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Dissolved companies restored to the Register: Implications for directors' duties

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Kenneth Davies v (1) Stephen Ford (2) Richard Monks (3) Greenbox Recycling Kent Ltd [2020] EWHC 686 (Ch)

A High Court decision has, among other findings, provided clarity to the effect of the statutory provisions relating to dissolved companies once they are restored to the Register.

The High Court held that directors' duties owed to the company do not continue while it is dissolved. The directors in this particular case were held liable for breaching orthodox fiduciary principles, for example that a fiduciary must not profit from its position of trust even if the principal could not make that profit.

The focus of this note is on the position of directors' duties upon dissolution of a company that is then restored to the Register.

Background

- The facts of this case are complex and were in dispute between the parties.
- Greenbox Recycling Ltd ("**GBR**") was incorporated on 1 March 2010 by Mr Davies. Mr Davies intended GBR to take over an existing skip hire and waste recycling business (the "**Business**") which was run through a different company. Mr Davies' case is that the Business was transferred to GBR in about November 2010.
- Mr Ford and Mr Monks were directors of GBR. Mr Ford and Mr Monks each held 10% of the shares in GBR. Mr Davies held 80% of the shares in GBR. Mr Davies stepped back from any day-to-day involvement because of various personal and professional difficulties which had affected him during 2010, and moved abroad.
- Another company called Greenbox Recycling (Kent) Ltd ("**GBRK**") was incorporated by Mr Ford and Mr Monks on 7 January 2011. Mr Ford and Mr Monks were both directors and shareholders of GBRK on incorporation, although Mr Ford resigned as a director after only a few days, and sold his shares to Mr Monks during 2013.
- GBR was struck off the Register of Companies on 18 October 2011 under the power conferred on the Registrar to strike off a company which is apparently defunct and no longer trading. On 13 December 2016 an application was made to restore GBR and simultaneously a petition presented for GBR's winding-up on the just and equitable ground. GBR was restored to the Register on 23 January 2017 and also ordered to be wound-up.
- The claims advanced against Mr Ford and Mr Monks were that they diverted the Business, which was intended to be operated through GBR to GBRK, and that such diversion involved them in breaches of

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contract and breaches of the duties they owed as directors of GBR.

- In support of these claims, one of Mr Davies' arguments was that the duties of the directors of GBR continued even when GBR was struck off the Register. As a consequence of GBR being deemed "to have continued in existence" the current business of GBRK should be held on constructive trust for him.

Restoration of a company does not deem directors' duties to have continued while the company was dissolved

The Court held that, while sections 1028(1) and 1032(1) of the Companies Act 2006 deem a restored company "to have continued in existence as if it had not been dissolved", it was not relevant to the facts of this case as the Court was not concerned with the existence or non-existence of GBR. Instead, its concern lay with the liability of the directors who are separate legal persons.

Accordingly, the directors who were still in office when GBR was dissolved were not deemed to have owed duties to the company while it was dissolved. The Court distinguished previous cases on the scope of these statutory provisions as relating to the validity of actions concerning the dissolved company, not its officers.

The Court also considered that if this argument was accepted, it could lead to unnecessary consequences. It was not appropriate to deem directors' duties to continue in circumstances where they had no powers over the same company (as it did not exist while dissolved).

Directors are entitled to certainty as to the scope of their fiduciary duties. If the legislation could retrospectively resurrect fiduciary duties so that they were owed to companies once they had ceased to exist, this would create a level of uncertainty.

On the facts, the relevant directors could still be pursued for breach of other duties owed to GBR before it was dissolved. However the Court held that the question of remedy from the breaches of duty could not be answered by saying that the whole of GBRK's current business is held on constructive trust for Mr Davies. Issues therefore remain which will have to be addressed at a further trial, concerning the form of relief to be awarded and its extent.

Conclusion

This case provides useful clarity to directors that their fiduciary duties do not continue when the company has been struck off the Register. It also provides a reminder to directors of their fiduciary duties.

Although this is a decision from the High Court in England and Wales, it is likely that the Royal Court of Guernsey would find this decision highly persuasive and would likely follow it here in Guernsey as the Companies (Guernsey) Law, 2008 has a similar statutory provision (section 371(7)).

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