

## Article

# Restoration to the Register of Companies and Winding Up Order

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## Introduction

In the recent judgment of *In the Matter of Margara Shipping Limited* (the “Margara Decision”)<sup>1</sup> the Cayman Islands Grand Court provided some useful guidance on the basis on which a company can be restored to the Register of Companies (the “Register”) and subsequently wound up pursuant to section 159 of the Companies Act (2021 Revision) (the “Companies Act”) and the Grand Court Rules (2022 Consolidation) (“GCR”), Order 102, Rule 18.

## The Legal Basis to Restore and Wind Up A Company

Section 159 of the Companies Act provides that:

*“If a company or any member or creditor thereof feels aggrieved by the company having been struck off the register in accordance with this Act, the Court on the application of such company, member or creditor made within two years or such longer period not exceeding ten years as the Cabinet may allow of the date on which the company was so struck off, may, if satisfied that the company was, at the time of the striking off thereof, carrying on business or in operation, or otherwise, that it is just that the company be restored to the register, order the name of the company to be restored to the register, on payment by the company of a reinstatement fee equivalent to the original incorporation or registration fee and on such terms and conditions as to the Court may seem just...”*

Order 102, Rule 18(1) of the GCR provides that:

*“An application by a creditor under Section 159 may be combined with an application under Section 94 of the Companies Act and may be made by petition in Form No. 68 of the Grand Court Rules – Volume II, in which case Order 3 of the Companies Winding Up Rules (as amended and revised) shall apply”.*

## The Margara Decision

The Margara Decision was the second reported Cayman Islands case that deals with the law surrounding the right of a company to be restored and thereafter wound up in the Cayman Islands. The case involved a company that was struck off the Register of Companies on 30 December 2011. Margara Shipping Limited (the “Company”) was incorporated solely for the purposes of ownership of a vessel, “the Margara”. Shipowners Insurance and Guaranty Company Ltd., a company registered in Bermuda was a creditor (and a prospective creditor) of the company (the “Petitioner”). The Petitioner applied for the restoration and subsequent winding up of the Company pursuant to Section 159 of the Companies Act and Order 102, Rule 18 of the GCR.

The Petitioner had provided the Company with a Certificate of Financial Responsibility (“COFR”), subject to certain standard terms and conditions (the “STCs”), for liability that may arise under certain United States (“US”) legislation. It was a term of the STCs that in the event that the Petitioner was called on to settle any claims, the Petitioner would be *prima facie* entitled to be indemnified by the Company in respect of such liabilities as well as the Petitioner’s expenses in responding to such demands. The Petitioner was subsequently called upon to settle liabilities incurred by the Company (as the owner of the vessel) resulting from the grounding of the vessel which caused significant damage to a coral reef in Puerto Rico (the “Underlying Claim”). Further, the Petitioner incurred legal fees and expenses in its efforts to negotiate and settle the Underlying Claim with the US authorities (the “Legal Fees Claim”). The Petitioner sought payment of the amounts demanded for the Underlying and Legal Fees Claim.

The Court referred to the helpful decision of Justice Quinn *In the Matter of OVS Capital Management (Cayman) Limited*<sup>2</sup> which states:

<sup>1</sup> FSD 325 of 2021 (DDJ)

<sup>2</sup> 2017 (1) CILR 232

*“The decision of Laddie, J. in the Chancery Division of the High Court of England and Wales in Re Priceland Ltd<sup>3</sup> provides the following helpful guidelines to the court when considering whether to restore a company to the Register:*

- (i) Before the court can exercise its discretion to restore a company, it must first be satisfied that either the company was carrying on business or in operation or alternatively that it is otherwise just to restore the company.*
- (ii) Whether a company was carrying on business or in operation has to be considered by reference to the time of dissolution.*
- (iii) The words “in operation” should be given a broad meaning in order to give the court the widest possible powers to restore.*
- (iv) In considering whether it was just to restore a company to the register, the court is entitled to look at all the circumstances of the case and is not limited to any particular date.*
- (v) In an application to restore under either limb, absent special circumstances, restoration should follow and exercising the discretion against restoration should be the exception, not the rule...”*

The Court had to be satisfied that either the company was at the time of the striking off carrying on business or in operation, or otherwise that it was just that the company be restored. If an applicant succeeds in passing through on one or both of these gateways, then absent special circumstances restoration should follow<sup>4</sup>. The Court was satisfied that the Petitioner had standing to present the petition as a creditor in respect of the Legal Fees Claim and as a contingent or prospective creditor in respect of the Underlying Claim noting that “creditor” should be construed as widely as possible to include contingent creditors (see *Re Harvest Lane Motor Bodies Ltd* [1968] 2 All E.R. 1012).

The Court cited and relied on helpful authorities which supported the position that notwithstanding that a company was not carrying on business at the time of its strike off (which was the case in the Margara Decision) it might still be considered just to restore the company to the Register adopting the reasoning of

Millet J in *City of Westminster Assurance Co Ltd v Registrar of Companies & Anor* [1997] BCC 960. In the Margara Decision, the Petitioner sought to restore the Company in order to seek indemnification in respect of the Underlying Claim and the Legal Fees Claim and the Court was content to make an order restoring the company on that basis.

The Court noted that the Registrar of Companies (the “Registrar”) had confirmed she had no objection to the reinstatement subject to the payment of outstanding fees and the filing of notice of a licensed service provided as registered office to be filed<sup>5</sup>. It was also noted that the Minister for Finance and Economics Development had further stated that there was no objection to the restoration application.<sup>6</sup>

#### *Appointment of Official Liquidators*

The Court had to be satisfied that the evidence is sufficient not just for the reinstatement application but also to justify the appointment of official liquidators thereafter. In the Margara Decision, the Court was satisfied that the Petitioner had established a solid basis for the appointment of official liquidators and that it had standing to present the petition as a creditor in respect of the Legal Fees Claim and as a contingent or prospective creditor in respect of the Underlying Claim. It noted sections 94, 92(d) and (e) of the Companies Act and stated, “it appears that the company is unable to pay its debts but in any event it is also just and equitable for the company to be wound up”.<sup>7</sup>

#### **Conclusion**

The Margara Decision is a useful reminder of the steps that are required to be taken when a creditor is seeking to rely on section 159 of the Companies Act and GCR Order 102 R 18. The application is in effect a two-step process of ensuring that the necessary evidence and statutory requirements are in order not just for the reinstatement aspect of the application (pursuant section 159 of the Companies Act) but also for the application to wind up a company (pursuant to section 94 of the Companies Act). It is worth bearing in mind that notwithstanding that a company is sought to be put into official liquidation immediately following its reinstatement, following the Court order it nonetheless needs to provide the Register with notice of a licensed service provider to agree to provide registered office services before the reinstatement will be effective. Applications under section 159 of the Companies Act and GCR Order 102 Rule 18 can provide a useful avenue for creditors who have claims resting against a struck off entity to reinstate the entity and thereafter to ensure its orderly wind up where its proof of debt can be submitted in the usual way.

<sup>3</sup> [1997] BCC 207

<sup>4</sup> *Re Blue Note Enterprises Ltd* [2001] 2 BCLC 427; *Priceland Ltd* [1997] 1 BCLC 467/

<sup>5</sup> Prior to a reinstatement of a company, the application must provide notice of a licensed service provided to act as the registered office.

<sup>6</sup> Justice Doyle, noted in the Margara Decision that there had been a lapse in time from seeking the letter of no objection from the Minister of Finance and from

filing the application. It was noted by the Court that “in future, petitioners would be wise to act expeditiously once the extension of time is granted”. The Court accepted that it was implicit that the Minister for Finance allowed a longer period of 2 years upon with to bring an application to reinstate the company but within the 10 year maximum.

<sup>7</sup> Paragraph 14 of the Margara Decision.

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