



## Legal Updates

# The restoration of struck-off and dissolved companies in the British Virgin Islands: post January 2023

February 2023

### Introduction

This article follows our previous article of 5 January 2023 which considered, in broad terms, the changes to the BVI Business Companies Act, 2004 (the **Companies Act**) of the British Virgin Islands (**BVI**) brought about by The Business Companies (Amendment) Act, 2022 (the **Amendment Act**). This article will consider in more detail the changes introduced by the Amendment Act to the provisions of the Companies Act which deal with the restoration of companies which have been struck-off or dissolved.

In this article, references to the **Amended Companies Act** are references to the Companies Act as amended by the Amendment Act.

### The pre-January 2023 position

Before the Amendment Act came into force, there were two distinct processes under the Companies Act which dealt with the restoration of companies that had been struck off and those which had been dissolved, respectively.

A company which was struck-off for a continuous period of 7 years was automatically dissolved with effect from the last day of that 7-year period<sup>1</sup>. An application could be made to the Registry of Corporate Affairs prior to dissolution by the company or a creditor, member or liquidator of the company.

A similar (but less straight-forward) process was available for companies which had been dissolved. An application could be made to the BVI Court by a creditor, former director, former member or former liquidator of the company or indeed any person who was able to establish an interest in the company being restored<sup>2</sup>.

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<sup>1</sup> Section 216 of the Companies Act.

<sup>2</sup> Section 218 of the Companies Act.

Any application to restore a dissolved company was required to be made within the period of 10 years after the date of dissolution of the company.<sup>3</sup>

Therefore, in some cases, it would be possible to restore a company as long as 17 years after it was initially struck-off (for example, where a company was struck off for a period of 7 years before being dissolved, it would then be a further 10 years before restoration of the dissolved company ceased to be available).

A company that was restored was deemed to have continued in existence as if it had not been struck off or (as applicable) dissolved and (in the case of a company that had been dissolved) any assets that had vested in Crown as a result of its dissolution was required to be returned to the company.

### **The amendments made to the Companies Act by the Amendment Act**

The amendments made to the Companies Act by the Amendment Act make significant changes to the circumstances in which companies that have been struck-off are dissolved and also to the permitted timescales within which an application to restore a struck-off or dissolved company can be made.

Under the Amended Companies Act, a company that is struck-off will be automatically dissolved on the date the Registry of Corporate Affairs publishes a notice of striking-off of the company, which will be done approximately 90 days after the company is struck-off. The previous 7-year gap between striking-off and dissolution has therefore all but vanished.

As regards the process of restoring a struck-off / dissolved company, section 217 of the Amended Companies Act states that an application in the approved form may be made and that if the conditions in section 217(2) of the Amended Companies Act are met, the company will be restored. The conditions in section 217(2) are:

- 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 and that registered agent has updated the company's records;
- in circumstances where any of the company's assets have, following its striking-off and dissolution, vested in the Crown *bona vacantia*, the Financial Secretary has expressly or impliedly consented to the restoration of the company;
- the company has paid the applicable restoration fee and other outstanding amounts; and

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<sup>3</sup> Section 218(2) of the Companies Act.

- the Registry is otherwise satisfied that it would be “fair and reasonable” for the company to be restored.

The timescale within which an application for restoration of a company has also been shortened from 7 years to 5 years, with such 5-year period commencing on the date on which the notice of striking-off is published in the BVI Gazette.

Importantly, however, it should be noted from the above that *dissolved* companies can now be restored by way of an application to the Registry, whereas this would (as noted in the previous section) have previously required an application to the BVI Court. Whilst there may be some justified concern around the significantly altered time periods noted above, this streamlined process for restoring dissolved companies is a welcome development.

For the avoidance of doubt, an application to the BVI Court is still required in circumstances where the company that is to be restored was dissolved following the conclusion of its liquidation<sup>4</sup>.

### Transitional provisions

One immediate question that arises from the provisions of the Amended Companies Act relating to the restoration of companies, is what do these changes mean for companies who, as at the time the Amendment Act came into force, were struck-off but not dissolved and whose striking-off was published in the BVI Gazette? Does this mean that the former provisions apply to such companies or has their date of dissolution been back-dated to tie in with the provisions of the Amended Companies Act?

Fortunately, clarity on this issue is provided by the “Transitional Provisions Applying to Struck Off And Dissolved Companies” in sections 60A to 60G (inclusive) of the Amendment Act:

- For companies who, as of 1 January 2023 (the **Effective Date**), were struck-off and not restored, they have until 30 June 2023 to apply to the Registrar to be restored to the register **unless** (A) the previously applicable 7-year period<sup>5</sup> ends *prior* to such date, in which case that earlier date shall be the deadline for applying for restoration; **or** (B) the previously applicable 7-year period ends *after* 30 June 2023, in which case 30 June 2023 shall be the deadline. If a struck-off company is not restored on or by such dates (whichever is applicable), that company will be dissolved on the day thereafter; and
- For companies who, as of the Effective Date, were dissolved, they have until 1 January 2028 to apply for restoration **unless** (A) the previously applicable 10-year period<sup>6</sup> ends *prior* to such date,

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<sup>4</sup> Section 218 of the Amended Companies Act.

<sup>5</sup> Per Section 216 of the Companies Act

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.

## Conclusion

Restoring companies that have either been struck-off or dissolved has always (necessarily) been a process-driven matter. Notwithstanding some welcome changes that have been brought about by the Amendment Act this very much remains the case.

We have advised on a significant number of BVI company restorations and we are well placed to do so in light of these developments. Please contact a member of our team, who will be able to discuss the options available to you under the law as it now stands and to guide you through the restoration process.

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<sup>1</sup> Per Section 218(2) of the Companies Act

***This publication is not intended to be a substitute for specific legal advice or a legal opinion. For specific advice on restoration of struck-off and dissolved companies in the British Virgin Islands, please contact your usual Loeb Smith attorney or any of the following:***

E: [gary.smith@loebsmith.com](mailto:gary.smith@loebsmith.com)

E: [robert.farrell@loebsmith.com](mailto:robert.farrell@loebsmith.com)

E: [elizabeth.kenny@loebsmith.com](mailto:elizabeth.kenny@loebsmith.com)

E: [peter.vas@loebsmith.com](mailto:peter.vas@loebsmith.com)

E: [vivian.huang@loebsmith.com](mailto:vivian.huang@loebsmith.com)

E: [yun.sheng@loebsmith.com](mailto:yun.sheng@loebsmith.com)

E: [faye.huang@loebsmith.com](mailto:faye.huang@loebsmith.com)

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