EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS
IN THE HIGH COURT OF JUSTICE

CLAIM NO. BVIHCV (COM) 2017/200

Between:

Patrick Smulders

Claimant

And:

[1] Registrar of Corporate Affairs

[2] Financial Secretary

Defendants

Appearances:

Ms Kimberly Crabbe-Adams, Harney Westwood & Riegels for the Claimant,

Ms Dian D. Fahie with Mr Stephen Grayson, Financial Services Commission, Counsel for the First Defendant

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2018: January 11; 25
……

JUDGMENT

[1] **Adderley J.** On 25 January I delivered judgment in this matter ordering that Winning Wave Corp. (No 325490) (the "Company") may be restored to the Register of Companies ("the Register"). I promised to give my reasons later, and I do so now.

[2] This was an application by way of Fixed Date Claim Form dated 3 November 2017 to restore the Company to the Register. The application was made pursuant to s.218 of the BVI Business Companies Act, 2004 (as amended) (the "BCA") by which the Claimant, Mr Patrick Smulders sought orders that:

(1) the dissolution of the company on 31 October 2014 be rescinded and declared void;

(2) the Company be restored as a BVI Business company pursuant to the BCA;

(3) the Company be restored to the Register by the Registrar of Corporate Affairs (the "Registrar") upon payment of any outstanding fees and penalties pursuant to and in accordance with the BCA;

(4) the Company be deemed never to have been dissolved or struck off the Register;

(5) any property which belonged to the Company and which was not disposed of at the date of the dissolution or which was received for the benefit of the Company since its dissolution and which was not vested in the Crown, be restored to and do vest in the Company; and such further and other relief as the Court thinks fit; and

(6) such further and other relief as the Court thinks fit.

[3] My first observation is that if orders (1) and (2) are granted by the Court, by virtue of section 218B and s.220 of the BCA, certain statutory consequences along the lines of 2-5 automatically flow from restoration and so it was not necessary to seek paragraphs 3 to 5 as separate orders. Insofar as the orders applied for vary from the provisions of the BCA, the BCA will prevail. In this context I note paragraph 5 which essentially follows as a matter of law under s.220 and assume the word "not" before "vested" is a slip.

[4] Secondly, the company is deemed to have been dissolved. The date of a company's dissolution depends on the date of its striking off. The original position on dissolution under the BCA was that companies were dissolved after 10 years of striking off. The introduction of section 216, which sets out that the dissolution of a company follows 7 years after being continuously struck off was introduced in 2012 by section 69 of SI 5/2012. The amendment also made it clear that the provision does not apply to a company that was struck off the Register six or more years prior to the commencement date, being 15 October 2012. Therefore any company struck off on or before 15 October 2006 is dissolved after having been struck from the Register for a continuous period of 10 years and any company struck off after 15 October 2006 is dissolved after being struck off for a continuous period of 7 years .

THE FACTS

[5] The Company was incorporated as an International Business Company (IBC) on 20 May 1999, and was therefore automatically re-registered on 1 January 2007. On the evidence it was struck off the Register in 2009 under s.213 (1)(c) of the BCA due to non-payment of fees.

[6] The applicant is relying on statutory dissolution. By virtue of s.216 of the BCA after being struck off for a continuous period of 7 years the company is deemed dissolved. The applicant stated that the company was dissolved on 31 October 2014. There is reason to doubt this latter date because under s. 216 the date of statutory dissolution is 7 years after it has continuously been struck off. In this case it appears to have been calculated from the date of automatic re-registration in 2007 instead of from the dated of being struck off in 2009. The statutory dissolution would therefore have occurred in 2016, 7 years after 2009, not 2014. However in this particular case nothing seems to turn on it.

[7] The claimant affirmed an affidavit in support of his application. He is a wealthy investor with considerable assets in various parts of the world. The Company was incorporated as a holding company for the claimant's investments. Ultimately, however, the Company was thought to hold only shares ("the shares") in a start-up company M Ltd incorporated in England which the claimant purchased in the Company's name in 2009.

[8] As director of the Company, the Claimant based on what he paid for the shares formed the view that the shares in M were of very little value. He had lost contact with the agents of M Ltd and decided that the cost to continue to incur the fees to keep the Company current was disproportionate to the value of the shares. He therefore allowed the Company to go into arrears and it was struck off the Register by the Registrar for the non-payment of fees.

[9] Recently the Claimant learned that the shares have a significant monetary value and in fact, he, along with other shareholders in M Ltd., have been offered what he considers a worthwhile price for their purchase. He now wishes to restore the Company for the purpose of being able to dispose of the shares. Subsequent to discovering this, he has since discovered that the Company owns additional valuable shares in company S Ltd.

PRINCIPLES OF RESTORATION

[10] The BCA is largely silent on the principles upon which the Court should exercise its discretion to restore a company that has been struck off the Register and dissolved. To put it another way if a person unhappy with a judge's refusal to restore, wished to appeal to the Court of Appeal, on which principles can an aggrieved applicant rely to show that the judge wrongfully exercised his/her discretion?

[11] Upon my enquiry to counsel about the guiding principles, a few BVI cases were brought to my attention which very helpfully dealt with the discrete applications on behalf of companies that had gone into voluntary liquidation before dissolution, but it does not appear that the bulk of the applications for restoration are in that category. So I have taken this opportunity to, hopefully, give a little more guidance on cases which appear to arise more frequently in this court. This discussion is concerned with former IBCs.

[12] Over the years common features have emerged. Some are listed in the paragraphs that follow.

[13] The most common occurrence is that the company had been struck off the Register under s.213(1)(c) because the annual fees or late payment penalties had not been paid and it was later deemed to have been dissolved by statute. The non-payment was either intentional by the owners to cease incurring annual charges, or unintentional because the owners claimed that they were not aware of the requirements in relation to annual filings and payment of license fees. Alternatively, somehow the registered agents lost contact with the owners and the company's striking off and dissolution were inadvertent because the arrears were not brought to their attention.

[14] Sometimes for whatever reason the applicants are unable to locate the registers of members and directors and other corporate documents, or cannot access them.

[15] In rare cases application is made to restore a company that has been dissolved because it was wound up voluntarily under the BCA.

[16] In some cases the company will have been struck off before the statutory re-registration date for former IBCs (January 2007) under the BCA 2004; in others they were struck off after the re-registration date. In the former case the company is deemed statutorily dissolved after a period of 10 years; in the latter case 7 years after having been continuously struck off the Register. This makes perfect sense because if a company is struck off before the re-registration date, one of the statutory results of its restoration is that it is automatically re-registered. In the case of a company struck off after the re-registration date it will already have been re-registered before it was struck off.

[17] In all cases the applicants seem to claim that the company owned either valuable real or personal property, or choses in action which they wish to dispose of or to make use of.

[18] While s.218 has a rubric which states "**Application to restore dissolved company to Register**" the section does not state what form that application should take. The section only states that application may be made to restore, who can apply, the time limit for applying, and who must be served with an application.

[19] One must look to the transitional provisions promulgated under section 248 of the BCA and Schedule 2 to find out what the nature of the application is. Paragraph 57(1) of Schedule 2 provides:

> **"**(1) Application may be made to the Court for an order declaring the dissolution of a CapCo or an IBC to which subparagraph (2) applies to be void.
>
> (2) This paragraph applies, in place of section 218, where-…
>
> …(b) in the case of an IBC-
>
> (i) The company was dissolved under the provisions of the International Business Companies Act prior to the re-registration date; or
>
> (ii) Is deemed to be dissolved under paragraph 56…"

[20] Paragraph 56 (3) provides:

> "(3) An IBC that is struck off the IBC register under section 99 of the International Business Companies Act, prior to the re-registration date, if it remains struck off continuously for a period of 10 years , shall be deemed to be dissolved with effect from the last day of that period.
>
> (4) Where this paragraph applies to ... an IBC, it applies in place of section **216"**

[21] The power of the court to restore is set out in paragraph 57(4) which provides:

> **"(4) On an application under subparagraph (1), the court may declare the** dissolution of the company void subject to such conditions as it considers just**"**

[22] Only in instances of winding up is the court prohibited from making an order of restoration unless certain pre-conditions are fulfilled and therefore must make a conditional order. Under paragraph 59(2) the court "shall not make and order declaring the dissolution of a company void under paragraph 55, and the Registrar shall not restore a company under paragraph 56 unless in addition to the amounts paid to the Registrar under section 59(1) they also pay the applicable restoration fee. The reference to the fees payable under section 59(1) refer to all fees and penalties for which the company was liable under the former International Business Companies Act (the "IBC Act"), and such fees and penalties that would have been payable under the BCA if the company had been automatically re-registered under Part III on 1 January 2007.

[23] Paragraph 55 refers to the case where Part IX of the IBC Act shall continue to apply to the winding up and dissolution of an IBC after the repeal of the IBC Act if prior to the re-registration date of 1 January 2007, articles of dissolution are registered by the Registrar pursuant to section 94(4) of the IBC Act, and either the company has not been dissolved under section 94(6) of that Act or the articles of dissolution have not been rescinded under section 95 of that Act.

[24] Paragraph 56(3) refers to an IBC that was struck off the IBC Register under section 99 of the IBC Act prior to the pre-registration date and deemed to be dissolved on or after the re-

registration date because it remained struck off continuously for a period of 10 years. It is deemed dissolved with effect from the last day of that period.

[25] Accordingly, because of paragraph 59(2), Court orders under those sections must necessarily be made conditional on the payment of such fees. In addition the Court may impose any other lawful conditions.

[26] Apart from those two groups paragraph 57(4) invokes the equitable jurisdiction of the Court and bestows a wide discretion on the Court to declare the dissolution of the company void subject to such conditions as it considers just. Conditions may include any which may be lawfully imposed. For example, if a company was struck off under s.213(1)(a)(i) for failing to have a registered office the Court may well impose a condition that they first confirm the a licensed person has agreed to act as its registered agent upon its restoration.

APPLICATIONS ARISING UNDER SECTION 218 OF THE BCA

[27] Under s.213 of the BCA the Registrar may strike the name of a company off the Register for a number of reasons.

[28] Under s.216 where a company that has been struck off the register under s.213 remains struck off continuously for a period of 7 years it is dissolved from the last day of that period.

[29] Under s.218(1) application may be made to the Court to restore a dissolved company to the Register. The section does not set out the nature of that application. The practice has evolved that the application made under s. 218 is to declare the dissolution void. Strictly speaking this is the remedy stated in paragraph 57(1) of Schedule 2: an application to declare the dissolution void. However it seems to be the remedy of choice of applications under s 218 and the court has accepted it.

[30] Under s.218 the application can be made by:

(a) A creditor, former director, former member or former liquidator of the company
(b) Any person who can establish an interest in having the company restored to the Register

[31] The application may not be made more than 10 years after the date that the company was dissolved (s.218(2).

[32] Under s. 218 notice of an application must be served on the Registrar, the Financial Secretary, and the British Virgin Islands Financial Services Commission if at any time prior to the dissolution the company was a "regulated person". Each of them is entitled to appear and be heard on the hearing of the application.

[33] Under the general law the burden of proof, as correctly submitted by the First Defendant in this case, is on the claimant to produce evidence to support the contention that it falls within the statutory class of persons who have *locus standi*. As relevant to the issue of proving that the restoration is for a beneficial purpose, if the claimant claims that the company owned property the claimant must prove that the company owned the property at the date it was struck off and dissolved. The standard of proof is the normal civil standard on a balance of probability.

[34] If the company was struck off after the re-registration date, by s.216 (Amended by Act 5 of 2012), it will be statutorily deemed dissolved 7 years after being continuously struck off for 7 years and application must be made under s.218 within 10 years of it having been dissolved.

[35] Section 218A sets out the Court's power on the hearing under s.218 to restore the company or give directions, s.218B sets out the effect of restoration, section 220 sets out that any property not disposed of prior to the dissolution vests in the Crown and upon restoration any property, other than money, that had vested in the Crown and had not been disposed of must be returned to the company. Money received by the Crown or if the property had been disposed of by the Crown is to be paid out of the Consolidated Fund. The Minister may by notice in the Gazette within 12 months of the deemed vesting disclaim "onerous property" and there are detailed provisions set out in section 221. By paragraph 60 these provisions also apply to CapCo's[1] and IBC's struck off prior to the re-registration date but dissolved by statute under s 54 after the re-registration date, or on that date.

[1] Means a former Act company that was incorporated under the Companies Act (Cap. 285) that has not been continued under the IBC Act

EFFECT OF RESTORATION

[36] This is worth highlighting and is set out in section 218B as follows:

> **"218B. (1)** Where the court makes an order restoring a company to the Register, a sealed copy of the Order shall be filed with the Registrar-
>
> (a) In the case of a company to which section 218[A](2) applies, by the person appointed to be liquidator of the company under section 218A(4); and
> (b) In any other case, by the applicant for the Order
>
> (2) on receiving a filed copy of a sealed order under subsection (1), the Registrar shall restore the company to the Register with effect from the date and time that the copy of the sealed order was filed.
>
> (3) Where the company was dissolved following the completion of termination of its voluntary liquidation under this Act or its liquidation under the Insolvency Act-
>
> (a) the company is restored as a company in liquidation under this Act or the Insolvency Act; and
>
> (b) the person appointed by the Court as liquidator is constituted liquidator of the company with effect from the time that the company is restored to the Register.

[Note: Because of Section 3(a) supra which come into force in2012, after the ruling by Bannister J, his decision to the contrary in para 19 of Dedyson has been overturned by statute and is no longer good law.].

[37] It should be noted that under paragraph 57(6) (promulgated by S/I 84/2006) the restoration has effect "*from the date of the Court order or such other date as may be specified in the order*". However, under section 218B(2) (amendment by Act 5 of 2012) the restoration takes effect "*from the date and time that the copy of the sealed order was filed***"** This suggests that in applications under Section 218 where the IBC was dissolved after the automatic re-registration date restoration takes effect from the date the sealed order is filed, while in the case of IBCs dissolved prior to that date the date of restoration is from the date of the order or such other date specified in the order. While in practice the dates may normally not be far apart, it could be very relevant in dating the instruments of transfers of properties from the reinstated company.

APPLICATIONS UNDER SCHEDULE 2

[38] The proper application for a company struck off before the re-registration date but deemed statutorily dissolved after the re-registration date is under the provisions of Schedule 2. One of the results of restoration on this application is that the company is treated as if it had re-registered.

[39] Paragraph 56 applies to companies which were incorporated and were maintained under the Register of Companies Act (Capco Register), and companies that were on the Register of IBCs under the IBC Act (IBC Register).

[40] The re-registration date is 1 January 2009 for a CapCo and 1 January 2007 for and IBC.

[41] Although the provisions relating to CapCos are similar to those for IBCs I will focus my discussion on IBCs.

[42] Under paragraph 56(3) an IBC that is struck off the IBC Register under s.99 of the IBC Act prior to the re-registration date, but that is not deemed to be dissolved prior to the re-registration date, if it remains struck off continuously for a period of 10 years is dissolved by statute from the last day of that period. This section applies in place of s.218.

THE NATURE OF THE APPLICATION UNDER SECTION 57

[43] Under paragraph 57(1) application may be made to the Court for an order declaring the dissolution of an IBC to be void to which paragraph [44] below (paragraph 57(2)(b) of Schedule 2) applies. In such case the paragraph applies in place of s. 218.

[44] The application can be made where the IBC was dissolved under the provisions of the IBC Act prior to the re-registration date. Alternatively, it was deemed dissolved under paragraph 56, that is to say it was struck off under section 99 of the IBC Act, prior to the re-registration date, and remained struck off continuously for a period of 10 years.

[45] Under paragraph 57(3) an application may be made by the company, or a creditor, member or liquidator of the company, shall be made within 10 years of the date that the company was dissolved; and may be made after the applicable re-registration date, or where the company has been struck off and dissolved prior to the re-registration date, prior to that date.

[46] Paragraph 57(4)-57(6) provides

> **"**(4) On an application under subparagraph (1), the court may declare the dissolution of the company void subject to such conditions as it considers just,
>
> (5) Where the court makes an order under subparagraph (4)-
>
> (a) the company is deemed never to have been struck off the Capco or the IBC Register, as the case may be, or to have been dissolved; and
>
> (b) where the order is made on or after the applicable re-registration date, the company under the Act is deemed to have automatically re-registered in accordance with Part III on the reregistration date.
>
> (6) Where the court makes the order the person who applied for the order must file a sealed copy of the order and on receipt, the Registrar shall issue a certificate of restoration and re-registration to the company in the approved form and the restoration has effect form the date of the court order or such other date as is specified in the order.**"**

[47] Under paragraph 59 a company stuck of the register remains liable for all fees and penalties as if it was continuously registered and had automatically re-registered on the re-registration date.

[48] On the authorities, in exercising its wide equitable jurisdiction to determine whether it was just to restore a company judges have considered a number of factors discussed below,

LOCUS STANDI:

[49] This has been taken into account as a threshold issue. The BCA provides in s. 218 that "a creditor, former director, former member or any other person who can establish an interest", and under paragraph 57(3) "the company, or a creditor or a member" may apply.

Since the company will have been dissolved, on its true construction it is necessary to imply the word "former" before "member" and "company in paragraph 57(3).

PURPOSE OF RESTORATION

[50] There must be an identifiable special or beneficial purpose for restoration.

[51] English case law suggests that the court should look at the benefit to be obtained by restoring the company.

[52] In Re Lindsay Bowman Ltd [1969] 1 WLR 1443, it was held that the court had the power to refuse to recognise an applicant as an 'aggrieved person' if the benefit to that person of restoring the company was *de minimis.* The company was struck off and dissolved for failure to file accounts. A creditor of the company applied for the restoration due to debts owing before the company's dissolution. On considering the evidence the court was not persuaded that any real financial benefit could be gained from restoring the company and so refused the application.

[53] In Witherdale Ltd v Registrar of Corporate Companies [2005] EWHC 2964 the court exceptionally refused an order for restoration where it was not possible to ascertain what the purpose of restoration was. The locus standi of the applicant was also considered. The applicant was a former director of the company who subsequently became bankrupt after the company had been struck off for failure to file accounts and dissolved. It was in the company's Articles of Association that an office of director should be vacated if the director became bankrupt. It was held that the applicant had lost his authority to apply for restoration. He also had no locus standi to apply as a shareholder as he had acquired his shares after the date of dissolution. The respondents sought to substitute another individual as an applicant with locus standi who had allegedly been a shareholder at the relevant time before the dissolution. The court refused the application on the basis that the former director had not established locus standi. In respect of the substitute applicant, the court

decided that it could not be demonstrated that any discernible purpose would arise from the restoration as his position of entitlement as shareholder was doubtful: "A shareholder applying for restoration of a company which has been struck off needs to demonstrate, as the authorities show, that some good will flow to somebody from the restoration which he is asking for."

REFUSAL THE EXCEPTION

[54] Exercise of the discretion against restoration should be used proportionately. It should be the exception and not the rule in the absence of special circumstances to refuse restoration where it is just to do so. In Re Priceland Ltd v Registrar of Companies and others [1997] BCC 207, (referred to in Witherdale, supra), Laddi J held that where it was just to restore, then in the absence of special circumstances restoration should follow. Although there was still adiscretion against restoration, exercising it should be the exception and not the rule if it was just to do so. "The court should be wary of refusing restoration so as to penalise a particular applicant or in a possibly futile attempt to safeguard the special interests of a single or limited class of affected persons." The case concerned a lease agreement between a London Council and the respondent supermarket chain that was assigned by the respondent to a company that was subsequently struck off and dissolved. The Council applied to restore the company in order to hold the respondent supermarket chain liable as the original tenant for paying the increase in rent for Council property under the terms of its lease. In determining that it was just to restore the company and granting the restoration, the court considered that the respondent had not shown that it would be prejudiced by restoration, since the financial disadvantage it would suffer could not be attributed to the restoration but to the terms of the lease it had entered into.

[55] The concept of exceptional circumstances was also applied in Re Bluenote Enterprises [2001] 2 BCLC 427 involving a company that had been struck off for failure to file its

accounts. The company applied for restoration having rectified the failure. The court granted the restoration based on the following principles:

(a) The company had a bona fide desire to pursue the claim
(b) As a matter of discretion, the court would not refuse restoration where the company had been struck off for the reason of failing to file an annual return since that would in the ordinary circumstances be an excessive or inappropriate penalty for that oversight.
(c) An applicant for restoration only has to cross a relatively low threshold in terms of showing some sort of interest in the restoration or prospect of recovery.

[56] In the case of In the Matter of the British Virgin Islands Business Companies Act Schedule 2 Section 57 and another v Financial Services Commission (BVIHCV2011/305) which concerned a paragraph 57 Schedule 2 application to restore a company struck off for non-payment of fees, Wallbank J had to construe a Power of Attorney. The issue arose as to whether the Power of Attorney was sufficiently specific to enable the person as lawful attorney, to restore the company on behalf of the sole member. Wallbank J concluded that there was "nothing in the Power of Attorney which even remotely causes an objective reader to suppose that Shaika Luwla would not want Shaikh Rashid to restore a company which was struck off for non-payment of fees and which ostensibly continued to own the family's home." It appears that Wallbank J may have exercised his discretion based on the same principles outlined above, that on an objective construction of the Power of Attorney, there were no exceptional circumstances that would cause the court to refuse the application being that it was just to do so.

DELAY

[57] The normal equitable principle of laches applies. This was applied in the Scottish case Whitbread (Hotels) Ltd v Walkmore (95) Ltd, The Times 18 January 2002. It concerned

an application by a liquidator however the point may be of general application in a case where there has been an unnecessary delay in bringing an application within the 10 year period allowed by the Act. The court in Whitbread confirmed that where an order for restoration was justified, the court should have regard to any inactivity or delay on the petitioners' part in raising proceedings when computing time for the purposes of the rules relating to prescription and limitation of actions. In that case it held that there was no particular reason why the petitioners should have the consequences of their inactivity in the period between the dissolution of the company and the raising of proceedings. Likewise, there was no reason why other creditors of the company who had similarly been idle during such period should have any benefit conferred on them.

OTHER STATEMENTS OF PRINCIPLE

[58] Re Blenhiem Leisure (Restaurants) Ltd All England Official Transcripts (1997-2008) was a case where a company struck off the Register under s. 652(1) of the of the 1985 Companies Act could be restored by the court if satisfied that the company was at the time of the striking off carrying on business or was in operation, or otherwise that it just that the company's name be restored. Neuberger J, as he then was, in rendering his decision made a number of statements of principle relating to restorations some paragraphs of which I have set out below for guidance:

"[6] If the case for restoration of the company is essentially an alleged claim which it has, then the approach of the court in general terms has been laid down in two cases. The first is Stanhope Pension Trust Limited v Registrar of Companies [1944] 1BCLC 628.where at page 635 F to G of the former report Hoffmann LJ said this:

" .As Megarry J said in *Re Wooton Martin Bricklaying Contractors Limited* [1971]…the interest of an applicant under section 651 in having the company revived does not have to be firmly established or highly likely to prevail. It is sufficient that it is not merely shadowy…" …

In *Re Oakleague Limited* [1995] 2 BCLC 264, [1995] BCC 921, page 921 at line 24 of the latter report, Robert Walker J said this:

"As often occurs in cases of this sort, the restoration of the company to the Register may do it some good or it may not. The attitude of the companies Court is that provided the application for restoration falls within the general legislative purpose, as I have described it, the company will be restored, and whether the restoration does any good or not is a matter to be decided by another tribunal in the future"

"[7] It seems to me clear in light of points 4,5, and 6 that a member seeking restoration of a company need not establish that if restored, the company will on the balance of probabilities be solvent. It seems to me that such a requirement is a plainly inappropriate gloss on the wide discretion conferred by s.653(2)(b)….However, it must be said that where a member is relying on the benefit to him of the company being restored, the court does have to look into the matter where there is a real issue as to the prospects of restoration doing any good…"…

"[8] Where it would be otherwise right to do so, refusal to restore a company to the Register on the grounds that it was the company's own fault, or the fault of its advisers, that the company was struck off may in many circumstances and, I believe, in the overwhelming majority of circumstances be too great a penalty to impose (see Re Moses & Cohen Limited [1957] 3 ALL ER 232, [1957] 1 WLR 1007"…

"[11] When deciding how to exercise its discretion under s. 653(2)(a) the court can, indeed in an appropriate case, must take into account the interests and arguments of third parties who may be affected by the restoration of the company ( see per the majority of the Court of Appeal in Re Blenheim Leisure(Restaurants) Ltd, The Times 13 August 1999, 26 July 1999 unreported). This is especially so when the third party would be ''directly affected" by the restoration (see per Aldous LJ at page 36). It seems to me that the observations of Hoffman LJ in Stanhope at 635 are to the same effect."…

"[12] Applications [sic] for restoration are quasi-administrative proceedings which should be dealt with simply and quickly … and they are proceedings where the court should be particularly astute to invoke its case management powers."

Some of these principles may themselves raise their own questions but they are a useful starting point.

SUMMARY OF PRINCIPLES

[59] From the cases we can extract a non-exhaustive list of matters that should be considered by a judge in determining whether or not to exercise his discretion to restore a dissolved company on the "just" principle:

(1) the threshold issue of whether the person or entity applying to restore the company has the *locus standi* to make the application;

(2) the purpose for which the company was formed;

(3) the purpose for which it is to be restored; it should be for a beneficial purpose;

(4) the reason why the company was struck off;

(5) the length of time that it was dissolved , and the delay in seeking its restoration;

(6) whether the restoration of the company would cause prejudice to a third party;

(7) the discretion against restoration should be exercised proportionately;

(8) whether in all the circumstances it is just to restore the company; and

(9) the exercise of the discretion not to restore should be the exception and not the rule where it is just to do so.

[60] It seems to me also that as this is the exercise of an equitable jurisdiction it would be relevant whether the applicant is coming to the court with clean hands. Any impropriety must be considered, as well as whether the company has previously acted against the interest of the BVI. The public policy of the BVI to encourage company formation and commerce, and not to confiscate private property may also feature in in some cases.

DISCUSSION

[61] It should be noted that the application to declare a dissolution void with which this application is concerned is different from an appeal to the Court for restoration of a company under s.214 of the BCA that has not been deemed dissolved, or the application

to the Registrar under Paragraph 58 of Schedule 2 to restore a company which was struck off but not dissolved. Different provisions govern those situations. This application and the case itself is concerned with a company that has been statutorily dissolved.

[62] The facts set out at [4] to [9] are repeated.

[63] The claimant is a former member and director of the company, and therefore has standing to bring the application pursuant to section 218(1)(a)

[64] The company was statutorily dissolved in 2016, therefore the application has been brought well within the time limit of 10 years prescribed by section 218(2) of the Act.

[65] Pursuant to section 218(3) an applicant is required to serve notice on the Registrar of Companies/Registrar of Corporate Affairs, the Financial Secretary and if it was ever a "regulated person" on the Financial Services Commission. The application was served on both defendants on 28 November 2017. There was no requirement to serve the Commission because the company was never a regulated person under the BCA.

[66] The Claimant has undertaken to pay all fees and penalties required to be paid for the Company to be restored to the Register.

[67] The applicant filed a copy of the Company's Certificate of incorporation, memorandum and articles of association, and documents tracing the ownership of the shares of the company to himself first held by nominees on his behalf and the transfers from nominees to himself. He also filed a copy of the Company's Register of Members, Register of directors and relevant share certificates. The evidence shows that at the date the company was struck off the applicant was the sole shareholder and director. Before the company was struck off it also had a registered agent in Tortola whose name and address was in evidence.

[68] At the first hearing on 11th January, 2018 there was no objection by the second defendant but the first defendant objected on three grounds.

(1) there was not sufficient proof that the Claimant owned the shares in M Ltd at the time the Company was struck off

(2) there was a distinction to be drawn between a case where the applicant completely overlooked an asset and allowed the company to be struck off which was the case where a company was restored in Yeung Kwok v Attorney General et al BVIHCM 3011/0002, and in this case where the Claimant knew that the company had assets though he thought they were of little value. In a case where an applicant has intentionally allowed the company to be dissolved it should have to convince the court that in those circumstances the company should be restored.

(3) the Claimant was therefore at fault for the Company being struck off.

[69] The Court adjourned the matter to allow the claimant to file additional evidence.

[70] In response to the objection on ownership in addition to his own affirmation with exhibits confirming his ownership of the shares, he relied on the affidavit of James Granby and the documents exhibited thereto which contained confirmation from Hogan Lowells the attorneys for M Ltd that the Company was listed as a member of M Ltd. The court also adjourned for further evidence that a Share Purchase Agreement ("SPA") had been entered into to sell the shares. An affidavit by Marcia McFarlane with exhibits was filed on 12 January 2018. The evidence being confidential the Court on application ordered them to be sealed in the court file. The Court perused the SPA and by its terms the purchase is conditional on the company being restored. The contracted price and therefore the value of the shares was significant. Similarly, evidence was presented of the Company's ownership in company S Ltd.

[71] With respect to the observation that it was the Claimant's fault for intentionally allowing the company to be struck off Ms Crabbe-Adams relied on one of the principles referred to by Neuberger J, as he then was, in Re Blenheim:

> "[8] Where it would be otherwise right to do so, refusal to restore a company to the Register on the grounds that it was the company's own fault, or the fault of its advisers, that the company was struck off may in many circumstances and, I believe, in the overwhelming majority of circumstances be too great a penalty to

impose (see Re Moses & Cohen Limited [1957] 3 ALL ER 232, [1957] 1 WLR 1007"…

[72] After considering the additional evidence the first defendant informed the court in a further written submission that it had withdrawn its objection relating to the applicant discharging its evidentiary burden.

CONCLUSION

[73] The Claimant passed the threshold test for applying under the BCA having proved by clear documentary evidence his ownership of the company at the time of dissolution. The purpose for which the Company was formed was to hold his assets, and he proved by cogent evidence that he owned the shares in M Ltd at the date of dissolution. The application to restore was made well within the 7-year period after its dissolution and ll other procedural requirements were met. The reason for the Company being restored was to recover residual assets whose value was lately discovered by him which otherwise would have remained vested in the Crown. The restoration was therefore for a beneficial purpose.

[74] The second defendant who represents the Crown did not object to the restoration and the first defendant withdrew its initial objection.

[75] There was no evidence that any third party would be prejudiced by the restoration. Although the Claimant knowingly allowed the Company to be struck off it was based on an erroneous belief. He will have to pay the fees and penalties applicable under the BCA as a precondition for restoration. In the circumstances it would have been a disproportionate response not to restore the Company to the Register because it was just to do so.

[76] By virtue of s. 218B(2) (amendment by Act 5 of 2012) the restoration will take effect from the date and time that the copy of the sealed Order is filed with the Registrar.

[77] I imposed as a condition for restoration that the applicant must pay all the back fees and penalties due to the Registrar under the BVI Business Companies Act and also pay costs to the defendant in the sum of US$2000.00.

[78] I wish to thank both counsel and Mr Grayson for their useful assistance.

Hon K Neville Adderley
Commercial Court Judge (Ag)

By the Court

Registrar