EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCVAP 2010/039

On appeal from the Commercial Division

BETWEEN:

PACIFIC CHINA HOLDINGS LIMITED

Appellant

and

GRAND PACIFIC HOLDINGS LIMITED

Respondent

Before:

The Hon. Mde. Janice M. Pereira — Justice of Appeal
The Hon. Mr. Davidson Kelvin Baptiste — Justice of Appeal
The Hon. Mr. Don Mitchell — Justice of Appeal [Ag.]

Appearances:

Mr. Richard Millett, QC, Mr. Mark Forte and Ms. Tameka Davis for the Appellant
Mr. Matthew Hardwick for the Respondent

2011: December 14;
2012: May 14.

Civil appeal – Liability for liquidators' remuneration – Order appointing liquidators set aside - Whether the liquidators' remuneration are considered costs arising out of or in relation to the proceedings – Whether liquidator's remuneration may be recoverable by the successful party against the unsuccessful party

An order appointing liquidators was made in respect of the appellant, Pacific China Holdings Limited ("PCH"), on 11th January 2010. PCH appealed that Order and on 20th September 2010 the appeal was allowed and the Order set aside. The issue of liability for the liquidators' remuneration and expenses arose for determination the Court having referred those matters and the assessment of costs to be determined by the court below. PCH claimed that the respondent Grand Pacific Holdings Limited ("GPH") should bear the ultimate liability for the liquidators' remuneration and expenses, the order appointing the liquidators, sought and obtained on GPH's application, having been set aside. The judge,

on considering the matters referred, concluded that in respect of determining the incidence of liability for the liquidators' remuneration, he was functus officio. He further held that in any event he would not make such an order absent a specific statutory power (holding there was no inherent jurisdiction so to do), and additionally, that the liquidators' remuneration could not be treated as costs of the proceedings. PCH launched this appeal contending, in essence, that the Insolvency Act, 2003 provided a statutory jurisdiction for so doing and that such an order could also be made under the court's costs jurisdiction

Held: allowing the appeal and ordering that GPH bear the remuneration of the liquidators and the costs of the proceedings below and on this appeal, the costs of the appeal being fixed at two thirds of the costs as assessed by the court below, that:

1. A successful appeal against the making of a winding up order resulting in the setting aside of that order does not and cannot equate to a termination of the liquidation under section 233 of the Insolvency Act. Wholly different considerations are engaged on a section 233 termination, which specifically states that the court may order the termination of a liquidation if it is satisfied that it is just and equitable to do so. Such termination does not anticipate a termination order taking effect retroactively. In the case at bar, where the Winding up Order was set aside on appeal as being wrongly made, it sought to 'unwind' the winding up and accordingly did not require the Court to have specific regard to just and equitable considerations before setting it aside.

   Section 233 of the Virgin Islands Insolvency Act, 2003 considered.

2. The Court by virtue of rule 64.3 of the Civil Procedure Rules 2000 has the power to award costs arising out of or related to any proceedings to a person who is not necessarily a party to the proceedings. The liquidators in this instance are considered persons who are not a party to the proceedings. The Court accordingly has a wide discretion in all matters relating to expenses, including the power, when necessary, to direct which of the parties is to bear the cost of the remuneration and expenses of any professional man or other officer appointed by the court to act in the proceedings which have come to an end.

3. GPH knowingly made an application for a winding up order when there was a real dispute as to the debt. This was an abuse of process. Moreover, GPH resisted a stay of the Winding up Order and produced no cogent evidence showing that the liquidators conferred some benefit to PCH which it would be unconscionable for PCH to keep without paying for it. Accordingly, GPH should bear the ultimate liability for the liquidators' remuneration.

JUDGMENT

[1] PEREIRA JA: This appeal raises a single question: that is, whether the appellant ("PCH") having been found by this Court to have been put into liquidation wrongly,

(based on a Hong Kong arbitral award) should nonetheless shoulder the ultimate responsibility for the liquidators' remuneration and expenses (together called "remuneration").

The Background

[2] On 20th September 2010, this Court allowed PCH's appeal against the Winding up Order made by the trial judge on 11th January 2010 over it ("the Winding up Order"). The Court held that PCH had raised arguable Convention Defences[1] and accordingly the debt based on the arbitral award was genuinely disputed on substantial grounds and thus, liquidators over PCH ought not to have been appointed. On the setting aside of the Winding up Order, the parties then undertook to agree a form of order which would cover and settle all matters arising out of and incidental to the Winding up Order. Not surprisingly, the parties were unable to agree on all the terms. The Court eventually made a formal order on 12th October 2010 ("the Appeal Order") having considered correspondence from both sides as well as correspondence on behalf of the liquidators whose offices had been terminated.

[3] The relevant part of the Appeal Order which has spawned this second appeal is paragraph 6 which reads as follows:

> "That the costs of the proceedings in the court below shall be referred back to the Hon. Justice Bannister for assessment including all questions regarding the fixing of the remuneration, costs and expenses of the Liquidators. The Liquidators' remuneration, costs and expenses including the costs and expenses, of complying with this order, shall, until fixed by the Court below and paid, operate as a lien on the assets of the company."

[4] The question of PCH being reimbursed by the respondent ("GPH") in respect of the liquidators' remuneration on the setting aside of the Winding up Order had immediately become a live issue. PCH considered that it was 'plainly wrong' that PCH should be asked to bear those costs in light of its successful appeal against

[1] These are recognized defences set out in the New York Arbitration Convention of 1958 and incorporated in the Arbitration Act Cap. 6, Revised Laws of the Virgin Islands 1991.

the Winding up Order. This was made clear in their letter of 4th October 2010 to GPH's counsel. GPH, by their letter of 5th October 2010, in essence said that the question of the liquidators' remuneration was a matter properly for the Commercial Court and ended by saying: "If the Commercial Court, having heard submissions from your client, is of the view that our client should reimburse your client for the remuneration of the liquidators then this is an entirely separate matter, and one which is yet to be determined."

[5] Following receipt of the Appeal Order, PCH once again sought to obtain an undertaking from GPH to meet the liquidators' remuneration and then issued an application to the Commercial Court (being the court to which the matters were referred) seeking an order (among others) that GPH pays the liquidators' remuneration ("the Remuneration Application"). It appears to me clear from the tenor of the exchanges between the parties that both sides considered that the question as to which party was to be ultimately liable for the liquidators' remuneration was to be determined by the court below.

[6] The remuneration application came on for hearing before the Commercial Court judge on 24th November 2010, and on 3rd December 2010 he gave a written judgment thereon. Beginning at paragraph 29 of his judgment the learned trial judge dealt with the issue of the liquidators' remuneration. He concluded that he did not have jurisdiction to make an order determining the incidence of liability as between the parties in respect of the liquidators' remuneration. At paragraph 33 he had this to say:

> "I do not think that I have jurisdiction to make an order now fixing Grand Pacific with ultimate liability for the liquidators' remuneration. I am, after all, with the exception of the matters specifically remitted to me by the Court of Appeal, functus officio. All that the Court of Appeal required me to do was to assess the costs and the proper amount to be allowed to the Liquidators by way of remuneration and expenses. It would be very bold of me to assume that that direction permitted me to make an order governing the incidence of the Liquidators' remuneration."

[7] Having carefully scrutinised the formal order which was issued it would seem that the word "and" was inadvertently omitted after the word "regarding" and before the

words “the fixing” in the second line of paragraph 6 of the Appeal Order. It was certainly intended that the learned trial judge be tasked not only with fixing the liquidators’ remuneration but also with determining who should ultimately be liable for paying them. Were this not the intent then there would be no need for the words “all questions regarding” as it is difficult to see what questions could arise in relation to “the fixing of the remuneration”. It would have simply read:

> “That the costs of the proceedings in the court below shall be referred back to the Hon. Justice Bannister for assessment including [words omitted] the fixing of the remuneration, costs and expenses of the Liquidators.”

[8] A single word can certainly make all the difference and the omission is regrettable. However, I do not consider that more need be said on this aspect as it certainly does not bring closure to the matter. The learned judge went on to hold, on the assumption that he was not functus officio, that he would not in any event have ordered that GPH bears ultimate liability for the liquidator’s remuneration. His reasons for so concluding were:

(i) That he had no jurisdiction to award compensation against one party in favour of another for losses suffered as a result of what turned out to be the erroneous grant of final relief. He held that absent a specific statutory provision there was no inherent jurisdiction to make such an award.[2] He felt fortified in this view having regard to the Virgin Islands Insolvency Act, 2003 [“IA"][3] section 172(4) which expressly provided for an applicant to contribute to a provisional liquidator’s fees where a full or final appointment is not made where it can be shown that the applicant either misled the court or acted unreasonably in applying for a provisional liquidator. He noted that the IA did not contain a similar provision dealing with a final order appointing liquidators. He then went on to opine that if such a power existed then it fell to be exercised in manner analogous to section 172(4).

[2] See para. 35 of the judgment.
[3] No. 5 of 2003, Laws of the Virgin Islands.

(ii) The liquidators' remuneration could not be treated as costs of the proceedings.[4]

[9] PCH being dissatisfied with these rulings launched this appeal. I propose to deal firstly with the 'statutory jurisdiction point' and thereafter with the 'costs jurisdiction' point. Before doing so however, I mention the fact that by the time of hearing of this appeal the Hong Kong Court on 29th June 2011 had set aside the award. This means that as matters now stand there is no underlying debt in the nature of an arbitral award on which PCH's winding up was premised. The Hong Kong judgment is under appeal in Hong Kong by GPH.[5]

The Statutory Jurisdiction – The IA, section 233.

[10] PCH seeks to rely, on appeal, on section 233 of the IA. During the hearing of the remuneration application, PCH's counsel accepted that there was no statutory jurisdiction for making an order against GPH in respect of the liquidators' remuneration.[6] Section 233 of the IA did not enter into the discussion. Indeed, PCH was relying on the court's inherent jurisdiction.[7]

[12] The relevant parts of section 233 of the IA says:

> "233. (1) The Court may, at any time after the appointment of the liquidator of a company, make an order terminating the liquidation if it is satisfied that it is just and equitable to do so.
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> (2) An application under this section may be made by the liquidator, a creditor, director or a member of the company or the Official Receiver.
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> (3) …
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> (4) An order under subsection (1) may be made subject to such terms and conditions as the Court considers appropriate and, on making the order or at any time thereafter, the Court may give such supplemental directions or make such other order as it considers fit in connection with the termination of the liquidation.

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[4] See para. 37 of the judgment.

[5] The judgment of the Hong Kong Court and GPH's Notice of Appeal were placed before the Court by consent.

[6] See the transcript in the Appeal (Procedural) Bundle Volume 1 p. 303.

[7] Leave to appeal was not granted to argue on the basis of the Court's inherent jurisdiction and PCH has reserved its right to appeal this point to the Privy Council if necessary.

> (5) Where the Court makes an order under subsection (1), the company ceases to be in liquidation and the liquidator ceases to hold office with effect from the date of the order or such later date as may be specified in the order." (My emphasis).

[13] PCH argues that the Court of Appeal's order setting aside the Winding up Order is in effect a 'termination of the liquidation' under section 233 of the IA; that it brought the liquidation to an end. And accordingly, the powers of the Court under section 233(4) are sufficiently wide as to encompass the power to hold GPH ultimately liable for the liquidators' remuneration.

[14] Mr. Hardwick, counsel on behalf of GPH, makes a number of points in response. Apart from the concession by PCH during the Remuneration Application hearing, GPH also says that:

(i) No application was made for termination pursuant to IA section 233;

(ii) PCH has no standing under IA section 233 to terminate based on IA section 233(2) (quoted above); and

(iii) The Court of Appeal did not terminate the liquidation under the IA section 233. In essence, says GPH, the Court of Appeal acceded to an appeal brought by PCH pursuant to rule 62.3 Civil Procedure Rules 2000 ("CPR") and was not satisfied that it was 'just and equitable' to terminate the liquidation within the meaning of section 233; on the contrary it found that there was a bona fide dispute on substantial grounds with the result that the Winding up Order ought not to have been made.

[15] Points (i) and (ii) made by GPH are all valid points. The most compelling point in my view however, is point (iii). A successful appeal against the making of a winding up order on the basis that it ought not to have been made in the first place does not and cannot equate to an IA section 233 termination. As GPH stated, wholly different considerations are engaged on a section 233 termination. Section 233(1) is itself quite explicit. It says that the court may order the termination of a

liquidation 'if it is satisfied that it is just and equitable to do so.' It is a discretionary power. The considerations to which the court will have regard in exercising this discretion were discussed in the cases Re Lowston Ltd[8] and McGruther v James Scott Ltd.[9] Derek French, in his text Applications To Wind Up Companies,[10] succinctly captures these considerations. He states:[11]

> "The court must consider the rights and interests of persons who may be affected by its decision. Depending on the circumstances, they may include the company's creditors, its liquidator and its contributories (members, shareholders), and there may be a public interest which must be considered. There may be other persons whose rights and interests are to be considered. There is no absolute right to full protection of the position which any person has in the winding up:
>
> > What is reasonable protection for any person with an interest must depend on the nature of that interest, the nature of any other interests and the whole other circumstances of the particular case."

It goes without saying that where the decision to terminate rests on equitable considerations then many and diverse matters may be taken into account as befits the peculiar circumstances in any particular case.

[16] It is also difficult to conceive of an order on appeal setting aside the Winding up Order on the basis that it was wrongly made as an IA section 233 termination because a termination order (233(5)), takes effect as from the date of the order or some later date. It does not contemplate a termination order taking effect retroactively. It seems to rest on the assumption that the Winding up Order was a proper one and that a proper liquidation was underway. On the contrary, where, as here, a winding up order is set aside on appeal as being wrongly made, it seeks in essence to 'unwind' the winding up ab initio and does not require the Court to have specific regard to just and equitable considerations before setting it aside. Perhaps this is the reasoning behind David French's statement at paragraph 5.5.8 of his text where he states that, "an assertion that a winding-up order was wrongly

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[8] [1991] B.C.L.C. 570. In this case Harman J. followed Buckley J. in Re Telescriptor Syndicate, Limited [1903] 2 Ch. 174.
[9] 2004 S.C.L.R 328.
[10] Second Edition.
[11] At p. 365, para. 5.5.4.2.

made should be pursued in an appeal against the order…rather than an application for a stay."[12]

[17] I would accordingly reject PCH's argument by which it seeks to invoke the IA section 233 as the basis on which the Court may exercise the power to make GPH liable for the payment of the liquidators' remuneration. Whilst it is true that, in effect, the liquidation of PCH was terminated in the ordinary sense, it is simply not a termination within the meaning and context of IA section 233.

The Costs Jurisdiction

[18] The real question here is whether the liquidators' remuneration, in the court's wide discretion in relation to expenses incurred by a party in or in relation to proceedings, may fall under the general ambit of costs arising out of or in relation to the proceedings.

[19] It is not disputed that the costs provisions contained in CPR are routinely applied in respect of insolvency proceedings notwithstanding CPR 2.2(3) which says that CPR does not apply to insolvency (winding up of companies). Indeed the Virgin Island Insolvency Rules, 2005 ("Insolvency Rules")[13] say that CPR (save where expressly dis-applied) apply to insolvency proceedings with necessary modifications unless inconsistent with the IA or the Insolvency Rules. The costs provisions of CPR do not fall within the table of Schedule I to the Insolvency Rules which specifies those parts and rules of CPR which are not applicable to insolvency proceedings. Accordingly it must be taken that the costs regime in CPR applies to insolvency proceedings in the Virgin Islands.

[20] CPR 64.3 states that:

> "The court's power to make orders about costs include power to make orders requiring a party to pay the costs of another person arising out of or related to all or any part of any proceedings." (My emphasis).

[12] The cases considered by Mr. French are English cases where the legislation speaks of a 'sist' or 'stay'. It is accepted however that the provisions regarding a stay are analogous to the termination provisions in the IA.
[13] Rule 4.

This provision not only gives the court power to award costs arising out of or related to any proceedings, but also, it would seem, by the use of the word 'person' to award costs to a person who is not necessarily a party to the proceedings. Also of note is the fact that 'costs' is not defined in CPR. Rather CPR says that costs include a legal practitioner's charges and disbursements, fixed costs, prescribed costs budgeted costs or assessed costs.

[21] PCH argues that liquidation is a proceeding and thus the liquidators' remuneration are costs in the liquidation proceedings, which do not end on the making of a winding up order; that the winding up order commences the liquidation process. Mr. Millett, QC, counsel for PCH said that there is nothing that says that remuneration should not be treated as a disbursement or an expense of PCH 'arising out of or related to' the proceedings. PCH relies upon the following cases: E.N.E. 1 KOS Limited v Petroleo Brasileiro S.A. (The Kos),[14] Westford Special Situations Fund Ltd. V Barfield Nominees Limited et al,[15] Graham v John Tullis & Son (Plastics) Ltd,[16] Re Secure & Provide plc,[17] Re U O C Corporation[18] and other cases all of which (save for Westford) appear to be cases concerning the appointment of provisional liquidators. PCH says that nothing turns on the fact that these cases deal with provisional and not full liquidators. Counsel submits that a liquidator's remuneration cannot rationally be "costs" if incurred by a provisional liquidator but not "costs" if incurred by a full liquidator.

[22] It is common ground that the IA deals expressly with the situation where a provisional liquidator's remuneration may be paid or contributed to by the applicant for a provisional liquidator where a liquidator is not appointed. This is the subject of section 172 and is canvassed in paragraphs 39 to 41 of the judgment of the learned judge.

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[14] [2010] 2 Lloyd's Rep. 409.
[15] Territory of the Virgin Islands HCVAP 2010/014 (delivered 28th March 2011, unreported).
[16] [1991] B.C.C. 398.
[17] [1992] B.C.C. 405.
[18] [1998] B.C.C. 191.

[23] At paragraphs 37 and 38 the learned judge, in dealing with the question whether the liquidators' remuneration may be treated as litigation costs, stated that he did not derive much assistance from the case of Tullis on which heavy reliance was placed by PCH. This was because, he said, Tullis was (i) a provisional liquidation and (ii) turned upon the proper construction of foreign legislation. Further, he said that the part of the decision which treated the remuneration as part of the litigation costs was unpersuasive because (i) the remuneration of the provisional liquidator could not be said to be 'incurred' by a company, rather the assets of a company are rendered so liable by statutory force and (ii) costs means litigation costs and collateral loss suffered in consequence of a court order could not be properly described as a litigation cost.

[24] PCH argues that the learned judge was wrong to adopt such a restrictive approach to litigation costs. Counsel refers to Kos where, albeit in different circumstances, the UK Court of Appeal held that the costs of putting up a guarantee by way of security to avoid a vessel being arrested were properly recoverable as costs incidental to the proceedings whereas damages suffered if the vessel was arrested would not be recoverable as costs but rather would be a collateral loss claim. The Court reasoned that the costs of putting up a guarantee are like, "costs incurred to protect the subject matter of an action, which on any natural reading of the words, are costs incidental to the proceedings." By analogy PCH contends the liquidators' remuneration were incurred to preserve the company's assets and carry out the liquidation process under the control of the court, particularly as here, where the order made was conservatory in nature, pending appeal and are naturally costs incidental to or related to the proceedings. PCH also points to the fact that GPH resisted a stay of the Winding up Order pending appeal precisely for the purpose, it was said, of preserving the assets in the interim.

[25] In Tullis, a decision of the Scottish Inner House,[19] Lord President Hope held that the costs of a provisional liquidator may be treated as litigation costs. He was

[19] The equivalent of the Court of Appeal.

there considering Rules 4.5 and 4.6 of the Insolvency (Scotland) Rules 1986. Rule 4.5(3) of the Scottish Insolvency Rules stated as follows:

> "Without prejudice to any order of the court as to expenses the provisional liquidator's remuneration shall be paid to him…
>
> (a) If a winding up order is not made, out of the property of the company], and
>
> (b) If a winding up order is made, as an expense of the liquidation." (My emphasis).

Lord President Hope said that the emphasised words:

> "are there in recognition of the fact that the court has power, in its discretion, to order that the remuneration and expenses of the provisional liquidator shall form part of the expenses [costs] of the case…. But the court has a wide discretion in all matters relating to expenses, and there is no doubt that this includes the power, when necessary, to direct which of the parties is to bear the cost of the remuneration and expenses of any professional man or other officer appointed by the court to act in the proceedings which have come to an end. [Counsel for the Petitioner] submitted that the remuneration and expenses of the provisional liquidator could not form part of the judicial expenses, on the view that the remuneration and expenses of the provisional liquidator in fulfilling the duties of his appointment were to be distinguished from the charges incurred by a party in the conduct of the litigation. We do not accept this distinction, for which he cited no authority, because it seems to us that in an appropriate case the charges incurred by the company to the provisional liquidator may form part of the expenses recoverable by the company if the petition is dismissed. The provisional liquidator is not a party to the proceedings, and in that sense, his remuneration and expenses cannot be said to be recoverable by him as part of the expenses of the cause, but that is not to say that they may not form part of the company's expenses in the cause should it be found to be entitled to its expenses against some other person at the end of the day."

[26] The amended English Insolvency Rules 1986 ("IR") rule 4.30(3) is more or less in similar terms but uses the word 'costs' instead of the word 'expenses' as used in the opening sentence of the Scottish provision. It is not however disputed that the word expenses as used there, is a reference to costs (i.e. litigation costs). In Re U O C Corporation,[20] Carnwarth J., in considering the comparable Scottish and English provisions of the Insolvency Rules, considered the Tullis case and appeared to accept the correctness of the approach taken there. Similarly, (as

[20] Supra note 17.

with section 172(2) of the IA referred to below), he accepted that rule 4.31(2) of the English IR directed that a provisional liquidator be paid out of the company's assets. He said[21] that this provision:

> "simply orders the position as between him and the company, and is without prejudice to the ultimate allocation of the responsibility as between the parties to the petition under r. 4.30."

[27] In Re Secure & Provide Plc[22] under the same English IR 4.30 the court there, in circumstances where the winding up petition was dismissed and the provisional liquidator discharged, ordered the petitioner to bear the costs which covered also the remuneration and expenses of the provisional liquidator. A similar approach was adopted in Re a company (No. 002180 of 1996)[23] where Knox J. lumped together the parties' costs and the provisional liquidator's remuneration and treated them together as litigation costs.

[28] The Hong Kong Court of Appeal in Hong Kong Property Services (Agency) Limited v Pioneer Venture International Limited[24] also treated the provisional liquidator's 'costs' which was recognised as being primarily payable out of the assets of the company as litigation costs and ordered that those costs be reimbursed by the petitioner.

[29] GPH says that court-appointed liquidators are analogous to court-appointed receivers[25] and refers to various receivership cases.[26] It relies most heavily on the receivership case of In re Andrews[27] which is cited in Kerr & Hunter on Receivers and Administrators[28] for the proposition that:

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[21] At p. 198.
[22] Supra note 16.
[23] [1996] 2 B.C.L.C. 409.
[24] [1999] HKCU 80.
[25] GPH acknowledges however that the position as to receivers is different in England as English CPR 69.7(2)(a) confers upon the court a discretion to say who is to be responsible for paying the receiver.
[26] Boehm v Goodhall [1911] 1Ch. 155; Monks v Poynice Pty Ltd and Another (1987) 11 A.C.L.R. 637; Kyrgyz Mobil Tel Limited et al v Fellowes International Holdings Limited British Virgin Islands High Court Civil Appeal No. 25 of 2005 (delivered 24th April 2006, unreported); Audubon Holdings Limited et al v The Treasure Island Company Limited et al British Virgin Islands Claim No. BVIHCV2002/0227 (delivered 22nd December 2006, unreported).
[27] [1999] 2All ER 751.
[28] 19th Edition 2010, chapter 10.

> 'the court has no jurisdiction to order a party to a proceeding to pay the remuneration and expenses of a receiver appointed in the proceeding, as part of the costs of and incidental to the proceeding.'

In re Andrews cited with approval the case of Boehm v Goddall. Boehm v Goddall was, in turn, cited with approval in the cases of Kyrgyz and Audubon decided by the Eastern Caribbean Supreme Court.

[30] There is no doubt, and I accept, that the general rule is that a receiver or a liquidator must look respectively, to the assets in his hands or of the company to recover his remuneration. Neither a court-appointed receiver nor a court-liquidator is a party to the proceedings and cannot, as such, seek costs or an order directing a party to the proceedings to pay his remuneration and expenses. Indeed, this is the thread which runs through the case law in respect of receiverships and liquidations. The question here is whether such remuneration and expenses, notwithstanding that they are primarily payable out of the assets in hand or assets of the company, may ultimately be recoverable by the successful party against the unsuccessful party where it turns out that the order of appointment was wrongly made.

[31] Barrow, J.A. (as he then was) in Kyrgyz at paragraph 29 of the judgment appears to leave open the possibility that in appropriate circumstances a receiver's remuneration may be recoverable from the other parties to the proceedings.

[32] The offices of receivers do bear some similarities to the offices of liquidator. There are also differences. I must confess to not deriving much assistance from delving into the differences and similarities between the two offices save for one significant difference. A liquidation is a proceeding in and of itself. A receivership is not. It is a relief ancillary to proceedings. I can only say from the paucity of authority as there is on this issue, that the line of cases dealing with provisional liquidators do not appear to draw guidance or support from the receivership cases on the point, or vice versa. Each appears to occupy its own sphere. In the text McPherson's

Law of Company Liquidation,[29] the author expresses an opinion which suggests at least one instance where liquidators ought to be treated in similar fashion as receivers in respect of defective appointments. He states thus:

> "In Monks v Poynice, a case dealing with the defective appointment of a receiver, Young J. of the New South Wales' Supreme Court said that a receiver should be entitled, on an equitable basis, to reasonable remuneration as his service had conferred:
>
> > "incontrovertible benefit on the defendant [the company] and it would be unconscionable for the defendant to keep the benefit of the service without paying a reasonable sum therefor[e]."
>
> The same reasoning could be applied equally to liquidators. Whether the recent Australian decisions which allowed a liquidator whose appointment was defective some costs for work done will be followed in England is open to speculation, but it is submitted that the decisions should be followed."

[33] I am loath to apply the general principle emanating from the receivership cases to the case at bar. Indeed no case has been cited which has fully addressed this issue. This Court did however in Westford, make such an order. In Westford, this Court held that the applicant was not a creditor at all under the IA and therefore had no standing to seek the winding up of the company. No authority has been cited to the Court which suggests that the Court's costs jurisdiction is fettered. Further, the language employed in the relevant provisions of the Irish and English Insolvency Rules, suggests that the court generally has an unfettered costs jurisdiction in relation to any matter before it. In this vein, I agree with the observations of Lord Hope in Tullis as set out in paragraph 25 above.

[34] The comparable rule under the IA to the English IR 4.30 and the Irish IR 4.5(3) is section 172(4). It is in these terms:

> "If a liquidator is not appointed, the Court may order the applicant for the appointment of the provisional liquidator to pay or contribute to the remuneration and expenses of the provisional liquidator if it is satisfied that the applicant
>
> (a) misled the Court when making the application; or
> (b) acted unreasonably in applying for the appointment of the provisional liquidator."

[29] Second Edition, p. 50.

This subsection qualifies section 172(2) which says, in effect, that the remuneration of a provisional liquidator is to be paid out of the assets of the company. What becomes immediately apparent is that section 172(4) of the IA does not have the opening words, "Without prejudice to any order of the court as to costs [expenses]" as contained in the English and Irish versions. I do not consider however, that the missing language may be construed to mean that without those express words the court's power to award costs is in some way fettered. I do not read the words 'without prejudice to any order of the court as to costs' as conferring any costs jurisdiction on the court which hitherto it did not have. Those words were clearly necessary given the manner in which those provisions are framed so as to give recognition to the court's overarching costs jurisdiction. Section 172(4) of the IA on the other hand is framed more in the affirmative by saying 'if a liquidator is not appointed, the Court may order the applicant…to pay...' In my view, save for the IA section 172(4) tailpiece, which qualifies the circumstances under which the court may exercise the power to order an applicant to pay, it is for all practical purposes on par with its English and Irish counterparts.

[35] PCH says, and I accept, that there would seem to be no rational basis for treating the provisional liquidator's remuneration as 'costs' where no final appointment is made but not 'costs' where a full appointment was made which was then set aside. If the court under its wide costs jurisdiction is restricted in its power in respect of the manner in which costs are to be ultimately allocated it may very well turn out to be the case that the court is then powerless to rectify an abuse of its process which may have occurred by the making of a winding up order. I am fully satisfied that the IA seeks to do no more than to order the position as between the liquidator and the company whilst leaving the court's general costs jurisdiction intact in terms of allocating ultimate liability. I can see no real distinction between ordering an applicant to pay the remuneration and expenses of a provisional liquidator where no full appointment was made and ordering an applicant to pay the liquidator's remuneration where a full appointment was discharged as being wrongly made. It would seem to me to be an expense of the company arising out

of or related to the proceedings. In re Plumstead Waterworks Co. Ltd, ex p Hardinge[30] the English Court of Appeal expressed the view that where the court below had no jurisdiction to make a winding up order, the liquidator was not entitled to any remuneration at all out of the assets of the company in respect of the period for which he so acted. This does not extend however to saying that a liquidator can never recover his fees and expenses from an applicant at whose instance he was appointed where the appointment turned out to be invalid or otherwise wrongly made.

Should the applicant GPH be ordered to bear the liquidators' remuneration?

[36] Unlike the case of Westford, the winding up order here was set aside on the basis that there was a dispute as to the debt. The trial judge held,[31] applying considerations analogous to the tail piece in section 172(4) of the IA that had he the jurisdiction he would nevertheless decline to make such an order unless it could be shown that the applicant had mislead the court or otherwise acted unreasonably. Neither, he said, applied here.

[37] PCH says that the trial judge ought to have found that GPH's application to appoint a liquidator where the debt was genuinely disputed on substantial grounds, was an abuse of process and therefore amounted to unreasonable conduct, relying on the cases of Mann and Another v Goldstein and Another,[32] Stonegate Secuirities v Gregory[33] and Sparkasse Bregenz Bank AG v In The Matter of Associated Capital Corporation.[34] They further rely on the fact that the Hong Kong Court has set aside the arbitral award on which the application to wind up was made and thus the entire substratum of the GPH's claim no longer exists. As earlier stated, GPH has appealed the Hong Kong Court's order setting aside the award. That appeal is still to be heard.

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[30] (1862)11 WR 99; 7 LT 550.
[31] Para. 42 of judgment.
[32] [1968] 1 W.L.R. 1091 pp.. 1098-1099.
[33] [1980] Ch. 576, at 580A-B.
[34] British Virgin Islands High Court Civil Appeal No. 10 of 2002 (delivered 18th June 2003, unreported).

[38] GPH says that in all the cases relied on by PCH where the petitioner was ordered to pay the costs of the liquidation there were exceptional circumstances warranting departure from the general rule of making the assets of the company liable for such costs. It says that GPH at all times acted properly; it based its application on an unsatisfied arbitral award; that whatever be the outcome of liquidation proceedings, based on PCH's Convention Defences, there remains outstanding by PCH a substantial debt of some $55m; that during the period of the liquidator's appointment they had very limited power which was to take possession and protect PCH's assets and thus was beneficial to the company, relying on the observations made in Monks v Poynice. To this, PCH says that it, at all times, resisted the Winding up Order and that in any event the order placed the control of the assets in PCH's hands and thus it is difficult to see what extra benefit the liquidators conferred on PCH had the order been stayed altogether pending appeal as had been sought by PCH but resisted by GPH.

[39] I am of the view that here, where the debt was genuinely disputed, it was wrong of the applicant to move for a winding up order. This Court has already ruled that the order was wrongly made in the circumstances. Accordingly, I would hold that it was an abuse of process. A stay of the Winding up Order was resisted. In the absence of cogent evidence showing that the liquidators conferred some benefit to the company which it would be unconscionable for the company to keep without paying for it, (and it has not been so shown here), I would order GPH to bear the ultimate liability for the liquidators' remuneration.

Conclusion

[40] For the reasons given, I would allow the appeal and make the following orders:

(1) That GPH ultimately bears the remuneration of the liquidators; and

(2) That GPH bears the costs of the proceedings below and on this appeal, the costs on the appeal being fixed at two thirds of the costs as assessed by the court below.

Janice M. Pereira
Justice of Appeal

I concur.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Don Mitchell
Justice of Appeal [Ag.]