

THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS
COMMERCIAL DIVISION

IN THE HIGH COURT OF JUSTICE

CLAIM NO: BVIHC (COM) 0280 of 2024

IN THE MATTER OF CHURCHILL GRAHAM HOLDINGS LIMITED (a dissolved BVI
company)

BETWEEN:

JOHN LOCHIEL GRAHAM

Claimant

-and-

THE REGISTRAR OF CORPORATE AFFAIRS

Defendant

Appearances:

Christopher McCarthy and Nyssa Christopher for the Claimant
Dian D. Fahie for the Defendant

DECISION

2024: July 25

July 31

Application for restoration of dissolved company – ordering the defendant's costs as a condition of restoration – return of money and property vested in the Crown – sections 218, 218A, 218B and 220 of the BVI Business Companies Act

[1] **WEBSTER J [Ag]** This is an application by John Lochiel Graham ("Mr. Graham"), a former director of Churchill Graham Holdings Limited ("the

Company”), under section 218 of the BVI Business Companies Act to restore the Company to the Register of Companies.

- [2] The Company was incorporated on 24 November 1993 as an international business company under the provisions of the **International Business Companies Act**, and was automatically re-registered under the **BVI Business Companies Act** (“**the Act**”) on 1 January 2007. Since its incorporation, the Company has operated as an investment holding company and at all material times Mr. Graham was a director of the Company.
- [3] On or about 22 November 2021, the Company's first registered agent, Newhaven Corporate Services (B.V.I.) Limited, merged with Vistra (BVI) Limited (“**Vistra**”). The Company thereafter stopped receiving notices and/or annual invoices from Newhaven Corporate Services and did not receive any notices from Vistra. The Company attempted on several occasions to contact Vistra to obtain an update on the Company's status with the British Virgin Islands Registry of Corporate Affairs (the “**BVI Registry**”), however those attempts were initially futile.
- [4] On or about 25 November 2022, Mr. Graham was, for the first time, informed by Vistra that the Company had been struck off the Register on 1 May 2021 for non-payment of its annual licence fees.
- [5] On 1 January 2023 the **BVI Business Companies (Amendment) Act 2023** came into force. The amendments introduced by the 2023 amendments provided, *inter alia*, that all existing struck off companies that were not restored to the Register prior to 1 January 2023 had a transitional period of 6 months from the 1 January 2023 to be restored. The Company was not restored within the prescribed timeframe and was dissolved on 4 July 2023.
- [6] When a company is dissolved following striking off any property of the company that was not disposed of at the date of the company's dissolution vests in the Crown (*bona vacantia*).¹

¹ Section 220 of the Act which is set out and considered in paragraphs 19 and 20 below.

- [7] The Company, before its dissolution, held a number of shares in several subsidiaries which ultimately own and operate a port and Douro wine business in Portugal ("**the Assets**"). Mr. Graham, in his capacity as a former director of the Company, applied to restore the Company to the Register of Companies and otherwise put the Company in good standing with the BVI Registry of Corporate Affairs so that it could deal with its assets and affairs.

Relevant provisions of the Act

- [8] The claim for restoration was made by fixed date claim form under section 218 of the Act which provides that -

218. (1) A person specified in subsection (2) may make an application to the Court to restore a dissolved company to the Register if

- (a) the company was struck off the Register and dissolved following the completion or termination of its voluntary liquidation under this Act or liquidation under the Insolvency Act;
- (b) on the date of dissolution, the company was not carrying on business or in operation;
- (c) the purpose of restoration is to
 - (i) initiate, continue or discontinue legal proceedings in the name of or against the company; or
 - (ii) make an application for the company's property that has vested in the Crown *bona vacantia* to be returned to the company, subject to subsection (4); or
- (d) in any other case not falling under paragraph (a), (b) or (c) 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.

(2) An application under subsection (1) may be made by

- (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.

[9] The claim was made by Mr. Graham in his capacity as a former director of the Company. The fixed date claim form does not specify the ground or grounds in section 218 on which the claim was made but it is apparent from the facts and the skeleton argument of learned counsel for the Claimant, Mr. Christopher McCarthy, that the claim was made under paragraph c(ii) of subsection 219(1) as an application to recover the Company's property that became vested in the Crown pursuant to section 220 of the BC Act, and/or under paragraph (d) of subsection 218(1) as a claim where it is just and fair to restore the Company to the Register.

[10] Upon being served with the claim the Registrar of Corporate Affairs ("**the RCA**"), raised concerns about the claim relating to the standing of Mr. Graham to apply, the lack of approval of the Financial Secretary to the restoration of the Company, service of the claim on the Financial Secretary; and the declaration of the new registered agent that the Company's records have been updated. I will not go into the details of these concerns because by the time the claim came up for hearing on 25 July 2024 they were addressed by the Claimant to the satisfaction of the RCA, and the RCA had withdrawn her objection to the restoration of the Company. However, the parties could not agree on the terms of the order that the Court should make.

Issues relating to the order

[11] There are two unresolved issues relating to the draft order:

- (1) whether the costs of the claim should be made payable as a precondition to restoration; and
- (2) whether the part of the draft order relating to the property of the Company to be returned to the Company upon restoration should include the words "other than money".

Costs as a condition to restoration

- [12] The general rule under part 64.6 of the **Civil Procedure Rules (Revised Edition) 2023 (“CPR”)** is that the unsuccessful party must pay the costs of the successful party. In restoration applications the claimant is the person applying for the restoration of the company, and as most restoration claims are granted, is usually the successful party. However, and this is not disputed, the practice is that the claimant is usually ordered to pay the costs of the Defendant. This is not surprising. A restoration application is only necessary because the company, through its officers or agents, has defaulted on its obligations under the Act, whether those defaults relate to the payment of licence or other fees, the maintaining of a registered agent, the unintended liquidation of the Company, or otherwise. The proceedings are for the benefit of the company. The role of the RCA is to ensure that the company has remedied its defaults and has complied with the relevant provisions of the Act, and should be restored to the Register of Companies. The claimant, having brought the RCA to court entirely for the benefit of the company, is invariably ordered to pay the reasonable costs of the RCA.
- [13] Mr. McCarthy did not dispute any of these principles and agreed that in practice the claimant is usually ordered to pay the costs of the RCA. His position is that Mr. Graham should not be ordered to pay those costs as a condition precedent to restoration.
- [14] Learned counsel for the RCA, Dian Fahie, submitted that the orders for the payment of costs are generally within the discretion of the Court and specifically in this case by virtue of section 218A of the Act which provides that on an application under section 218 the Court may order the restoration of the company subject to conditions relating to the registered agent, payment of restoration fees and outstanding penalties, and “such other conditions as the Court considers appropriate.” Ms. Fahie submitted that the payment of the RCA’s costs is an appropriate condition to order in restoration applications.
- [15] Counsel also relied on CPR rule 26.1(4) which provides that when a court makes an order or direction it may make an order or direction requiring a party to pay all or part of the costs of the proceedings.

- [16] Ms. Fahie submitted that apart from the legal position outlined in the preceding paragraphs, the Court should consider that restoration applications are invariably made by natural or artificial persons who reside overseas and are not otherwise subject to the Court's jurisdiction. Further, that the RCA has had difficulties recovering the costs from some applicants and those costs become practically irrecoverable because the claimants are overseas. In answer to a question from the Court Counsel submitted that ordering the company, instead of the claimant, to pay the costs would also be impractical because the amounts, usually \$1,500.00, do not justify the time and effort involved in pursuing local enforcement proceedings. The simple solution is to order the claimant to pay the reasonable costs of the application as a condition of restoring the company.
- [17] Before writing this decision I reviewed some of the restoration orders that I have made in the recent past. Many of them ordered the costs of the RCA to be paid as a condition of restoration. These orders were made without objection or comment by the respective claimants.
- [18] I have taken note of the fact that the reasons advanced by the RCA requesting that payment of its costs as a condition of restoration are somewhat generic and do not apply to Mr. Graham except in the general ways outlined above. But the impracticality attached to recovering costs orders from claimants who are overseas, and even those who are resident in the jurisdiction, impel me to order that the costs of this claim of \$2,500.00, be paid by the Claimant to the RCA as a condition precedent to the restoration of the Company, and I so order.

Property of the Company

- [19] The parties could not agree the wording of the order as it relates to the return of the Company's property to the Company upon its restoration to the Register. This issue is best resolved by reference to the relevant provisions of the Act.
- [20] As stated above, the Company was struck off the Register and dissolved and one of the consequences of dissolution is that the Company's property vests in the Crown bona vacantia. This is apparent from section 220 (1) which states

that “Subject to subsection (2), any property of a company that has not been disposed of at the date of the company’s dissolution vests in the Crown”. However, if the company is restored to the register by the court under section 218B dealing with the effects of restoration, it is deemed never to have been struck off the register and dissolved (subsection (6) of section 218B). The deemed continuous existence of the company is at least one reason why applications for restoration under section 218 are routinely made for orders that the dissolution of the company also be declared void. These declarations are routinely granted and have become firmly a part of the practice in restoration applications.²

[21] This takes me to the remainder of section 220 which provides that -

- “(2) When a company is restored to the Register, any property, other than money, that was vested in the Crown under subsection (1) on the dissolution of the company and that has not been disposed of must be returned to the company upon its restoration to the Register.
- (3) The company is entitled to be paid out of the Consolidated Fund,
 - (a) any money received by the Crown under subsection (1) in respect of the company; and
 - (b) if property, other than money, vested in the Crown under subsection (1) in respect of the company and that property has been disposed of, an amount equal to the lesser of
 - (i) the value of any such property at the date it vested in the Crown, and
 - (ii) the amount realized by the Crown by the disposition of that property.” (Emphasis added)

[22] Subsection (2) states the obvious – the company’s property must be returned to the company upon its restoration to the Register. This follows from section 218B (6) which I dealt with in paragraph 20 above. However, there is a carve out in section 220 (2). On a literal reading it is that the company’s money (which vests in the Crown by operation of law) is excluded from the property that is returned to the company upon restoration.

² per Adderley J in **Patrick Smulders v Registrar of Corporate Affairs and another** BVIHCV(COM) 2017/0200 at paragraph 29).

[23] The difference between the parties on the wording of the order is the inclusion of the words “other than money” in paragraph 3. The proposed paragraph 3 reads –

“Any property other than money which belonged to the Company and which was not disposed of at the date of the dissolution of the Company and any property which was received for and on behalf of the Company after the dissolution date which was vested in the Crown or elsewhere, be returned and vested in the Company upon its restoration to the Register.”

[24] Ms. Fahie submitted that the underlined words should be included in the order because that is what the section stipulates. Excluding the words would be contrary to the wording and intention of the subsection and would mean that the Crown would have to return any vested money immediately upon restoration. Further, subsection (2) should be read in context of the Act generally and subsection (3) of the section specifically which provides that if money is received by the Crown (as a result of the automatic vesting) and is to be paid out or returned to the restored company, it must be paid out of the Consolidated Fund. Conversely, if no money was received nothing needs to be paid out. Therefore, there is no harm in including the underlined words in the order and this is what the drafter intended by the inclusion of the underlined words.

[25] Mr. McCarthy submitted that the underlined words are unnecessary and should not be included in this or any order because they suggest that the Company’s money that vested in the Crown on dissolution is not automatically returnable on restoration. This could create confusion, especially with monies held in bank or investment accounts overseas, which may require some sort of approval from the Crown before revesting such monies in the affected company. He did not accept the RCA’s position that any such concerns are catered for by the scheme of the restoration provisions that a restored company is deemed never to have been dissolved.

Analysis

[26] I do not find that there is any utility in the inclusion of the words “other than money” in section 220 (2) and they should not be included in an order without qualification. I made such a qualification in the order of the court – see paragraph 28(2) below. The scheme of Part XII Division 3 of the Act dealing with striking off and dissolution of companies is that when a dissolved company is restored to the Register it is deemed never to have been dissolved and its existence is deemed to be continuous. The upshot of this is that when a company is restored the Crown should return all vested property, including money, to the company. The processes of vesting and revesting happens by operation of law and no actual transfer or taking possession of money or property is usually necessary. However, when the Crown receives vested money or property, the procedures in subsection (3) of section 220 must be followed. In the case of money received by the Crown, paragraph (a) of subsection (3) applies and the money is to be paid out of the Consolidated Fund. This is a procedural matter and has nothing to do with the Crown’s obligation to return vested property upon restoration.

[27] In summary, the property of a dissolved company, including its money, is vested in the Crown by operation of law; upon restoration all money or property re-vests in the company by operation of law; when vested money is actually received by the Crown it is repayable out of the Consolidated Fund in accordance with paragraph (a) of subsection 220 (3); when vested property other than money is received by and disposed of the Crown, it must refund the company an amount determined in accordance with paragraph (b) of subsection 220 (3).

Disposal

[28] The draft order should be amended as follows:

- (a) the payment of the RSC’s costs of \$2,500.00 be made a condition of restoration;

- (b) paragraph 3 of the draft order set out above in paragraph 23 be amended by including the words "received by the Crown" after the words "other than money" in the first line; and
- (c) a new paragraph 4 be included as "The Company is entitled to be paid out of the Consolidated Fund any money received by the Crown under section 220(1) of the Act in respect of the Company."

[29] Counsel for the Claimant, after consulting counsel for the RCA, shall submit a revised draft order reflecting the findings of the Court.

[30] The Court is grateful for the helpful submissions of counsel.

Paul Webster (Ag.)

High Court Judge

By the Court

Registrar