



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

CAUSE FSD 122 of 2022 (IKJ)

**IN THE MATTER OF S 159 OF THE COMPANIES ACT (2021 REVISION)
AND IN THE MATTER OF O. 102, r. 18
AND IN THE MATTER OF MANGO JAM CHARTERS LTD**

IN COURT

Appearances: **Mr Rupert Wheeler, KSG Attorneys-at-Law, for Ms Shamilia Wright (the “Petitioner”)**

Before: **The Hon. Justice Kawaley**

Heard: **22 June 2022**

Date of Judgment: **22 June 2022**

INDEX

Petition to restore struck-off company to the register-personal injuries claim with limitation period due to expire imminently-penalty fees-inability of petitioner to obtain access to justice if payment of penalty fees imposed as a restoration condition-jurisdictional requirements for restoration-discretion to waive immediate payment of penalty fees-role of Registrar of Companies in relation to restoration applications-Companies Act (2022 Revision) section 159--Third Parties (Rights against Insurers) Act (2012 Revision), section 9(1)(b)



EX TEMPORE JUDGMENT

Introductory

1. The Petitioner in this case petitions to restore the Company, Mango Jam Charters Ltd, to the register, for the specific purpose of pursuing a claim for personal injuries. The Petitioner submits through Mr Wheeler that it is obviously just that this relief been granted, because absent the Restoration Order sought, the Petitioner will not have any remedy for the substantial injuries that she suffered in a terrible accident that happened at sea on the 11th of August 2019 (a collision between the vessels ‘Pepper Jelly’ and ‘Godfrey Hurricane’) which resulted in two passengers of the vessel, ‘Godfrey Hurricane’, losing their lives. A third passenger, the Plaintiff, sustained life-altering injuries and has clearly suffered considerable loss.

Factual overview

2. The Company, which operated the ‘Pepper Jelly’ was struck off the Register on the 30th of April 2021. The Petitioner has written to the Registrar of Companies, who has confirmed that the Registrar has no objections to the restoration of the Company provided that the restoration fee of \$300.00 is paid and the Company's penalties of \$2100.00 are also paid. The Registrar's letter was a placed before the Court.

Applicable law

3. The law in relation to restoration appears to me to be fairly settled in the Cayman Islands. Section 159 of the Companies Act 2022 (Revision) states as follows:

“159. If a company or any member or creditor thereof feels aggrieved by the company having been struck off the register in accordance with this Law, 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, and thereupon the company shall be deemed to have continued in existence as if its name had not been struck off; and the Court may, by the same or any subsequent order, give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off.” [Emphasis added]

4. Counsel referred the Court by way of guidance to the decision of Justice Quin *In the Matter of OVS Capital Management (Cayman) Limited*, FSD 207/2016 (CQJ), Judgment dated February 28, 2017 (unreported), which contains a helpful summary of the guiding principles to be followed in this Court on such an application. Justice Quin (at paragraphs 21 to 22) said this:

“21. Section 159 of the Companies Law (2016 Revision) permits a company, member or creditor to apply for orders that a struck off company be restored to the register if the Court is 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.

*22. The decision of Mr Justice Laddie in the Chancery Division of the High Court of England and Wales in *Re Priceland Ltd, Waltham Forest London Borough Council v Registrar of Companies*¹, provides the following helpful guidelines to the Court, when considering whether to restore a company to the Register:*

¹ [1997] 1 BCLC 467.



- (a) *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;*
- (b) *Whether the company was carrying on business or in operation has to be considered by reference to the time of dissolution;*
- (c) *The words ‘in operation’ should be given a broad meaning in order to give the Court the widest possible powers to restore. However, if the company is completely dormant, this particular avenue for founding jurisdiction is not made out;*
- (d) *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;*
- (e) *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.* [Emphasis added]

5. Mr Wheeler placed considerable emphasis on that last principle. The Petitioner contends, very simply, that it is manifestly just that she be allowed to restore the Company to pursue the claim because she has no other remedy. That submission appears to me to be sound; and it was substantiated by reference to what appears to be a loophole in section 9(1) (b) of the Vehicle Insurance Third Party (Rights against Insurers) Act (2012 Revision). That subsection provides as follows:



“(1) Where under any contract of insurance a person (hereinafter referred to as ‘the insured’) is insured against liabilities to third parties which he may incur, then:

(a)...

(b) in the case of the insured being a company, in the event of a winding up Order being made, or a resolution for voluntary winding-up being passed with respect to the company, or of a receiver or a manager of the company's business or undertaking being duly appointed, or of possession being taken by or on behalf of the holders of any debentures secured by a floating charge, of any property comprised in or subject to the charge, if, either before or after that event, any such liability is incurred by the insured, his rights against the insurer under the contract in respect of the liability shall, notwithstanding anything in any other law to the contrary, be transferred to and vest in the third party to whom the liability was so incurred.”

6. That is a powerful section which would potentially benefit the Petitioner in the present case where it appears the Company was insured, but which is not available to her because the instance or the case of a company being struck-off is not dealt with in that section. The position in England and Wales is apparently different.

Findings

7. And so I am bound to find that it is manifestly just that the Company should be restored to the register, with a view to enabling the Petitioner to pursue her personal injuries claim against the Company.



8. The only issue, which gave me some concern, was the subsidiary submission that was advanced on the Petitioner's behalf. That submission was equally clearly meritorious in general terms. It was, simply, this. The Petitioner cannot afford to pay the penalty fees and if payment were to be made a condition of the restoration order she would effectively be turned away from the seat of justice.

9. The law, it seems to me, is clear; there is no statutory requirement that all fees be paid. As Mr Wheeler rightly points out, the Court has an unfettered discretion as regards the granting of the substantial relief and as regards what conditions the Court chooses to impose upon a Restoration Order. The only guidance that the statute gives is that any condition should be designed to put the Company back in the position that it was before the striking-off, and that is why it seems to me there is a practice that an applicant for restoration will normally be ordered to pay the relevant restoration fee, together with any penalty fees, which penalties usually reflect in part at least, if not in whole, fees that should have been paid before the Company was struck-off and fees that would cover the period between the striking-off and the restoration.

10. That practice must yield in the face of special circumstances, and it seems to me that the usual practice probably derives from cases where there is no question about the ability of the petitioner to pay the fees. Counsel helpfully put before the Court the case of *In the matter of Grencorp Limited* [2013 2 CILR 39] and a cursory review of the law report of that case makes it clear that the circumstances there were far removed from those in this case. Foster J. observed at paragraph two of his judgment in that case that the petitioner² "*claimed to be a creditor of the company in the sum of at least \$2,859,348.64 and possibly as much as \$6,500,000.00*". This was clearly a substantial commercial entity pursuing a substantial commercial claim. The Petitioner here, in stark contrast, has recently returned to modest employment and I accept entirely lacks the means to pay.

² Biodiesel (L) Ltd.



11. The concern that I have is that the Registrar has not been heard and might wish to be heard, because the standard practice is that payment of all fees is made a condition of making of a Restoration Order. And in the course of argument I canvassed with counsel the possibility of imposing a condition that the Petitioner should be liable for the penalty fees, but should only have to pay them in the event that she makes a recovery from the Company in the proceedings that she proposes to commence. Counsel accepted that this would meet the justice of the case and also conceded that such an order should properly include liberty to the Registrar of Companies to the right to be heard. But he rightly also emphasised that because of the impending expiry of the limitation period applicable to the Petitioner's proposed claim, any such order should not in any way detract from the finality and efficacy of the Restoration Order.

Disposition

12. Taking those concerns into account, it seems to me that the appropriate way to deal with the question is that I will make a Restoration Order today and will adjourn for separate hearing, if necessary, on notice to the Registrar of Companies, the question of what order, if any, should be made in respect of the payment of the penalty fees. As I understand it, it is accepted that the restoration fee should be paid.
13. But in adjourning the question of penalty fees, I record my very strong provisional view that under no circumstances should the Petitioner be required to pay the penalty fees save in circumstances where she has been able to make a recovery in respect of such liabilities from the proceedings that she proposes to commence against the Company post-restoration.

THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT