

Restoring companies in the BVI: recent case law and recent legislative changes

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Where a British Virgin Islands company is struck off the register, its directors and members cannot carry on the company's affairs, commence or defend legal proceedings in the name of the company, or deal with the assets of the company.

Where a company has been dissolved – whether voluntarily, by Court Order, or because of a lapse of time since it was struck off administratively – it is legally dead. There will often be a need for it to be brought back into existence to fulfil some purpose. Often this is to sue the company, and sometimes it is to distribute property that was not distributed upon its dissolution and that fell bona vacantia.

Accordingly, directors, members and other stakeholders of British Virgin Islands (**BVI**) companies should take steps to understand how the restoration of companies in the BVI (whether they have been struck off or dissolved) is provided for in BVI legislation and case law. Amendments to the BVI Business Companies Act 2004 (**BCA**) came into force on 1 January 2023 which substantially alter the law in this area.

Also, recent case law in the BVI has served as a salutary reminder that the Court exercises its power to restore dissolved Companies very carefully and that any such application is more than a mere box-ticking exercise. In this article, we look at the ways a company – which has been struck off or dissolved – can be restored.

Restoring a company that has been struck off and dissolved

Prior to 1 January 2023, if a company had been struck off for administrative reasons (usually the non-payment of government fees), the company could be restored by a simple process involving the submission of a form to the Registrar of Companies and the payment of outstanding fees

and penalties. Under the old law, if the company remained continuously struck off for a period of seven years it was automatically dissolved and a different restoration process was required.

The amendments to the BCA, which came into force on 1 January 2023, alter this process. There will be some transition arrangements in place until 1 July 2023, but it is important for BVI company directors and shareholders to understand the changes taking place.

From 1 January 2023, any company which is struck off for administrative reasons will only have **90 days** to make good on all outstanding fees and penalties and be restored. If it fails to do this, the Registrar of Companies may publish a notice in the BVI Gazette which has the effect of dissolving the company. The transition arrangements apply to companies which have been struck off before 1 January 2023. These companies will be automatically dissolved on 1 July 2023.

The importance of restoring struck off companies to the register is to avoid dissolution. Once a company is dissolved for having been struck off and not having repaired its position within the 90 day period, the process for restoring it is more complicated.

Although struck off and then dissolved, the company can still be restored to the Register by the Registrar of Companies under the newly amended BCA. This is a welcome simplification of administrative strike off and dissolution. Any applicant should be aware of the criteria to be met before the Registrar of Companies will restore a struck off and dissolved company. The application for restoration must be made in the approved form and the Registrar of Companies must be satisfied that:

- a. the company was carrying on business or in operation at the date of its striking off and dissolution
- b. a licensed person has agreed to act as registered agent of the company
- c. the registered agent has made a declaration in the approved form that the company's records have been updated as required under the BCA
- d. the company has paid the restoration fee and any outstanding penalties in relation to the company
- e. the Registrar is satisfied that it would be fair and reasonable for the company to be restored to the Register

If, following the striking off and dissolution of the company, any property of the company has vested in the Crown *bona vacantia*, the Financial Secretary must signify to the Registrar the Crown's consent to the company's restoration. Alternatively, the applicant must show that the Financial Secretary failed to respond to its request for the Crown's consent to the restoration within seven days of being notified of it.

An application to restore a company that was dissolved subsequent to being struck off must be

made within five years.

Restoring a company after voluntary/involuntary liquidation

Restoring a company which has been liquidated voluntarily or by Court Order is much less straightforward in the sense that it involves an application to the BVI Court. The BCA has also been amended as it relates to this area.

Standing

In order to restore a dissolved company, the person making the application to the BVI Court must have standing. The categories of persons entitled to make the application have changed. They are as follows:

- a. the Attorney General or any other competent authority in the BVI
- b. a creditor, former director, former member or former liquidator of the company
- c. a person who but for the company's dissolution would have been in a contractual relationship with the company
- d. a person with a potential legal claim against the company
- e. a manager or trustee of a pension fund established for the benefit of employees of the company
- f. or any other person who can establish an interest in having the company restored to the Register

Purpose

The applicant must be seeking to restore the dissolved company for a valid purpose. There are two valid purposes given in the BCA: (i) to initiate, continue or discontinue legal proceedings in the name of or against the company; and (ii) to make an application for the company's property that has vested in the Crown bona vacantia to be returned to the company. Outside of these two categories, the Court has a discretion to entertain an application to restore a company if, considering any particular circumstances, it is just and fair to restore the company. The exercise of this discretion has yet to be tested.

Timing

An application cannot be brought more than five years after the company was dissolved. This is a significant reduction in the period which existed before the BCA amendments.

Notice

The application must be notified to the Registrar of Companies, the Financial Secretary and (where the company was regulated under the Financial Services Act) the Financial Services Commission. Applications must be accompanied by the consent of the Crown (signified by the Financial Secretary) that the Crown does not object to the restoration, or a response from the Financial Secretary that there is an objection, or a declaration by the applicant that they have received no response from the Financial Secretary within seven days of having given notice of the application.

Liquidator

A company dissolved following voluntary or Court ordered liquidation can only be restored into liquidation. Therefore, an essential step to take in applying for the restoration of a company is to find a BVI licensed insolvency practitioner who will agree to act as liquidator of the restored company. Ogier maintains good working relationships with a variety of BVI licensed insolvency practitioners and we can help an applicant find the insolvency practitioner best suited to their needs.

Discretion

Once a valid application has been made, the Court may make an order restoring the company subject to the Court being satisfied that the restored company will have a licensed registered agent who has made the relevant statutory declaration, that the company has paid any outstanding fees and penalties and "such other conditions as the Court considers appropriate". It is this final criterion that has given rise to much of the case law in this area.

In a number of judgments over the last 10 or more years, the BVI Court has been very clear that English authorities on the restoration of companies are inapplicable in the BVI. The legislative frameworks for the restoration of companies in the United Kingdom and the BVI are so different that the English approach to the questions which arise on restoration applications is of limited or no benefit to the BVI Court.

The phrase "such conditions as the Court considers appropriate" has not been changed by the amendments to the BCA. Neither has the fact that upon the making of a valid application the Court "may" restore the company. Therefore, the case law regarding the restoration of dissolved companies as it has developed in the BVI remains instructive.

The legislation is largely silent on how the Court must exercise its discretion to restore companies, but a line of authority has developed which places the onus on the applicant to demonstrate not just that the company can be restored and that there are good grounds for doing so, but that there are sufficiently good grounds for restoring the company which outweigh any prejudice to third parties (see *Elite Source Ltd v Registrar of Corporate Affairs*

BVIHCV2013/0077, per Ellis J). This is crucial since very often the rights of third parties can be adversely affected by the decision to restore or not to restore the company, for example, where the company made an equitable assignment of a chose in action to a third party.

Some judgments seemed to suggest that the Court would only restore a company if there was no other alternative open to the applicant, for example, it was a necessity (see *Dedyson Enterprises Ltd v Registrar of Corporate Affairs* BVIHCM2011/0008, 17 February 2011 per Bannister J, and *Yeung Kwok Mung v Attorney General* BVIHCM2011/0002, 23 February 2011 per Bannister J). These cases gave rise to a misplaced belief that where the applicant had some other means of resolving their difficulty, that actually precluded an application for restoration. However, in *Global Diversity Opportunity II Ltd v Registrar of Corporate Affairs* (BVIHC (COM) 2020/0176, 12 March 2021) Jack J made clear that the Court always retains a discretion to restore a company and the existence of an alternative resolution to a difficulty faced by the applicant is a factor to be considered, but it is not a determinative one.

Jack J's judgment in *Global Diversity* underlines the discretionary nature of the Court's power to restore a dissolved company. Such a discretion will be exercised when the Court has taken all the relevant factors into account. The dissolution of a company is a lengthy and important process. The Court will not lightly restore a company once it has been dissolved. It is for this reason that applicants should be mindful that applications to the Court for the restoration of a dissolved company are not administrative applications. These applications require careful preparation.

Post application and Order

Unlike other Orders of the Court, the restoration of the company does not take effect immediately. The Court's Order must first be sealed and served on the Registrar of Companies. Once this has taken place (and the Registrar of Companies is satisfied that the requirements of the Order have been complied with, and all outstanding fees and penalties have been paid), the Registrar can proceed to restore the Company. The effective date of restoration is the date the sealed Order was served on the Registrar of Companies. It is important to bear this timing in mind where limitation periods or other deadlines are an issue for the applicant. If the sealed Order is not served on the Registrar of Companies within 30 days, it ceases to be valid.

Ogier's Dispute Resolution Team in Hong Kong has extensive experience restoring struck off and dissolved companies. For more information about this area of BVI law, contact our team.

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