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

CAUSE NO. FSD 119 of 2022 (CRJ)

**IN THE MATTER OF THE COMPANIES ACT (2020 REVISION)
AND IN THE MATTER OF OAK PALM FUND LTD**

Appearances: **Mr. Denis Olarou of Carey Olsen for the Petitioners**

 Ms. Janice Behari of FrancisGrey for Mr. Russell Boychuk

Before: **The Hon. Justice Cheryll Richards Q.C.**

Heard: **9th August 2022**

Draft Judgment: **8th September 2022**

HEADNOTE

Company Law – Section 92 and Section 159 of the Companies Act (2022 Revision), Petition to restore struck-off company to the Register and for its winding up; Application for an adjournment of hearing; Applicable principles; Proof company unable to pay its debts.

JUDGMENT

- 1
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- 3
- 4 1. By Petition filed on the 8th June 2022, the Petitioners, Kingfisher Management Limited
- 5 (“Kingfisher Management”) and Lawrence Edwards seek the restoration of Oak Palm Fund Ltd
- 6 (“the Company”) to the Register of Companies and its immediate winding up. The Petition is
- 7 verified by the First Affidavit of Mr. Edwards dated 30th May 2022.
- 8
- 9 2. The Company was incorporated as an exempted limited company in the Cayman Islands in
- 10 February 2006. This was under its original name “ACCL Multi-Strategy Fund Inc”. The name
- 11 change was effected in May 2012. Its business purpose was to serve as an investment holding
- 12 company and up to 2018 it was registered with the Cayman Islands Monetary Authority
- 13 (CIMA) as a mutual fund.
- 14
- 15 3. Mr. Russell Boychuk is described as the founder of the Company and he served as a director
- 16 from the 3rd of January 2007 until the 30th of April 2021 when the Company was struck from
- 17 the Register of Companies. The fees and penalties owing to the Registrar in order for the
- 18 Company to be re-instated amount to \$8,903.38¹.
- 19
- 20 4. Kingfisher Management (formerly Delta FS Limited) provided registered office services to the
- 21 Company. Kingfisher Management resigned on the 3rd December 2020 because of nonpayment
- 22 of fees. Mr. Edwards is a director and beneficial owner of Kingfisher Management. He has
- 23 been a director of it for over 10 years. He provided non-executive directorship services to the
- 24 Company through to the date that it was struck from the Register. He asserts that there are fees
- 25 owed to him by the Company for services which he provided over a six year period from 2015.
- 26 It is said that the Company owes US\$129,369.62 to Mr. Edwards and US\$67,794.97 to
- 27 Kingfisher Management in respect of services provided to it for a total debt of US\$197,164.59.
- 28
- 29 5. The sole asset of the Company at the time it was struck off was a minority shareholding in a
- 30 Canadian Corporate structure (“CanCorp”). CanCorp is the owner of a commercial property
- 31 in Ontario, Canada.
- 32

¹ Amount for reinstatement up to 30th September 2022

1 6. The Petition asserts that in the circumstances it is just and equitable that the Company be
2 restored to the Register, be wound up and that Karen Scott and Russell Homer of Chris Johnson
3 Associates Ltd., be appointed Joint Official Liquidators of the Company.

4 **THE LEGAL PROVISIONS**

5 7. The application for restoration of the Company to the Register is made pursuant to s.159 of the
6 ***Companies Act (2022 Revision)***.

8 8. This provides as follows:-

9 *“If a company or any member or creditor thereof feels aggrieved by the company*
10 *having been struck off the register in accordance with this Act, the Court on the*
11 *application of such company, member or creditor made within two years or such*
12 *longer period not exceeding ten years as the Cabinet may allow of the date on*
13 *which the company was so struck off, may, if satisfied that the company was, at the*
14 *time of the striking off thereof, carrying on business or in operation, or otherwise,*
15 *that it is just that the company be restored to the register, order the name of the*
16 *company to be restored to the register, on payment by the company of a*
17 *reinstatement fee equivalent to the original incorporation or registration fee and*
18 *on such terms and conditions as to the Court may seem just, and thereupon the*
19 *company shall be deemed to have continued in existence as if its name had not*
20 *been struck off; and the Court may, by the same or any subsequent order, give such*
21 *directions and make such provisions as seem just for placing the company and all*
22 *other persons in the same position as nearly as may be as if the name of the*
23 *company had not been struck off.”*

24
25 9. The application for winding up is made pursuant to s.94 of the ***Companies Act***. This provides
26 that an application to the Court for the winding up of a company shall be by petition presented
27 either by:-

28
29 (a) *“the company;*

30 (b) *any creditor or creditors (including any contingent or prospective creditor*
31 *or creditors);*

- 1 (c) *any contributory or contributories; or*
2 (d) *subject to subsection (4), the Authority pursuant to the regulatory laws.”*

3

4 10. By s.92 of the *Act*, the Court may order the winding up of a company in certain circumstances
5 including if:-

6

- 7 (d) *“the company is unable to pay its debts; or*
8 (e) *the Court is of opinion that it is just and equitable that the company should*
9 *be wound up.”*

10

11 11. Section 93 sets out the circumstances in which a company shall be deemed to be unable to pay
12 its debts. These are if:-

13 (a) *“ a creditor by assignment or otherwise to whom the company is indebted*
14 *at law or in equity in a sum exceeding one hundred dollars then due, has*
15 *served on the company by leaving at its registered office a demand under*
16 *that person’s hand requiring the company to pay the sum so due, and the*
17 *company has for the space of three weeks succeeding the service of such*
18 *demand, neglected to pay such sum, or to secure or compound for the same*
19 *to the satisfaction of the creditor;*

20 (b) *execution of other process issued on a judgment, decree or order obtained*
21 *in the Court in favour of any creditor at law or in equity in any proceedings*
22 *instituted by such creditor against the company, is returned unsatisfied in*
23 *whole or in part; or*

24 (c) *it is proved to the satisfaction of the Court that the company is unable to*
25 *pay its debts.”*

26

27

28

1 THE EVIDENCE

2 12. The evidence before the Court consists of:-

- 3 i. First Affidavit of Lawrence Edwards dated 30th May 2022;
4 ii. First Affidavit of Russell Homer dated 30th May 2022;
5 iii. First Affidavit of Karen Scott dated 30th May 2022;
6 iv. First Affidavit of Jerry Archer dated 2nd June 2022;
7 v. Second Affidavit of Jerry Archer dated 22nd June 2022;
8 vi. First Affidavit of Josseline Paz-Bennett dated 22nd June 2022;
9 vii. Second Affidavit of Josseline Paz-Bennett dated 27th June 2022;
10 viii. First Affidavit of John Sustento dated 28th June 2022; and
11 ix. Third Affidavit of Josseline Paz-Bennett dated 2 August 2022.

12
13 13. Mr. Edwards asserts that although it was registered as a mutual fund, over time the Company
14 did not in practice raise material subscription funds from arms length investors. Instead it
15 appeared to him to be a personal investment vehicle for Mr. Boychuk and or Mr. Boychuk's
16 corporate entities. Mr. Edwards states that he is not aware that the Company had any cash at
17 the time of strike off or a bank account.

18
19 14. The debt is said to have arisen in the following way. By contractual agreement, Mr. Edwards
20 served as a non-executive director of the Company over a period of eleven years from October
21 2010 until it was struck off in April 2021. He exhibits to his Affidavit a service agreement
22 which was entered into with the Company under its previous name. This was made on the 13th
23 October 2010. By clause 4 of the agreement, the Company agreed to pay director remuneration
24 in accordance with the Schedule. This provides for an annual fee of \$20,000.00 for representing
25 the Company which shall be due and payable in advance on the first day of each annual billing
26 period. Payment for additional work and re-imburement of expenses including any legal
27 expenses incurred is to be upon submission of invoices.

28
29 15. From April 2012 through to December 2020, Kingfisher Management provided registered
30 office services and company secretary services to the Company. Exhibited to Mr. Edwards'
31 Affidavit is an agreement dated 17th April 2012 between Kingfisher Management and the
32 Company. Clause 4 provided for remuneration of the Manager in accordance with Part 2 of

1 the Schedule. This provides that remuneration at the rate of US\$1,500.00 per year is due and
2 payable in advance on the 1st January of each year. Additional services provided are to be paid
3 at a set hourly rate and are due in arrears at the end of the month in which they were incurred.
4 There are also provisions for re-imburement of expenses and for the right to charge interest at
5 a rate notified by Kingfisher Management to the Company.
6

7 16. Invoices setting out standard fees for services and for filing and registration fees are produced
8 for each year from January 2015 to January 2020.
9

10 17. Mr. Edwards states that over a three year period between March 2011 and August 2014, he was
11 advised by Mr. Boychuk that the Company was unable to settle the invoices in a timely manner.
12 Mr. Edwards says that he agreed to accept shares in the Company in lieu of payment for the
13 fees outstanding. By this route he became a shareholder in the Company. Beginning in 2015,
14 he stopped accepting shares in the Company. Between then and 2020, invoices were issued by
15 Kingfisher Management to the Company in the sums outstanding as detailed above.
16

17 18. The invoices remain unpaid together with any interest which has accrued. At paragraph 19 of
18 his Affidavit, Mr. Edwards states:-

19 *“...From time to time, Kingfisher Management demanded payment of the Unpaid*
20 *Invoices from the Company. The Company has never provided evidence disputing*
21 *that the Unpaid invoices were due and payable, but did not make payment. Indeed,*
22 *on occasion Mr. Boychuk made approaches to settle the Unpaid invoices, along*
23 *with other personal liabilities of his and the Company’s, but always by way of some*
24 *payment in kind and never cash settlement.”*
25

26 19. On the 3rd December 2020, Kingfisher Management notified the Registrar of its resignation as
27 the Registered Office and secretary of the Company.
28

29 20. Mr. Edwards identifies other creditors of the Company as including the Registrar of
30 Companies, in respect of annual registration fees and penalties in the sum stated above and
31 CIMA in respect of annual registration fees and penalties for the 10 years, 2009 to 2018 in the
32 sum of CI\$165,254.14.
33

1 21. Mr. Edwards exhibits a letter dated 28th November 2018 by which CIMA advised directors Mr.
2 Boychuk and Jyoti Choi that the Company's mutual fund registration was cancelled. Mr. Choi
3 is also a director of Kingfisher Management. CIMA stated that the Company continued to be
4 in breach of the Mutual Funds Law (2015 Revision), in that, it had failed to submit audited
5 accounts for the years 2009 to December 2017 and had failed to pay its annual registration fees
6 and penalties for the years 2009 to 2018. Under the heading 'Reasons' CIMA stated:-

7 *"The Authority is, pursuant to sections 30 (1) (a) and (d) of the Law, satisfied that*
8 *(i) the Fund is or is likely to become unable to meet its obligations as they fall due;*
9 *and (ii) the direction and management of the Fund has not been conducted in a fit*
10 *and proper manner."*

11
12 22. A second document is exhibited from CIMA dated 26th March 2021, which cancelled the
13 registration of Mr. Boychuk as a director for noncompliance with the ***Directors Registration***
14 ***and Licensing Act 2014***.

15
16 23. Mr. Edwards states his belief that the Company which has failed to pay not only the Petitioners'
17 fees but also CIMA and the Registrar of Companies for up to 10 years in one instance, is
18 insolvent on a cash flow basis.

19
20 24. The Registrar of Companies has indicated by letter dated 22nd April 2022 which is exhibited to
21 the First Affidavit of Mr. Edwards that there is no objection to the re-instatement of the
22 Company provided that the fees and penalties to the date of re-instatement are paid. These
23 include annual fees for 2017-2019.

24
25 25. Mr. Edwards is also a director and together with his family an ultimate beneficial owner of the
26 vehicle by which the Company holds the Canadian property. He says that loan advances were
27 made from that entity to the Company in 2016 and 2017 in the sum of CAD\$28,500.00 which
28 have never been repaid. The Canadian entity issued legal proceedings against Mr. Boychuk in
29 January 2022.

30
31 26. Russell Homer and Karen Scott of Chris Johnson Associates Ltd. provide Affidavits consenting
32 to act as liquidators and attesting to their qualifications, residence and independence pursuant
33 to the ***Companies Winding Up Rules 2018***, ("CWR"), O.3 r.4(1).

1 **SERVICE OF THE PETITION/ NOTICE TO MR. BOYCHUK**

2 27. The issue of service of the Petition and notification to Mr. Boychuk is a contested one in this
3 matter.

4
5 28. On 31st May 2021 Mr. Edwards advised Mr. Boychuk that the Company had been struck from
6 the Register effective 30th April presumably for non-payment of fees. The response of Mr.
7 Boychuk was that he was aware of this as his lawyer had done a continuance and change of
8 jurisdiction to Ontario.

9
10 29. On 28th September 2021, Mr. Boychuk advised Kingfisher Management by correspondence
11 that the Company's registered office pending transition had been changed to an address at Guy
12 Banks Road and or Blossom Village in Little Cayman. This change is believed by Mr. Edwards
13 to be invalid because no corporate records were ever transferred. A search at the Companies
14 Registry does not indicate any such change. No notice of deregistration has been published in
15 the Gazette.

16
17 30. On the 21st June 2022, the Petition and Affidavits with Notice of Hearing were served at the
18 last known registered office of the Company which meant serving them on Mr. Edwards
19 himself.

20
21 31. Exhibited to the Affidavit of Josseline Paz-Bennett is an email sent to Mr. Boychuk on the said
22 day at 6:19pm. It stated that copies of the documents served on the Company's registered
23 office were being provided in an electronic file as a courtesy. This file contained the Petition,
24 supporting evidence and Notice of Hearing. The file was accessed by Mr. Boychuk's email
25 account on the 22nd June 2022.

26
27 32. On the 24th June 2022, John Sustento, a process server with offices in Grand Cayman travelled
28 to Little Cayman to the addresses given by Mr. Boychuk as the new registered office for the
29 Company. One of the two addresses given could not be identified or located. Mr. Sustento met
30 and spoke to a gentleman who acknowledged the other address as his own. That gentlemen
31 initially signed accepting the service of the documents. He then tried to refuse service
32 indicating that the server should make direct contact with Mr. Boychuk in Toronto.

33

1 33. The gentleman later left a voicemail message and an email for the Petitioners' Attorneys,
2 stating in part:-

3 *"I know what Oak Palm Fund Ltd., is and I have a light knowledge of what's going*
4 *on between Oak Palm, and Kingfisher Management at the moment however I am*
5 *not a Director or a Signatory for Oak Palm Fund. So I do not intend to open the*
6 *envelope nor do (not) intend on being involved in any official business on behalf*
7 *of Oak Palm Fund."*

8 34. On 21st June 2022, the Notice of Hearing, the Petition and attachments were served on the
9 Companies Registry by Mr. Jerry Archer.

10
11 35. Notice of the Petition was published in the Gazette #54/2022 on the 13th July 2022. It was also
12 published on the 26th July 2022 in the Financial Post which has circulation in Ontario, Canada.
13
14

15 APPLICATION FOR ADJOURNMENT

16 36. A Notice of Appearance was filed on behalf of Mr. Boychuk on the 5th August 2022. Counsel
17 appeared on his behalf and sought an adjournment of the hearing of the Petition. No material
18 was filed or provided in support of the application to adjourn. Counsel explained that there had
19 been a recent retainer received five days before the hearing. The application was opposed by
20 Counsel on behalf of the Petitioners.
21

22 37. By agreement Counsel for the Petitioners produced what was described as a clip of
23 correspondence for the period 4th August to 8th August 2022 with attachments.
24
25

26 APPLICABLE PRINCIPLES

27 38. The Court was referred by the Petitioners to a number of authorities. In *Sekhon and another*
28 *v. Edginton*², the Petitioner creditors sought an order that the debtor be declared bankrupt. He
29 had failed to pay the debt in response to a statutory demand. Upon the hearing of the Petition,

² [2015] 1 W.L.R. 4435

1 the debtor applied for an adjournment of the hearing in order to pay the debt within a reasonable
2 time. The application was refused. The debtor appealed. In its judgment the English Court of
3 Appeal referred to the difference between ordinary civil proceedings and insolvency
4 proceedings. The latter proceedings are class actions brought with the primary purpose of
5 enabling an independent person to preserve the assets of the debtor. A second distinction is that
6 following upon the filing of a petition, dispositions of the debtor cannot be made without the
7 consent of the court.

8
9 39. The Appellate Court stated that delay in dealing with a petition is generally likely to have
10 adverse consequences for creditors. It was further stated that:-

11 “18 Against this background, the practice has evolved in relation to the grant
12 of adjournments of bankruptcy petitions where the debtor asks for time to
13 pay. The starting point is that, if the petitioning creditor establishes that
14 the statutory conditions are fulfilled, he is prima facie entitled to a
15 bankruptcy order: see *In re A Debtor (No 452 of 1948)*; *Ex p The Debtor*
16 *v Le Mee-Power [1949] 1 All ER 652* and the *In re A Debtor (No 72 of*
17 *1982)* case, both referred to in *Judd v Williams*.

18 ...

19 22 Delay is inimical to all forms of litigation and especially so in a collective
20 enforcement process such as insolvency. In my judgment, the judge was
21 entitled to take into account the very late stage which the application was
22 made. Even in ordinary civil litigation, late applications are frowned
23 upon, as are applications for adjournments which delay the final
24 resolution of the case.”

25 40. The general principle is that while the court has the power to adjourn the proceedings, the
26 practice is to do so only if there is credible evidence that there is a reasonable prospect that the
27 debt will be paid in a reasonable time.

28

1 41. In *Re Camburn Petroleum Products Ltd.*³, a contributory who was also a director opposed the
2 making of a winding up order against a company and sought an adjournment of the hearing of
3 the Petition. The Court held that a creditor upon presentation of a winding up petition was
4 prima facie entitled to a winding up order. This despite the opposition of the contributory. Slade
5 J., said that:-

6 *“Though there are a number of authorities which give guidance as to the attitude*
7 *of the court where some creditors support the making of an immediate winding-up*
8 *order and other creditors oppose it, counsel have been unable to find any other*
9 *authority which gives guidance as to such attitude, where the contest is between a*
10 *petitioning creditor on the one hand and contributories on the other hand.*

11 *I do not, however, feel much doubt in principle as to what that attitude should be.*
12 *In the case of a creditor's petition not opposed by other creditors, the general*
13 *approach of the court was expressed by Lord Cranworth in Bowes v Hope Life*
14 *Insurance and Guarantee Co ((1865) 11 HL Cas 389 at 402, 11 ER 1383 at 1389)*
15 *as follows:*

16 *'... I agree with what has been said, that it is not a discretionary matter*
17 *with the Court when a debt is established, and not satisfied, to say whether*
18 *the company shall be wound up or not; that is to say, if there be a valid*
19 *debt established, valid both at laws and in equity. One does not like to say*
20 *positively that no case would occur in which it would be right to refuse it;*
21 *but, ordinarily speaking, it is the duty of the Court to direct the winding*
22 *up.'*

23 *In other words a creditor in the circumstances mentioned is prima facie entitled to*
24 *his order, and is prima facie not bound to give time to enable the debtor to pay. In*
25 *my judgment, subject to the discretion given to it by ss 225 and 346 of the 1948*
26 *Act, to which I have already referred, the attitude of the court should be, and is,*
27 *essentially unchanged today. While I recognise that it would have the right under*
28 *those two sections to pay regard to the wishes of contributories, in deciding*
29 *whether or not to make a winding-up order on a creditor's petition, or to adjourn*

³ [1979] 3 All ER 297

1 *the hearing, in my judgment it can, and should, ordinarily attach little weight to*
2 *the wishes of contributories, in comparison with the weight it attaches to the wishes*
3 *of any creditor, who proves both that he is unpaid and that the company is 'unable*
4 *to pay its debts'.*”

5 42. This Court’s attention was also drawn to the following summary statement in the text
6 ***Applications to Wind Up Companies***⁴:-

7 *“On a creditor’s petition to wind up a company the court is unlikely to grant an*
8 *application for an adjournment made by the company or a contributory if the*
9 *application is opposed by the petitioner and not supported by other creditors. But*
10 *an adjournment should be ordered where the company has been led to believe that*
11 *adjournment would not be opposed by the petitioner because negotiations are in*
12 *progress. A mere assertion by counsel for the company that, given time, it was*
13 *hoped to obtain evidence to establish that the petitioner did not have standing was*
14 *not enough to obtain an adjournment in E G and H Nominees Pty Ltd v General*
15 *Mutual Insurance Co Ltd.”*

16
17 **SUBMISSIONS ON THE APPLICATION TO ADJOURN**

18 43. Counsel on behalf of Mr. Boychuk accepted that action was being taken “late in the day,” but
19 submitted that it was proposed to instruct Senior Counsel due to the complexity of the matter
20 and to file evidence as to the Petition. Counsel submitted that due to the lateness of the
21 instructions received, there had not been the opportunity to provide an affidavit to support the
22 application for an adjournment.

23
24 44. In response to a question from the Court as to the time between the receipt of instructions and
25 the date of the hearing which would have allowed for preparation of at least a short affidavit,
26 Counsel said that this had not been done. Counsel said that ultimately there would be no
27 prejudice to the creditors by the grant of an adjournment. Counsel submitted that the debts have
28 been outstanding for some time and that if the matter is adjourned there will be no further

⁴ Derek French, *Applications to Wind Up Companies*, 4th Edition , paragraph 5.120

1 prejudice as there is nothing that can happen in relation to the creditors because the Company
2 has been struck from the Register.

3
4 45. Counsel on behalf of the Petitioners referred to the evidence, in particular that notice of the
5 Petition, hearing date and evidence in support had been served since 21st June 2022. Counsel
6 relied on four procedural points. The first was that there is no valid application before the Court
7 on which an adjournment could be granted. No summons for an adjournment had been filed in
8 accordance with CWR O. 23 r. 2. This provides:-

9
10 “(1) every application or appeal to the Court made in connection with a
11 proceeding which is already pending before the Court shall be made by
12 summons.”

13 The submission was that this is a provision of some import given that the parties to the
14 proceedings need to know the basis upon which an application is being made.

15
16 46. Counsel’s second point was that the Notice of Appearance is defective in a number of ways. It
17 states that Mr. Boychuk is the registered shareholder of 1,402 shares of the Company. This is
18 not reflected in the register of members which does not list him as a member. Additionally the
19 total amount of shares recorded in the register as having been issued is 280. Mr. Boychuk is
20 purporting to have more shares than the Company has issued.

21
22 47. The submission was also that even if Mr. Boychuk is an indirect owner through some of the
23 other entities listed as shareholders, he would not have locus standi to present a petition. For
24 this submission reliance was placed on the judgment of the Appellate Court in the case of *In*
25 *the Matter of Lancelot Investors Fund Limited (In Official Liquidation) and Another v.*
26 *Varga (As Official Liquidator of the Company)*⁵

27
28 48. In that case the Court stated:-

29 “17 The principle is also the foundation of the rule that only a registered
30 shareholder may bring proceedings to vindicate shareholder rights: see,

⁵ [2015] (1) CILR 328

1 *for example, Schultz v. Reynolds (6) and Svanstrom v. Jonasson (7), both*
2 *decisions of this court holding that a mere beneficial owner of shares*
3 *could not maintain a derivative action on behalf of a company, and*
4 *Hannoun v. R Ltd (4), in which the Grand Court held that a beneficiary*
5 *under a bare trust of shares could not petition for a winding up on the just*
6 *and equitable ground. In the present case, the principle would have*
7 *prevented anyone but Fortis from making a valid redemption request; but*
8 *in fact it was Fortis that made the redemption request.”*

9 49. In reply to this point, Counsel for Mr. Boychuck sought to produce a list of the shareholdings
10 which had been received from him. This purported to show a total number of issued shares of
11 2,456. In response to a question from the Court as to its provenance, the document bearing no
12 registration markings, Counsel indicated that she was not in possession of a copy that was filed
13 with the Registry.

14
15 50. The third procedural point raised by Counsel for the Petitioners was that the Notice filed does
16 not claim any standing as a creditor but as a debtor, however the debt is not stated in accordance
17 with CWR O.3 r.8 (2).

18
19 51. The final procedural point was that the Notice of Appearance is late. By CWR O.3 r.8 (1) it is
20 required to be filed not less than three days before the hearing date. Given the way time is
21 calculated, the Notice is not within time.

22
23 52. Counsel on behalf of Mr. Boychuk argued in response that while it is agreed that no formal
24 application is before the Court the formalities can be complied with.

25
26 53. As to the merits of the application, Counsel for the Petitioners said that there is a burden on
27 Mr. Boychuk to satisfy the Court that there is good reason for an adjournment to be granted for
28 an unspecified period of time. He has failed to do that. The adjournment is opposed by the
29 Petitioners and no other creditor supports it.

30
31 54. Counsel submitted that this case is on all fours with the circumstances in the cited case of
32 *Sekhon v. Edginton* in which an adjournment was refused. It was also argued that the general

1 principle as discussed in *Re Camburn Petroleum Products Limited* applies. In the present case
2 there is no explanation for the delay in instructing attorneys since being notified and accessing
3 the documents on the 22nd June 2022. All that has been said is that there is an intention to file
4 evidence. Counsel said that this is in circumstances where previous statements made by Mr.
5 Boychuk have proven to be unreliable. In particular, statements as to the change of the
6 registered office to Little Cayman and the deregistration of the Company from the Cayman
7 Islands to Canada when no deregistration notice had been issued.

8
9 55. It was also said by Counsel that there is all the more prejudice because debts have been due
10 and payable for some time, the years 2015 to 2020. These became payable on the 1st of January
11 of each year. The Affidavit of Mr. Edwards provides evidence of possibly other prejudice in
12 that after the Company was struck off, Mr. Boychuk continued to act for the Company. There
13 is prejudice to the creditors of the Company if he continues to act as if the Company continues
14 to exist.

15
16 56. Having considered all the submissions made on this aspect and the applicable principles, I
17 refused the application. This was less on the procedural issues which I accept could be
18 remedied and more so on whether there was some justifiable reason or proper basis for the
19 request. This is in light of the fact that Mr. Boychuk had been put on notice some six weeks
20 ago. No clear basis was orally articulated by Counsel or set out in recent correspondence. Even
21 if Mr. Boychuk was to be given the benefit of the doubt and be treated as a contributor at the
22 level of shareholding claimed, this would not avail him in the present circumstances.

23
24 57. I accepted the arguments of the Petitioners as to the applicability of the general principles as
25 discussed in *Re Camburn Petroleum Products Limited*. These include that a court will usually
26 attach little weight to the wishes of a contributory in comparison with the wishes of unpaid
27 creditors. A creditor is entitled to his order. While there is jurisdiction to adjourn the
28 proceedings, this would only be done if there were exceptional circumstances. I take this to
29 mean that applications by contributors for adjournments of petitions must be the subject of
30 close scrutiny. In the cited case, the adjournment was sought on the basis that there was going
31 to be the ability to pay. This was held not to amount to a sufficient reason for the grant of an
32 adjournment. This perhaps gives some measure of the high threshold which requires to be
33 satisfied on such applications.

1 SUBMISSIONS ON THE PETITION

2

3 58. Counsel for the Petitioners submitted that the *Companies Act* gives broad powers for the
4 restoration of companies to the Register. Additionally it is submitted that whether a company
5 is operating or carrying on business should be given a wide meaning. It is argued that in this
6 case there is evidence that the Company was in operation at the time of strike off. The Company
7 held an asset at that time and it is said that after strike off Mr. Boychuk purported to act on
8 behalf of the Company.

9

10 59. Counsel said that even if the above is not correct, the application falls under the second limb
11 whereby it is just to restore the Company to the Register. Restoration is being sought for the
12 purpose of enforcing liability against the Company itself and not a third party. The Petitioners
13 cannot claim where the Company is struck off. Counsel referenced the case of *City of*
14 *Westminster Assurance Co. Ltd. v. Registrar of Companies and Anor*⁶ which was followed
15 in *Re Priceland Ltd*⁷. Both are cases where restoration was sought not for the purpose of
16 enforcement against a company but to enforce a third party liability or guarantee. These are of
17 further distance than the present case.

18

19 60. On the second aspect, Counsel said that grounds for winding up have been clearly established.
20 The fact of the indebtedness and that the Company has not paid its bills for 10 years is evidence
21 of inability to pay. Mr. Edwards also provides evidence that there is no bank account and no
22 cash.

23

24 61. In response to a question from the Court as to the absence of correspondence and underpinning
25 detail in relation to non-payment of the invoices exhibited, Counsel submitted that
26 contractually the invoices became due and payable at a certain date. They do not require a
27 request to be made.

28

29 62. In opposition to the two applications Counsel on behalf of Mr. Boychuk made submissions
30 primarily as to the second application for the winding up of the Company. Counsel made four
31 points. Three were as to procedural irregularities. A fifth point as to a fourth irregularity, which

⁶ [1997] B.C.C. 960

⁷ [1997] B.C.C. 207

1 was raised as a preliminary issue, was not strongly pursued. Counsel observed that the Affidavit
2 of Mr. Edwards sworn on the 30th May 2022 as contained in the Hearing bundle bore no stamp,
3 seal or indication that it had been filed with the Court as is required. The reply from the
4 Petitioners was that filing was done and could be verified by the Court Registry.

5
6 63. I did not consider this to be a material point and if necessary would have accepted an
7 undertaking that the Affidavit be re-filed.

8
9 64. Three other procedural matters were more forcefully advanced by Counsel on behalf of Mr.
10 Boychuk:-

- 11
12 i. The Petition had not been properly verified in accordance with CWR O.3 r. 2.
13 ii. The Petition had not been properly advertised.
14 iii. Service of the Petition was irregular.

15
16 65. Counsel submits that CWR O.3 r.2 states that a creditors' petition in respect of debts due to
17 two or more different creditors is to be separately verified on behalf of each creditor. In this
18 case Mr. Edwards has sworn a single Affidavit on behalf of himself as Petitioner as well as on
19 behalf of Kingfisher Management as a second creditor.

20
21 66. As this was undeniably the case, Counsel for the Petitioners argued in response that the
22 requirement for separate verification does not say separate individuals. The submission is that
23 the provision is aimed at a situation where there are two separate creditors who would not have
24 direct knowledge of the contents of a petition. In this case, where Mr. Edwards has been a
25 director of Kingfisher Management for some ten years, he has personal knowledge of the debt
26 to that entity. He thus has personal knowledge of both debts. Counsel said that Mr. Edwards
27 could have produced two separate affidavits if required to do so.

28
29 67. I accept the submissions of Counsel for the Petitioners on this point. I am also mindful that the
30 alleged debt to Mr. Edwards in his personal capacity if proved is well above the minimum
31 amount.

32
33 68. Counsel for Mr. Boychuk submits that the Petition is not properly before the Court because the
34 Petitioners have not complied with the specific requirements of CWR O.3. The CWR makes a

1 distinction between a gazette publication and a newspaper publication. CWR O.3 r.6 (1) states
2 that a creditor's petition shall be advertised once in a newspaper in circulation in the Islands.
3 Counsel said that admittedly there is evidence that the Petition was advertised in the gazette
4 but the CWR specifically states that the advertisement is to be by way of a newspaper. This
5 requirement has not been complied with.

6

7 69. The response of Counsel for the Petitioners to this was not a robust one. Counsel submitted that
8 as far as he is aware the general practice is for every winding up petition to be advertised in the
9 gazette rather than in a newspaper.

10

11 70. Counsel for Mr. Boychuk is correct with respect to the distinction drawn in the CWR. Some
12 Orders (O.5 and O.13) specifically require notices to be published in the gazette. These relate
13 to notices by Official Liquidators in respect of their appointments and of winding up orders
14 made by a court as well as notices required to be issued by Voluntary Liquidators.

15

16 71. The wording of CWR O.3 r.6 does indicate that there is some discretion vested in the Court
17 which may dispense with the advertising of a Petition.

18

19 72. I think that what has to be considered is whether in the circumstances of this particular case,
20 the irregularity in the manner in which the Petition was advertised is such as to vitiate these
21 proceedings. The purpose of the requirement to advertise in a local newspaper is to ensure that
22 by wide publication, a petition is brought to the attention of all possible creditors, who would
23 have the opportunity to appear on the hearing of the petition.

24

25 73. Upon the evidence of Mr. Edwards, the Company was not an active one. It did no real business,
26 had no accounts and had a single asset through another entity which is overseas. On his
27 evidence it had three local creditors, CIMA, the Registrar of Companies and the company
28 management service providers. I cannot see that the failure to advertise in a newspaper as
29 distinct from the gazette is an irregularity which rises to a level that these proceedings should
30 be vitiated. Put another way no injustice is likely to be caused as there do not appear to be
31 unknown creditors who would require to be notified of the proposed Petition. Had an
32 application been made for advertising to be dispensed with, this may have been appropriate in
33 these circumstances.

1 74. In respect of all the procedural matters raised above I bore in mind GCR O.2 r.1 which provides
2 as follows:-

3 “(1) Where, in beginning or purporting to begin any proceedings or at any stage in the
4 course of or in connection with any proceedings, there has, by reason of anything
5 done or left undone, been a failure to comply with the requirements of these Rules,
6 whether in respect of time, place, manner form or content or in any other respect,
7 the failure shall be treated as an irregularity and shall not nullify the proceedings,
8 any step taken in the proceedings, or any document, judgment or order therein.

9 (2) Subject to paragraph (3), the Court may, on the ground that there has been such a
10 failure as is mentioned in paragraph (1) and on such terms as to costs or otherwise
11 as it thinks just, set aside either wholly or in part the proceedings in which the
12 failure occurred, any step taken in those proceedings or any document, judgment
13 or order therein or exercise its powers under these Rules to allow such
14 amendments (if any) to be made and to make such order (if any) dealing with the
15 proceedings generally as it thinks fit.”
16

17 **SERVICE OF THE PETITION**

18
19 75. Counsel for Mr. Boychuk submitted under this heading that the service on the Company was
20 defective. According to the Second Affidavit of Jerry Archer it was served on the very person
21 who is making the application, Mr. Lawrence Edwards.
22

23 76. The response from Counsel for the Petitioners which I accept is that O.102 r.18 (2) prescribes
24 service on the last known registered office of the Company and the Registrar of Companies.
25 Kingfisher Management was the last registered office of the Company. Counsel noted that it is
26 appreciated that this led to an odd result hence the attempt to effect service in Little Cayman
27 and to notify Mr. Boychuk the only other director by other means. The service is therefore
28 compliant with the Rules.
29

30

1 **PROOF OF INABILITY TO PAY ITS DEBTS**

2 77. Counsel for Mr. Boychuk submitted that the Petitioners have not proved to the satisfaction of
3 the Court that the Company is unable to pay its debts. Counsel said that under s.93 of the
4 *Companies Act* there are three ways in which indebtedness may be established. The first is by
5 issuing a statutory demand on the Company. From the evidence of Mr. Edwards, it does not
6 appear that this was done. Section 93 (b) would not apply because no judgment of the court
7 was obtained.

8
9 78. In respect of s.93 (c) the broad submission is that the Affidavit of Mr. Edwards and the fact of
10 the striking off are insufficient for the Court to be able to draw the inference that the Company
11 is unable to pay its debts. Counsel said that as to striking off, the law does allow a company
12 time within which to remedy any defects. Thus this cannot be enough to prove inability to pay
13 its debts.

14
15 79. Counsel said that while there is no dispute that an agreement exists between the parties and a
16 number of invoices have been exhibited, there is no evidence that these invoices were
17 dispatched to the Company. Furthermore there is no evidence that having been dispatched there
18 was any request or demand for payment which would suggest that the Company is unable to
19 pay its debts. The invoices do not speak for themselves. The *Companies Act* requires proof of
20 more than the existence of the debt in order to prove inability to pay. The fact that a debt exists
21 and remains unpaid does not mean that the entity was unable to pay.

22
23 80. In relation to the test in s.93, Counsel for the Petitioners in response agreed that there is no
24 statutory demand. Counsel said that the Petitioners are proceeding on the basis of s.93 (c), not
25 by way of a statutory demand. An application under s.93 (c) can also include debts owed to
26 other creditors. Counsel said that by virtue of the agreements, a contractual liability arises for
27 the Company to pay the annual and registration fees in advance on the 1st January of each year.
28 No invoices need be issued. The question of the issue of invoices and demand is irrelevant to
29 at least the annual portion of these debts. There may perhaps be a different position in relation
30 to hourly fees. It is said that in any event the evidence of Mr. Edwards is that he issued invoices
31 and did not receive payments.

32

1 81. Counsel said that furthermore the Petitioners are not the only ones to whom the Company is
2 indebted. The Company is also indebted to CIMA as a matter of contract for ten years of fees.
3 The fact of unpaid indebtedness by itself is a ground for concluding that the Company is unable
4 to pay its debts. There is also the evidence of Mr. Edwards as to the Company's cash position
5 and that it has no assets. Applying the cash flow test, the circumstances all taken together
6 provide a sufficiency of evidence that the Company is unable to pay its debts.

7

8 ANALYSIS

9

10 82. In the case of *In the Matter of OVS Capital Management (Cayman) Limited*⁸, the Grand
11 Court (Quin J.) considered a petition which in part sought the restoration of the company OVS
12 Capital Management (Cayman) Limited to the register of companies. This was a solvent
13 company which had been placed into liquidation. The voluntary liquidator had failed to file
14 annual returns in the course of the liquidation process. As a result the company was struck from
15 the register. At the time of strike off it held assets which had not been distributed. It was also
16 due to receive a distribution from a related entity.

17

18 83. In considering the application of s.159 of *the Companies Act*, Quin J. referred with approval
19 to the decision of the English Court in the case of *Re Priceland*. Five helpful guiding principles
20 were identified from this case. They are:-

21 “(i) *Before the court can exercise its discretion to restore a company, it must*
22 *first be satisfied that either the company was carrying on business or in*
23 *operation or alternatively that it is otherwise just to restore the company.*

24 (ii) *Whether a company was carrying on business or in operation has to be*
25 *considered by reference to the time of dissolution.*

26 (iii) *The words “in operation” should be given a broad meaning in order to*
27 *give the court the widest possible powers to restore. However, if the*
28 *company is completely dormant, this particular avenue for founding*
29 *jurisdiction is not made out.*

⁸ 2017 1 CILR 232

1 (iv) *In considering whether it was just to restore a company to the register, the*
2 *court is entitled to look at all the circumstances of the case and is not*
3 *limited to any particular date.*

4 (v) *In an application to restore under either limb, absent special*
5 *circumstances, restoration should follow and exercising the discretion*
6 *against restoration should be the exception, not the rule.”*
7

8 84. In applying the guidance, the Court held that the fact that the company had been seeking to
9 secure distribution of assets at the time of strike off was sufficient to constitute being in
10 operation. It was therefore just for the company to be restored in order to allow the effort to
11 continue and the distribution to be completed.
12

13 85. In *City of Westminster Assurance Co. Ltd. v. Registrar of Companies & Anor*⁹ the English
14 Appellate Court considered an appeal against a refusal to restore a company to the register. A
15 landlord sought payment of arrears of rent from a company which had assigned the lease to
16 another tenant. Unknown to the landlord the company had been struck from the register. A
17 holding company which had signed as guarantor for the lease refused to pay the landlord. The
18 holding company argued that because the company had been struck off, it did not exist at the
19 time that the arrears of rent had accrued. The landlord’s application for the restoration of the
20 company to the register was granted. The holding company sought and was refused a stay of
21 the order. On appeal the holding company argued that the landlord was not a creditor of the
22 company when it was struck from the register as at that date no rent was in arrears. In response
23 it was argued that it was sufficient if the company was a contingent or prospective creditor at
24 the time of strike off.
25

26 86. The Court stated that the legislative policy underpinning s.653 of the English *Companies Act*
27 *1985* is to confine its application to persons who can claim to have been legally prejudiced in
28 some way by the dissolution of the company. This included those who would wish to enforce
29 a liability of the company. The Court concluded that it is not outside the scope of the section

⁹. [1997 BCC 960

1 where the object of the applicant is for the enforcement of a liability against a guarantor. The
2 Court stated:-

3 *“The respondent’s object is to enforce a liability against a guarantor. In my*
4 *judgment that is not outside the scope of the section. The section is intended to*
5 *provide a remedy for a person who has a claim, whether against the company or*
6 *a third party, which can be enforced only if the company is restored to the register.*
7 *He is a person who, being a creditor of the company, has a legitimate grievance if*
8 *the company is dissolved and he is no longer able to enforce the liability. It does*
9 *not matter whether he seeks to enforce the claim against the company itself or*
10 *whether he needs to establish the company’s liability in order to make a claim*
11 *against a third party such as the company’s insurer or guarantor.”*

12 87. Section 653 of the English **Companies Act 1985** is in similar terms to s.159 of the **Companies**
13 **Act**. It states:-

14 *“(1) The following applies if a company or any member or creditor of it feels*
15 *aggrieved by the company having been struck off the register.*

16 *(2) The court, on an application by the company or the member or creditor*
17 *made before the expiration of 20 years from publication in the Gazette of*
18 *notice under section 652, may, if satisfied that the company was at the time*
19 *of the striking off carrying on business or in operation, or otherwise that*
20 *it is just that the company be restored to the register, order the company’s*
21 *name to be restored.*

22 *(3) On an office copy of the order being delivered to the registrar of*
23 *companies for registration the company is deemed to have continued in*
24 *existence as if its name had not been struck off; and the court may by the*
25 *order give such directions and make such provisions as seem just for*
26 *placing the company and all other persons in the same position (as nearly*
27 *as may be) as if the company’s name had not been struck off.”*

1 88. Applying the dicta in these cases to the instant case it is plainly just that the Company be
2 restored to the Register to allow the Petitioners to seek to enforce the liability. The Registrar
3 does not object provided that the outstanding fees are paid.
4

5 89. The issue of the sufficiency of the evidence as to the inability of the Company to pay its debts,
6 is the primary issue in this case. The points raised by Counsel on behalf of Mr. Boychuk are in
7 effect that something more is required than the bare assertions made in the single Affidavit of
8 Mr. Edwards.

9
10 90. In *Taylor's Industrial Flooring Limited v. M. & H. Plant Hire (Manchester) Limited*¹⁰, the
11 English Court of Appeal considered an appeal from a decision striking out a petition. The judge
12 at first instance expressed the view that something more must be proved than simply that the
13 Company has not paid a debt. Secondly the judge said that where a reason for non-payment
14 was honestly put forward, even if it is a bad one, an inference of inability to pay should not be
15 drawn from the fact of non-payment. The Appellate Court said that there is no requirement that
16 a creditor must serve a statutory demand and there were usually good reasons why this is not
17 done. The view was expressed that if a debt is not disputed, failure to pay is itself evidence of
18 inability to pay. Dillon LJ stated:-

19 *"The short answer to the judge's view is twofold. They run together. The first limb*
20 *is that if a debt is due and an invoice sent and the debt is not disputed, then the*
21 *failure of the debtor company to pay the debt is itself evidence of inability to pay.*
22 *That appears from the judgment of Harman J. in Cornhill Insurance plc v.*
23 *Improvement Services Ltd. [1986] 1 W.L.R. 114. The headnote correctly states that*
24 *"Where a company was under an undisputed obligation to pay a specific sum and*
25 *failed to do so, it could be inferred that it was unable to do so; that accordingly,*
26 *the defendants could properly swear to their belief in the plaintiff company's*
27 *insolvency and present a petition for its winding up."* *The judge refers in passing*
28 *to a statement by Vaisey J. in an earlier case: "Rich men and rich companies who*
29 *did not pay their debts had only themselves to blame if it were thought that they*
30 *could not pay them."* *It is not right to say, as was submitted to us by Mr. Sterling,*

¹⁰ [1990] WL 754239 – Not Cited by Counsel

1 “well, it may be just that they do not want to pay and so you cannot from
2 nonpayment of an undisputed debt deduce inability to pay”

3 *The second point is that the reason for non- payment has to be substantial. It is not*
4 *enough if a thoroughly bad reason is put forward honestly.”*

5 91. In the instant case, there is evidence from the agreements exhibited that the payments were
6 contractually due on an annual basis. There is evidence from Mr. Edwards that they were not paid.
7 There is evidence from Mr. Edwards that the invoices were sent to the Company and that Mr.
8 Boychuk indicated inability to pay in cash. In addition to the evidence of Mr. Edwards as to the
9 unpaid annual fees for the years 2015 to 2020, there is also the failure to pay standard fees. Neither
10 the Authority nor the Registrar have been paid over a period of many years. In my view from all
11 the circumstances, the inference that the Company is unable to pay its debts is inescapable.

12

13 **CONCLUSIONS**

14

15 91. Having considered all the evidence and submissions made, some of which have not been rehearsed
16 herein, I conclude that it is just that the Company be restored to the Register. The Petitioners’
17 application for restoration of the Company to the Register is granted on condition that the
18 outstanding fees and penalties are paid as required by the Registrar. I conclude also that the
19 Petitioners have established on balance that the Company has failed to pay substantial debts, is cash
20 flow insolvent and is therefore unable to pay its debts.

21

22

23

1 Additionally, the formal requirements for the appointment of the proposed Joint Official
2 Liquidators have been complied with. The application of the Petitioners for a winding up order is
3 therefore granted.

4 **Dated this the 24th day of October 2022**

A handwritten signature in blue ink, consisting of a stylized, cursive 'C' followed by a series of loops and a final flourish.

5
6 **Honourable Justice Cheryll Richards K.C.**
7 **Judge of the Grand Court**