



Legal Insights

Company Restorations in the BVI

June 2024

Introduction

Amendments to the BVI Business Companies Act 2004 (the "**BCA**") came into force on 1 January 2023 which changed the landscape for striking off, dissolving and subsequently restoring a British Virgin Islands ("**BVI**") company to the Register of Companies ("**Registrar**"). This Briefing Note recaps the current position and aims to provide some practical insight into the restoration process. References to BCA are references to the BVI Business Companies Act 2004 as amended.

Position of companies struck-off and dissolved before 1 January 2023

The position for companies struck-off and dissolved before 1 January 2023 is set out in our previous [article](#).

To recap briefly, prior to 1 January 2023, a BVI company that was struck-off for an administrative reason, such as for non-payment of government fees, could be restored to the Register. This involved the submission of a form to the Registrar of Corporate Affairs ("**Registrar**") and the payment of the outstanding fees and penalties. An application could be made by the company, a creditor, a member or liquidator of the company. Under the previous law, a company which was struck-off for a continuous period of 7 years would be automatically dissolved from the end of the 7-year period. For a dissolved company, a similar (but less straightforward) process was available to restore the company. An application to restore a dissolved company was required to be made within 10 years of the date of dissolution. Such an application could be made by a creditor, former director, former member, former liquidator or any person who was able to establish an interest in the company being restored.

Transitional arrangements

There were transitional arrangements in place for companies which were struck-off or dissolved before 1 January 2023 and our previous [article](#) provides insight into these arrangements.

[Struck-off company](#)

To recap, a company which, as of 1 January 2023, was struck-off and not dissolved or restored had until 30 June 2023 to apply to the Registrar to be restored to the Register unless:

- a) the previously applicable 7-year period ended prior to such date, in which case that earlier date would have been the deadline for applying for restoration; or
- b) the previously applicable 7-year period ended after 30 June 2023, in which case 30 June 2023 would have been the deadline.

If a struck-off company was not restored on or by such dates set out above (whichever was applicable), that company would be dissolved the day after. Accordingly, 30 June 2023 was the last day that a struck-off company could be restored otherwise it would have been dissolved on 1 July 2023.

Such an application would have had to be made to the Registrar under section 217 of the BCA (see below).

If the struck-off company was restored, the company was deemed never to have been struck-off the Register.

Dissolved company

A company which, as of 1 January 2023, had been struck-off and dissolved, had until 1 January 2028 to apply for restoration unless:

- a) the previously applicable 10-year period ends prior to such date, in which case that earlier date shall be the deadline; or
- b) the previously applicable 10-year period ends after 1 January 2028, in which case 1 January 2028 shall be the deadline.

Such an application would be made to the court under section 218 of the BCA (see below).

If the dissolved company is restored, the company is deemed never to have been dissolved.

Position of companies struck-off and dissolved after 1 January 2023

From 1 January 2023, a company that was struck-off for administrative reasons will only have ninety (90) days to make good on all outstanding fees and penalties and be restored. A failure to do so will mean that the Registrar may publish a notice in the BVI Gazette striking off the company. It can therefore be seen that the process of strike off and dissolution under the new regime happens almost simultaneously.

Restoration by Registrar

Notwithstanding the above, a struck-off and dissolved company can still be restored to the Register by the Registrar under section 217 of the BCA. The BCA simplifies the previous process. An application in the approved form may be made and if the conditions set out in section 217 are met, the company *may* be restored. The Registrar must be satisfied that the following conditions have been met:

- the company was carrying on business or in operation as at the date it was struck-off and dissolved;
- a licensed person is willing to be the company's registered agent on restoration;
- the registered agent has updated the company's records and make the necessary declaration;
- where any of the company's assets have, following striking off and dissolution, vested in the Crown *bona vacantia*, the Financial Secretary has:
 - a) expressly signified to the Registrar the Crown's consent to the restoration of the company; or
 - b) has, within 7 days of receiving a request to give the Crown's consent to the company's restoration, failed to respond to the request or refused consent;
- the company has paid the applicable restoration fee and any outstanding penalties; and
- the Registrar is otherwise satisfied that it would be fair and reasonable for the company to be restored.

The period for restoring a struck-off and dissolved company to the Register via the Registrar is 5 years. The 5 years is from the date on which the notice was published in the BVI Gazette striking the company off the Register. It should be noted from the above that it is possible for dissolved companies to be restored by way of an application to the Registrar, whereas this would have previously required an application to the court. This streamlined process for restoring dissolved companies is a welcome development.

Where a company is restored to the Register under section 217, the company is deemed never to have been struck-off the Register and dissolved.

[Restoration by court](#)

An application to the court to restore a dissolved company to the Register is still required under section 218 of the BCA in circumstances where:

- the company was struck-off and dissolved following the conclusion of its liquidation (whether voluntary or involuntary);
- on the date of dissolution, the company was not carrying on business or in operation;
- the purpose of restoration is to:
 - a) initiate, continue or discontinue legal proceedings in the name of or against the company; or
 - b) make an application for the company's property that has vested in the Crown *bona vacantia* to be returned to the company; or
- in any other case or in which application cannot be made to the Registrar under section 217, the court considers that, having regard to any particular circumstances, it is just and fair to restore the company to the Register.

An application has to be made within 5 years of the date of the company's dissolution.

The restoration application is made by way of a Fixed Date Claim Form together with an affidavit of the claimant, exhibit and a draft Order. The affidavit should set out, inter alia:

- the purpose of the restoration; and
- the claimant's standing to restore the company. Under section 218(2), the following have standing to make an application to the court to restore a dissolved company to the Register:
 - a) the Attorney General or any other competent authority in the Virgin Islands;
 - 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; or
 - f) any other person who can establish an interest in having the company restored to the Register.

In the event that an application is made because the purpose of the restoration is to make an application for the company's property that has vested in the Crown *bona vacantia* to be returned to the company, such application shall not be made unless the application is accompanied by the written:

- a) consent of the Crown signified by the Financial Secretary that the Crown has no objection to the company's restoration;
- b) response of the Financial Secretary objecting to the company's restoration; or
- c) a declaration of the applicant that the Financial Secretary has not responded to a request for consent to the company's restoration within a period of 7 days after receipt of the request.

[Notice](#)

Notice of the application under section 218 of the BCA must be given to the Registrar, the Financial Secretary and, where the company was regulated under the Financial Services Act, the Financial Services Commission.

[Court's power to grant restoration upon application under section 218 of the BCA](#)

Upon an application under section 218, the court *may* make an order to restore the company to the Register under section 218A subject to:

- the court being satisfied that a licensed person has agreed to act as registered agent of the company;

- the registered agent making a declaration in the approved form that the company's records have been updated;
- the company paying the restoration fee and any outstanding penalties in relation to the company; and
- such other conditions as the court considers appropriate.

Evidence from the registered agent should be included in the exhibit to the affidavit.

It should be noted that in the event the company was dissolved following the conclusion of its liquidation (whether voluntary or involuntary), the court will not restore the company unless the claimant nominates a liquidator, the proposed liquidator consents to act and satisfactory provisions have been or will be made for the liquidator's expenses and remuneration (if appointed).

Upon a valid application, the court "may" restore the company. The court can exercise its discretion to restore a company but the legislation is largely silent as to how the court can do this. However, case law has developed which provides some guidance as to how the court can exercise its discretion. From our experience, it is prudent that any application to restore a company addresses the court's discretion to grant the application to restore the company. In *Global Diversity Opportunity II Ltd v Registrar of Corporate Affairs (BVIHC (COM) 2020/0176)*, the BVI court confirmed that the court always retained discretion to restore a company. The court will exercise its discretion when it has taken all the relevant factors into account. Another BVI court case, *Trade Management Ltd v The Registrar of Corporate Affairs (BVIHC (COM) 2021/0219)*, provided some more guidance as to the restoration of a company and the factors that the court will consider in an application. In *Trade Management*, it was stated that restorations are a two-step process. The first step is establishing the claimant's standing. The second step (assuming the claimant has standing) is for the court to exercise its discretion. In *Trade Management*, having valuable assets in Hong Kong, failing to pay the registration fee because of an oversight and the application being supported by shareholders were factors which favoured the ordering of the company's restoration by the court.

Order

The restoration of the company will not take effect immediately where the court makes an order restoring the company to the Register. There are several steps that need to be taken before this can happen:

- a sealed copy of the order shall, within 30 days, be filed with the Registrar. If a sealed copy of the order is not filed with the Registrar within 30 days, it will cease to be valid; and
- On receiving a filed copy of the sealed order, the Registrar shall restore the company to the Register upon being satisfied that the company has complied with the terms of the order. The effective date of restoration will be the date and time that the copy of the sealed order was filed. A certificate of restoration to the Register will be issued.

To avoid delays in the restoration of a BVI company, it is therefore prudent for the claimant to comply with the terms of the order once it has been made by the court. Where the company is restored to the Register, it is deemed never to have been struck-off the Register and dissolved.

Conclusion

As set out above, restorations of BVI companies are not merely an administrative act - they are applications that require careful planning in order to give the application the best chance of being granted. We have advised on a significant number of BVI company restorations. Please contact a member of our team who will be able to discuss the options available and to guide you through the restoration process.

This publication is not intended to be a substitute for specific legal advice or a legal opinion. For specific advice on company restorations in the BVI, please contact your usual Loeb Smith attorney or any of the following:

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