COLLAS CRILL

The Court's discretion to restore voluntary/involuntary liquidated and dissolved companies

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At the start of 2023, as we welcomed changes into our lives, the BVI also welcomed changes to the BVI Business Companies Act (BCA) with its amendments which came into force on 1st January 2023.

One notable change is that of the procedure for the restoration of companies to the Register of Companies in the BVI. Namely, any company which is struck off for administrative reasons, such as not having a Registered Agent or failing to pay its annual licencing fee, will only have **90 days** to settle all outstanding fees and penalties or appoint a Registered Agent and thereafter be restored to the Register of Companies.

If the company fails to do this, the Registrar of Companies may publish a notice in the BVI Gazette which effectively dissolves the company. Following the dissolution of a company, there is a simplified process for the restoration of a company, which starts with making an application to the Registrar of Corporate Affairs for its restoration. There are transitional arrangements in place for companies which have been struck off before 1 January 2023 which will result in the companies being automatically dissolved on 1 July 2023. There are also transition arrangements which apply to companies which were dissolved before 1January 2023 - specifically, that an application for restoration must be made within five years.

However, it is the restoration of a dissolved company following voluntary or involuntary liquidation that proves more difficult, as an application must be made to the court for an order to restore the company.

The restoration of dissolved companies following voluntary/involuntary liquidation

The amendments to the BCA requires the applicant to seek to restore a dissolved company for a valid purpose such as:

(a) to initiate, continue or discontinue legal proceedings in the name of or against the company; and/or

(b) to make an application for the company's property that has vested in the Crown bona vacantia to be returned to the company.

Beyond these purposes, it is the court's discretion to make an order restoring a company if it is just and fair to do so. The legislation is silent on how the court must exercise its discretion to restore companies, but case law

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places the onus on the applicant to demonstrate that there are good grounds for restoring a dissolved company.

Grounds for restoring a company can be demonstrated if:

1. There is no alternative to restoration of the company

The court is minded to exercise its discretion if it can be satisfied that there is no alternatives open to the applicant and thus restoration of the company to the Register of Companies is a necessity.

Banner J has made this clear in ***Yeung Kwok Mung v Attorney General BVIHCM2011/0002****, when he quoted* ***Dedyson Enterprises Ltd v Registrar of Corporate Affairs BVIHCM2011/0008*** at para [12-13]:

> "[that] a company which has been dissolved after liquidation should be restored only when necessary for the purpose either of dealing with matters which should have been dealt with in the winding up but were inadvertently overlooked or which have unexpectedly arisen subsequently. In my judgment, even in these circumstances *restoration should be the course of last resort* where companies have been dissolved following liquidation. If a difficulty can be resolved without restoration, *then that alternative method is to be preferred*. ... restoration should only occur when it is necessary in the interests of justice."

Accordingly, the court may be minded to grant the restoration of a company if it can be satisfied that upon the dissolution of a company, following a voluntary liquidation, that there was an asset that was overlooked which ought to have been transferred into the beneficial owner's name before the company was liquidated and thereafter dissolved.

However, this does not mean that where an applicant has some other alternative way of resolving an issue that an application for restoration cannot be made.

2. The court will consider all relevant factors

In fact, in ***Global Diversity Opportunity II Ltd v Registrar of Corporate Affairs (BVIHC (COM) 2020/0176)*** Justice Jack made it 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.* Rather, such *a discretion will be exercised when the Court has taken all the relevant factors* into account.

Key considerations the court will take into account:

- Whether the BVI company owed *fiduciary duties to third parties;*
- Where an alternative to restoration is to be preferred, the court will consider the *level of complexity* involved in exploring that alternative. A complex alternative will have less weight than a simple one; or

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- Whether there is *exceptional circumstances* to allow a liquidated company to *be restored to resume business*. If there are none, then the companies would only be restored for run-off purposes only – to deal with their assets or to bring a claim and thereafter, once the business has been done, to be immediately liquidated.

3. Restoring the company outweighs any prejudice to third parties

It is important to note that the court will take into consideration when exercising its discretion whether there will be any prejudice to third parties (see **Ellis J in Elite Source Ltd v Registrar of Corporate Affairs BVIHCV2013/0077**). This is crucial as it is very often that the rights of third parties can be adversely affected by the court's decision to restore/not to restore a company.

If you have any questions relating to the restoration of companies in the BVI please contact a member of our Dispute Resolution team.

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