 3 W.L.R. 1032; [1993] 1 All E.R. 42; [1992] S.T.L. 898; [1998] I.C.R. 291; [1993] I.R.L.R. 33; [1993] R.V.R. 127. referred to.

Legislation construed:

Companies Act 1930, s.267A(1):

"Subject to the provisions of subsections (2) to (4), the Registrar may strike off the register the name of any company, other than a

public limited company, in respect of which no annual return has been filed contrary to the requirements of section 153 or section 154, as the case may be, in the previous three calendar years."

s.332: "(1) A company or any member or creditor thereof who feels aggrieved by the company having been struck off the register under section 267A or section 331 may, before the expiration of 10 years from the publication of a notice under either section 267A or section 331, as the case may be, make application to the Registrar to restore the company to the register.

. . .

(15) After the expiration of the period of ten years referred to in subsection (1), if a company or any member or creditor thereof feels aggrieved by the company having been struck off the register, the Registrar of the Court on an application made by the company or member or may, if satisfied that the company was at the time of the striking off carrying on business or in operation, or otherwise that it is just that the company be restored to the register, order the name of the company to be restored to the register, and upon an office copy of the order being delivered to the Registrar for registration the company shall be deemed to have continued in existence as if its name had not been struck off; and the Registrar of the Supreme Court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off."

Companies Act 2014, s.414(1): The relevant terms of this sub-section are set out at para. 3.

Insolvency (Transitional Provisions) Regulations 2014, reg. 8: The relevant terms of this regulation are set out at para. 14.

Interpretation and General Clauses Act 1962, s.33(2): The relevant terms of this sub-section are set out at para. 10.

S.V. Catania for the appellant;
C. Grech for the Registrar of Companies;
K. Azopardi, Q.C. for the Attorney-General.

1 **RIMER, J.A.:** The provisions of the Companies Act 1930 were in material respects re-enacted by the Companies Act 2014, which came into force on November 1st, 2014. This appeal raises an important point of principle concerning the basis upon which, if at all, a company that was struck off the Register of Companies prior to November 1st, 2014 under provisions contained in the 1930 Act may apply after that date to be restored to the Register. The order of Jack, J. dated March 23rd, 2016, now under appeal, refused a restoration application made under the 2014 Act by a company that had been so struck off. On one view of his

judgment, he decided that, unless an appropriate amendment is made to the 2014 Act, there is no statutory jurisdiction at present in place that enables such a restoration to take place. His decision has accordingly raised some general concern and on the appeal we have had the benefit of argument not only from Mr. Catania for the appellant company, but also from Mr. Grech for the Registrar of Companies and Mr. Azopardi, Q.C. for the Attorney-General, who has been permitted to intervene in the appeal. Each counsel advanced a different line of argument as to why Jack, J.'s decision was in error, but all three arguments were directed at achieving the same end result, namely that of establishing that, contrary to his decision, there is a statutory jurisdiction under which the appellant company can be restored to the Register.

2 The facts and relevant statutory provisions are as follows. Tasmania Investments Ltd. ("the company") was incorporated on June 10th, 1985 under the 1930 Act. Its only business was that of holding a property in Spain. Its last-filed annual return was for the period to October 23rd, 1992. In consequence of its failure to file further returns, the Registrar of Companies struck the company off the Register of Companies on January 20th, 2002. The striking off was made under the provisions of s.267A of the 1930 Act, a section that had been introduced in 2001 and which allowed the Registrar to strike off a company that had failed, contrary to the requirements of ss. 153 and 154, to file annual returns for three years. The effect of the striking off was to dissolve the company. Such dissolution was not, however, necessarily final. Section 332(1) of the 1930 Act enabled a company that had been "struck off the register under section 267A" to apply within 10 years of the gazetting by the Registrar of his intention to strike the company off for its restoration to the Register. Such an application had to be made to the Registrar of Companies. Any application for such a restoration made after the 10-year period had, by s.332(15), to be made to the Registrar of the Supreme Court. If a restoration order was made, the effect was to deem the company to have continued in existence as if it had not been struck off. Section 331 contained a similar power for the Registrar to strike off a company that he believed was defunct, and s.332 contained like provisions for the application for the restoration of such a company as it did in relation to a striking off under s.267A.

3 The 2014 Act re-enacted these provisions. Section 411 is in the like terms as s.267A and s.412 mirrors the provision in s.331 in relation to defunct companies. Section 413 contains a new provision, one with no equivalent in the 1930 Act and which permitted the Registrar to strike off a company upon its own request. Sections 414 and 415 contain provisions by way of a re-enactment of s.332 dealing with how a company that has been struck off may apply to be restored to the Register. Section 414(1)

re-enacts s.332(1) and permits the application to be made to the Registrar of Companies. It provides as follows:

> "A company or any member or creditor of a company who feels aggrieved by the company having been struck off the register under section 411, 412 or 413, before the expiry of 10 years from the publication of a notice under section 411 or 412 or, as the case may be, section 413 may make an application to the Registrar [of Companies] to restore the company to the register."

Section 415(6) requires that any restoration application made after the 10-year period mentioned in s.414(1) must be made to the Registrar of the Supreme Court.

4 On December 22nd, 2015, the company applied to be restored to the Register. By then, the 1930 Act had been repealed. Moreover, more than 10 years had elapsed since the gazetting of the Registrar's intention to strike the company off. That meant that, if any restoration application could still be made, it had to be made to the Registrar of the Supreme Court rather than to the Registrar of Companies. The company's application was made, or purportedly made, under s.415. Although it should have been made to the Registrar, it was in fact made to Jack, J., a puisne judge.

5 Jack, J. gave a careful judgment in which he held that the application ought to have been made to the Registrar rather than to a puisne judge but held that the Registrar would anyway have had no jurisdiction to accede to it. Nor, so he held, did he have any such jurisdiction. The outcome was that he dismissed the application. His reasoning was simple. The source of the claimed restoration jurisdiction was s.414(1) of the 2014 Act, the words of which showed that it related only to a company that had been struck off under one or other of the three sections of the 2014 Act to which it referred, the relevant one in the present case being said to be s.411. The company's problem, however, was that it had been struck off not under s.411 of the 2014 Act but under the predecessor of s.411 in the 1930 Act, namely s.267A. It followed that ss. 414 and 415 of the 2014 Act were of no help to the company. The judge was referred to the provisions of ss. 17 and 33(1) of the Interpretation and General Clauses Act 1962 which, it was said, enabled him to interpret the jurisdiction conferred by ss. 414 and 415 as if it applied also to the case of a company that had been struck off under the equivalent provisions of the 1930 Act, and he gave his reasons as to why he considered that argument did not work. He also referred to s.488, "Transitional provisions," in the 2014 Act but held that nothing in it was of any help either. He expressed his regret at reaching the conclusion he did and suggested that the omission of the 2014 Act to cover the case of a company struck off under the 1930 Act was probably an oversight.

6 If the judge was right, the consequence is potentially serious. We were told by Mr. Grech, for the Registrar of Companies, that between 2001 and

November 1st, 2014 more than 44,000 companies were struck off under the 1930 Act. The likelihood is that a material number of such companies will at some point wish to apply to be restored to the Register, perhaps when it is realized by someone who had an interest in them that the companies had held assets that, upon their dissolution, will have become *bona vacantia.* We were also told that, since November 1st, 2014, some 135 companies that had been struck off under the 1930 Act had been restored to the Register, or perhaps I should say purportedly so restored. I do so because, if the judge's decision was right, it might be questionable whether such restorations were valid.

7 On the appeal, we have had the benefit of fuller argument than did the judge. For the company, Mr. Catania advanced a careful submission directed essentially at the proposition that the court should construe s.414(1) purposively as intended to cover not just the case of a company struck off under the provisions in the 2014 Act to which the sub-section expressly refers, but also the case of a company struck off under the predecessor provisions in the 1930 Act, to which it does not refer. It was said that, unless s.414(1) is so construed, the consequence would be an absurdity. Mr. Catania submitted that the real focus of s.414(1) was not on the particular statutory provision under which a company had been struck off but rather on the nature of the factual event that had resulted in its being struck off. He referred us to the Minister for Education's comments on the first reading of the Bill that became the 2014 Act, in which the Minister said he would refer only to the occasions in the Bill which made changes to the 1930 Act, and Mr. Catania pointed out that he then made no reference to ss. 414(1) or 415(6). This, said Mr. Catania, enabled the court to favour the wide purposive construction of s.414(1) for which he was arguing and he sought to derive assistance for that interpretive proposition from *Pepper (Inspector of Taxes)* v. *Hart* (2). He said that such construction was also fortified by the absence of any transitional provisions dealing with the cross-over from the 1930 Act to the 2014 Act. Mr. Grech, for the Registrar of Companies, adopted Mr. Catania's submissions but supplemented them with arguments to the effect that the answer to the problem apparently presented by the language of s.414(1) lies in the invocation of the expansive interpretive provisions to be found in ss. 17 and 33(1) of the 1962 Act.

8 With respect to Mr. Grech's argument, I derived no more assistance from ss. 17 and 33(1) than did Jack, J. and Mr. Grech failed to persuade me that either section was relevantly applicable. As for Mr. Catania's submissions, they did, if I may say so, give food for serious thought. In the event, however, I am satisfied that they do not provide the answer to the problem. That is because I am satisfied that the correct answer to the problem was provided by Mr. Azopardi in his submissions on behalf of the Attorney-General. If, as I would hold, those submissions are correct, Mr.

Catania's submissions that the court should apply a wide, purposive construction to the very precise language of s.414(1) simply fall away. That is because, for the reasons advanced by Mr. Azopardi, there is no basis for attributing to the legislature any wider intention as to the reach of s.414(1) than that identified by its clear and unambiguous language.

9 Mr. Azopardi referred, as did Jack, J., to s.488, "Transitional provisions," of the 2014 Act and in particular to s.488(1), which reads: "The following provisions are without prejudice to the operation of sections 32 and 33 of the Interpretation and General Clauses Act [1962] (effect of repeals)."

10 It is not necessary to consider the further provisions of s.488, but s.33, "Effect of repeal," of the 1962 Act is important. I have already said that I derive no help from s.33(1), but I do derive help from s.33(2), to which it appears Jack, J. was not referred. That provides materially:

> "Where any Act repeals in whole or in part any other Act, then, unless the contrary intention appears, the repeal shall not—
>
> . . .
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any Act so repealed; or
>
> . . .
>
> (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid,
>
> and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing Act had not been passed."

11 Mr. Azopardi emphasized the reference to "right" in s.33(2)(c). His point was that a consequence of the striking off was that the company acquired a "right" under the 1930 Act to apply to be restored to the Register; and s.32(2)(e) shows that the repeal of the 1930 Act could not affect any legal proceeding or remedy in respect of such right. It followed, he said, that the repeal of the 1930 Act by the 2014 Act could not prevent the company from pursuing a legal proceeding or remedy in respect of its right to apply to be restored to the Register. Thus, in the present case, the company was entitled to make the restoration application that it did in November 2015, although it was in error in making it under the 2014 Act. It should have made it under s.332 of the 1930 Act. Mr. Azopardi cited *B* v. *B (Children: Periodical Payments)* (1) as an illustration of the principle he was advancing in reliance on s.33(2), the case applying its equivalent provisions in s.16(1) of the English Interpretation Act 1978.

12 Mr. Azopardi advanced a further submission that was also directed at the same end result. It requires a consideration of Part VI of the 1930 Act, headed "WINDING UP." Section (A) is a "PRELIMINARY" section. Section (B) is headed "WINDING UP BY THE COURT" and includes, under the sub-heading "General Powers of Court in Case of Winding Up by Court," both s.267 ("Dissolution of company") and s.267A ("Companies in default since 1st January 1993"). Section (C) is headed "VOLUNTARY WINDING UP" and Section (E) is headed "PROVISIONS APPLICABLE TO EVERY MODE OF WINDING UP." The latter section includes, under the heading "Provisions as to Dissolution," s.330 ("Power of court to declare dissolution of company void"), s.331 ("Registrar may strike defunct company off register"), s.332 ("Restoration of dissolved companies to the register") and s.333 ("Property of dissolved company to be bona vacantia").

13 It is therefore to be noted that, although a Registrar's striking off of a company from the Register (and the company's consequential dissolution) is not strictly a winding up of the company, that did not prevent the provisions relating to such striking off, dissolution and restoration from being included in Part VI of the 1930 Act dealing with the winding up of companies. In this respect, the structure of the 1930 Act mirrored that of the English Companies Act 1929. The inference is that the striking off and dissolution of a company under ss. 267A or 331 was regarded by the legislature as sufficiently akin to the winding up of a company to be included in the part of the 1930 Act dealing with winding up. In this context, Mr. Azopardi also referred us to s.18 of the 1962 Act, which provides: "Where any Act is divided into Parts, or other divisions, the fact and particulars of such division shall, with or without express mention thereof in any Act, be taken notice of in all courts and for all other purposes whatsoever."

14 The 1930 Act has now been replaced by the 2014 Act and also, in certain respects relating to winding up, by the Insolvency Act 2011, which of course also contains new provisions. The Insolvency Act also came into force on November 1st, 2014. A subsidiary instrument containing transitional provisions relating to its enactment is the Insolvency (Transitional Provisions) Regulations 2014 ("the ITPR"). Under the heading "Liquidation," reg. 8 of the ITPR provides materially:

> "**Company being wound up under Companies Act**
>
> 8.(1) Part 6 of the [Insolvency] Act does not apply in relation to the winding up of a company under the former Companies Act, where the winding up commenced prior to the commencement date and the former law continues to apply in relation to any such liquidation or winding up."

15 Mr. Azopardi's submission is that the correct inference to be drawn from the structure of the 1930 Act and, in particular, the inclusion of ss. 331 and 332 in a section of Part VI of the 1930 Act headed "Provisions applicable to every mode of winding up" is that these provisions must also be regarded as part of the former law "in relation to the winding up of a company" under the 1930 Act that will continue after November 1st, 2014 to apply to any striking off that was effected under the 1930 Act. Whilst he accepts that a striking off is not in fact a winding up, the structure of the 1930 Act, in particular its Part VI, shows that the 1930 Act regarded a striking off as relevantly analogous to a winding up and he said that, for the purposes of the application of reg. 8(1) of the ITPR, the winding-up provisions in Part VI of the 1930 Act relating to the striking off of companies, including therefore the restoration provisions in Part VI, will continue to apply to any striking off effected under that Act.

16 I regard each of Mr. Azopardi's separate arguments as compelling and I would accept both of them. Section 33(2) of the 1962 Act entitles the company to say that its right under s.332(15) to apply to the Registrar of the Supreme Court for an order restoring it to the Register is a still continuing right notwithstanding the repeal of the 1930 Act. In addition, in my judgment, the inclusion in Part VI of the 1930 Act of the provisions relating to the striking off, dissolution and restoration of a company justifies a conclusion that a striking off was regarded by the legislature as sufficiently akin to a true winding up for the provisions relating to it to be regarded as part of the 1930 Act's law in relation to the winding up of a company. When, therefore, reg. 8 of the ITPR refers to the continued application of "the former law" in relation to the winding up of a company under the 1930 Act, that reference ought, in my view, to be read purposively as referring also to the provisions which that Act apparently regarded as part of the law in relation to winding up—namely the provisions relating to the striking off, dissolution and restoration of companies—even though, on a more literal interpretation of the words "winding up," those provisions might not ordinarily be regarded as part of such law. In short, in my view, reg. 8's reference to the "former law" ought, therefore, to be interpreted widely as intended to include all processes under the 1930 Act by which companies were extinguished, including dissolutions arrived at by virtue of the strike-off provisions contained within Part VI of that Act.

17 The outcome is, therefore, that, whether reliance is placed on s.33(2) of the 1962 Act or reg. 8 of the ITPR, I would regard either as sufficient to provide a jurisdictional basis upon which the company could apply to the Supreme Court for an order restoring it to the Register. Such application had, of course, to be made under the 1930 Act, not the 2014 Act. In the case under appeal, the application was made under the 2014 Act. That was wrong, because there is no jurisdiction under that Act to make the

restoration order that the company needed. It follows that Jack, J. was strictly correct to dismiss the application. I also consider, however, that, had he had the benefit of the argument that this court has had, he would have been likely to have offered the company the opportunity to apply to amend its application to one brought under the 1930 Act; and, had the company done so, I consider he would have been likely to have allowed the amendment and remitted the application to the Registrar of the Supreme Court for him to consider it on its merits.

18 In light of the conclusion to which I have come, I would offer the company the opportunity to make such an amendment application. If it makes it, I would grant it and then remit the application to the Registrar in the manner indicated. I would in consequence then allow the appeal in order to enable the remission to the Registrar to happen.

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

Appeal allowed.