

IN THE EASTERN CARIBBEAN SUPREME COURT

TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

COMMERCIAL DIVISION

CLAIM NO: BVIHC (COM) 0213/2018

BETWEEN

IN THE MATTER OF THE BVI BUSINESS COMPANIES ACT, 2004

IN THE MATTER OF KARINNA HOLDINGS LIMITED

BETWEEN

NIKOLAY ARTEMENKO

Claimant

and

THE REGISTRAR OF CORPORATE AFFAIRS

Defendant

**Appearances:**

Miss Rosalind Nicholson with her Ms Rhonda Brown of Walkers for the Claimant

Ms Tanya Dawson of the Financial Services Commission for the Defendant

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2019: February 11

2019: March 20

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**JUDGMENT**

*(Company Restoration- company “non-existent”- discontinued under section 184(4) of Business Companies Act 2004- Certificate of Discontinuance issued by BVI Registrar of Corporate Affairs- company*

*unsuccessfully continued under law of Cyprus- whether company validly discontinued under s. 184(4) - whether the Company Registrar and or the court has statutory power to restore the company- whether section 217 applies to companies discontinued under section 184(4) - sections 180-184, 213-218, 229 and 230 of the Business Companies Act 2004 considered)*

- [1] **GREEN J [Ag.]**: This is an unusual application to restore a company to the British Virgin Islands Register of Companies ("**Register**") after it has been struck off as discontinued under section 184(4) of the Business Companies Act 2004 ("**the Act**"). Karinna Holdings Limited ("**the Company**") attempted to continue as a company incorporated under the laws of Cyprus. However, for the reasons explained below, the Company presently appears to have no existence under the laws of any jurisdiction as it has been discontinued in the British Virgin Islands ("**BVI**") and seemingly cannot now be continued in Cyprus. This application may be the only way for the Company to be revived but this Court's jurisdiction to order its restoration to the Register is not straightforward, involving consideration of the operation of the Continuation provisions in Part X of the Act and the ability to rely on the restoration provisions in Division 3 of Part XII of the Act. The application is opposed by the Registrar of Companies ("**Registrar**").

## **Background**

- [2] The application is made by way of Fixed Date Claim Form filed on 7 December 2018. The Claimant, Mr Nikolay Artemenko, was both a shareholder and the Company's sole director when it was struck off on 28 March 2018. The evidence in support of the application is contained in an affidavit of the Claimant sworn on 5 December 2018. In accordance with the rules associated with applications under section 217(4) of the Act, the Fixed Date Claim Form, draft Order, Certificate under CPR 69A(4)(2) and the Claimant's affidavit and exhibit were served on the Financial Services Commission and on the Financial Secretary on 13 December 2018.
- [3] The undisputed evidence shows as follows:
- (1) The Company was incorporated under the Act on 4 January 2010.

- (2) The Company is the holding company of a large corporate group comprising more than 30 companies ("**Group**"). The companies within the Group have been incorporated in various different jurisdictions.
- (3) In 2016, the Group began a wide reorganisation process and as part of that the decision was taken to continue the Company as a company incorporated under the laws of Cyprus.
- (4) In order to effect this part of the reorganisation, the Company retained Cypriot lawyers, Andreas M Solocleous & Co LLC, and a company management services provider, Mastserve Ltd. The discontinuation in the BVI was to be handled by the Company's Registered Agent, Harneys Corporate Services Limited.

[4] The Claimant has obtained a legal opinion for the purposes of this application from a barrister qualified in Cyprus, Ms Tonia Antoniou, a partner with the law firm, Michael Kyprianou & Co LLC. Ms Antoniou explains the process for continuation of a company into Cyprus and the present legal status of the Company in Cyprus. No objection has been taken by the Registrar to this expert evidence and I am prepared to accept it as evidence of the legal position in Cyprus. The process under the Cyprus Companies Law, Cap 113 ("**Cyprus Companies Law**") appears to be as follows:

- (1) In order to be registered as continuing in Cyprus, an overseas company has to submit an application to the Registrar of Companies and such application must be accompanied by the following documents:
  - (a) A resolution of the appropriate body under the laws of its incorporation jurisdiction authorising the company to continue into Cyprus;
  - (b) A copy of the company's amended Constitution documents, meaning its Memorandum and Articles of Association;
  - (c) A certificate of good standing (or equivalent) issued by the relevant authority in the incorporation jurisdiction;
  - (d) An affidavit of a duly authorised director confirming the good standing of the company, its solvency and proof that the company has given official notice to the relevant authority of its intention to be registered as continuing in Cyprus;
  - (e) Lists of the current directors and members of the company;

- (f) Any other documents that the Registrar might specify as to whether the application is permissible under the law of the company's incorporation and/or that the relevant consents as required by such law have been obtained.
- (2) If the Registrar is satisfied with the documents provided and that there is no issue over the name of the company, the Registrar will certify that the company is temporarily registered as continuing in Cyprus. Ms Antoniou explains the nature and effect of such a temporary certificate ("**Temporary Certificate**"):

*"A temporary certificate of continuation will be issued and the company will be able to continue its business activities subject to Cyprus' Companies Law and Tax legislations.*

*From the date of issuance by the Registrar of the temporary certificate of continuation pursuant to section 354E, the company referred to in the temporary certificate of continuation shall be considered to be:*

- (a) *A body incorporated pursuant to the Law and shall be considered as temporarily registered in Cyprus for the purposes of the Law and it shall be subject to all the duties and shall be capable to exercise all the powers of a company which is registered pursuant to the Law;*
- (b) *The certificate of incorporation, as amended in accordance with section 354C of the Law shall be considered to be the memorandum and, where appropriate, the articles, of the company;*

*As such and assuming that the company subsequently obtains a final certificate of continuation, as explained below the date of issuance by the Registrar of the temporary certificate of continuation referred to above is to be treated as the effective date of the Redomiciliation."*

- (2) In order for a final certificate of continuation to be issued by the Registrar in Cyprus, the company has to file with the Registrar, within 6 months of the Temporary Certificate being issued, documents and evidence from the jurisdiction of incorporation showing that the company "*has ceased to be a company registered in the country of its incorporation*".
- (3) If the company fails to provide such evidence of discontinuation, the Registrar can remove the company from the register in Cyprus; if there is reasonable cause for the delay, the Registrar may allow an extension of 3 months to the period for filing the

evidence; however, *“No further extension is permitted under the Law for the provision of the aforementioned evidence.”*

[5] The position under BVI law will be discussed in more detail below. Suffice it to say at this stage that the relevant proof required to be filed with the Cyprus Registrar in order for a Temporary Certificate to become a final certificate of continuance is a certificate of discontinuance issued by the Registrar in the BVI (**“Certificate of Discontinuance”**). That will have the effect of striking the company off the BVI Register from the date of the Certificate of Discontinuance.

[6] Turning back to the undisputed facts:

(1) On 2 December 2016, the Company passed a written resolution of its shareholders approving the proposed continuation out to Cyprus;

(2) On 3 October 2017, all necessary documents having been provided to the Registrar in Cyprus, a Temporary Certificate was issued in the following terms (as translated):

*“It is hereby certified that KARINNA HOLDINGS LTD  
Was registered according to the Companies Law Cap 113, as a company  
temporarily continuing in the Republic of Cyprus under the name KARINNA  
INVESTMENTS (CY) LTD.”*

(3) The deadline for submission of the evidence required by the Registrar in Cyprus to convert the Temporary Certificate into a final certificate was 3 April 2018;

(4) On 12 March 2018, the Claimant made a statutory declaration as required by s.184(2A) of the Act that:

*“the laws of the Republic of Cyprus permit the continuation of the  
Company and that the Company has complied with those laws.”*

(5) On 28 March 2018, the Registrar issued a Certificate of Discontinuance, relying as she was entitled to pursuant to s.184(2B) on the Temporary Certificate; On the same day the Register was updated to show the Company as *“struck off – discontinued”*; The striking off was published in the BVI Gazette on 26 April 2018;

- (6) However, the Certificate of Discontinuance was inexplicably not filed with the Cyprus Registrar either by the deadline of 3 April 2018 or by the extended deadline of 3 July 2018;
- (7) On 13 September 2018 the Company's Cypriot lawyers, Andreas Sofocleous & Co LLC, wrote to the Cyprus Registrar asking exceptionally for the Certificate of Discontinuance to be accepted and for a final certificate to be issued despite the failure to file on time; they suggested that they had been advised that it was not possible to reinstate the Company in the BVI;
- (8) According to the Claimant's affidavit, the Cyprus Registrar has since communicated to their agents in Cyprus, Mastserve, that an exception would not be made for the Company; he also says in his affidavit (although I have not seen documentary evidence of this advice) that Ms Antoniou has further advised there is now "*no possibility that the Company can continue into Cyprus*";
- (9) As the Company was apparently discontinued in the BVI and not able to be continued in Cyprus, the Company, through its legal practitioners in the BVI, Walkers, approached the Registrar to see if she would restore the Company to the Register pursuant to her statutory powers under s.217(1) of the Act. The Registrar responded to say that because the Company was struck off as discontinued and therefore "ceased to exist" under s.184(2) of the Act, she had no power under s.217(1) to restore a non-existent company to the Register.

### **The Claim**

- [7] By the Fixed Date Claim Form, the Claimant applies under s.217(4) of the Act and/or the inherent jurisdiction of the Court for:

- (1) An order that the discontinuance of the Company on 27 March 2018<sup>1</sup> be rescinded and declared void;
- (2) A declaration that the Company be deemed never to have been discontinued;
- (3) An Order that the Company be restored to the Register of Companies;
- (4) Further or other relief.

[8] No point is taken by the Registrar as to whether the application is within the time limit in s.217(4) of the Act. Nor do I understand there to be any dispute that if I find there is jurisdiction to restore the Company to the Register, I can make the declarations and orders sought. The dispute is however about both the Court's and the Registrar's power to restore a company that has been struck off for discontinuance, rather than for the usual reasons as set out in s.213 of the Act.

### **Legal Framework**

#### **(a) Discontinuation in the BVI**

[9] As I have said above, Part X of the Act (ss.180 to 184) deals with continuation and discontinuation of companies. Continuation of a foreign company into the BVI is dealt with in ss.180 to 183 of the Act. I should point out one subsection that was relied on by Miss Nicholson for the Claimant – s.182(2) states that a "*certificate of continuation issued by the Registrar under subsection (1) is conclusive evidence that...the company is continued as a company incorporated under this Act*". Miss Nicholson says the reference to "*conclusive evidence*" should be compared to the wording in s.184(4A) of the Act.

[10] Discontinuation is dealt with in s.184 of the Act. The material subsections are set out below:

"184. (1) Subject to subsection (2) and its memorandum or articles, a company for which the Registrar would issue a certificate of good standing pursuant to section 235(1) may, by a resolution of directors or by a resolution of members, continue as a company incorporated under the laws of a jurisdiction outside the Virgin Islands in the manner provided under those laws.

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<sup>1</sup> This should be 28 March 2018

...

- (2) A company that continues as a company incorporated under the laws of a jurisdiction outside the Virgin Islands does not cease to be a company incorporated under this Act, unless –
  - (a) the laws of the jurisdiction outside the Virgin Islands permit the continuation and the company has complied with those laws;
  - (b) the registered agent of the company has filed with the Registrar the required notice of continuance under subsection (3); and
  - (c) the Registrar has issued a certificate of discontinuance of the company under subsection (4).
- (2A) For the purposes of establishing compliance with subsection (2)(a), the company shall file a declaration in the approved form confirming –
  - (a) That the laws of the jurisdiction outside the Virgin Islands permit the continuation of the company; and
  - (b) The company has complied with those laws.
- (2B) Subject to subsections (2) and (2A), where the continuation of a company under the laws of a jurisdiction outside the Virgin Islands is dependent upon the issuing of a certificate of discontinuance under subsection (4)(a), the Registrar may rely upon a provisional certificate of continuance (however described) issued in respect of that company under the laws of that jurisdiction as a basis to issue the certificate of discontinuance.
- (3) The registered agent of a company that continues as a company incorporated under the laws of a jurisdiction outside the Virgin Islands may file a notice of the company's continuance in the approved form.
- (4) If the Registrar is satisfied that the requirements of this Act in respect of the continuation of a company under the laws of a foreign jurisdiction have been complied with, he shall
  - (a) issue a certificate of discontinuance of the company in the approved form;
  - (b) strike the name of the company off the Register of Companies with effect from the date of the certificate of discontinuance; and
  - (c) publish the striking off of the company in the Gazette.
- (4A) A certificate of discontinuance issued under subsection (4) is prima facie evidence that
  - (a) All the requirements of this Act in respect of the continuation of a company under the laws of a foreign jurisdiction have been complied with; and

(b) The company was discontinued on the date specified in the certificate of discontinuance.”

[12] As can be seen, each jurisdiction is dependent on the other producing certificates at certain times to get past the next hurdle. It seems to me, and this is accepted by the Claimant, that the Registrar acted perfectly properly in issuing the Certificate of Discontinuance under s.184(4)(a) and that she was entitled to rely on the Temporary Certificate issued by the Cyprus Registrar on 3 October 2017 for such purpose (see s.184(2B)).

[13] However there is disagreement over whether the Company has actually discontinued under s.184(2) and whether, if it has not, the Certificate of Discontinuance, which under s.184(4A) is only *prima facie* evidence of its discontinuance, should be set aside as it does not reflect the true state of affairs.

(b) Restoration to the Register

[14] The provisions in relation to restoring a company to the Register after striking off or dissolution are contained in Division 3 of Part XII of the Act (ss.212 to 221). Part XII is headed “Liquidation, Striking Off and Dissolution”. Division 3 is headed “Striking Off and Dissolution”.

[15] By s.213 of the Act, the Registrar can strike a company off the Register for various defaults, such as the company failing to have a registered agent, failing to pay annual fees and penalties or ceasing to carry on business. By s.214 of the Act, “*any person who is aggrieved by the striking of a company off the Register under section 213 may, within ninety days of the date of the notice published in the Gazette, appeal to the Court*” (emphasis added).

[16] The effect of striking off is dealt with in s.215 of the Act. Although the company and its directors, members or liquidator may not commence or defend legal proceedings or carry on the business of the company when it is struck off, they still have power to make application to restore the company to the Register and to continue legal proceedings started before the striking off.

[17] Dissolution is provided for in s.216 of the Act. This states:

“216 Where a company that has been struck off the Register under section 213 remains struck off continuously for a period of seven years, it is dissolved with effect from the last day of that period.” (emphasis added)

[18] Section 217 of the Act provides as follows:

“217 (1) Where a company has been struck off the Register, but not dissolved, the Registrar may, upon receipt of an application in the approved form and upon payment of the restoration fee and all outstanding fees and penalties, restore the company to the Register.

(2) Where the company has been struck off the Register under section 213(1)(a)(i) or the struck off company does not have a registered agent, the Registrar shall not restore the company to the Register unless

(a) he is satisfied that a licensed person has agreed to act as registered agent of the company; and

(b) he is satisfied that it would be fair and reasonable for the name of the company to be restored to the Register.

(3) An application to restore a company to the Register under subsection (1) may be made by the company, or a creditor, member or liquidator of the company and shall be made within 7 years of the date of the notice published in the Gazette under section 213(5).

(4) The company, or a creditor, a member or a liquidator thereof, may, within ninety days, appeal to the Court from a refusal of the Registrar to restore the company to the Register and, if the Court is satisfied that it would be just for the company to be restored to the register, the Court may direct the Registrar to do so upon such terms and conditions as it may consider appropriate.

(5) Notice of an appeal to the Judge in chambers under subsection (4) shall be served on the Registrar who shall be entitled to appear and be heard at the hearing of the appeal.

(5A) Where the Registrar restores a company to the Register under subsection (1) or pursuant to a direction of the Court under subsection (4), he or she shall issue a certificate of restoration to the Register.

(6) Where a company is restored to the Register under this section, the company is deemed never to have been struck off the Register

(7) Where a company to which subsection (2) applies is restored to the Register, it shall forthwith appoint a registered agent under section 91A.”

- [19] Sections 218 to 218B of the Act make provision for the restoration of dissolved companies to the Register. It is clear from these provisions (see eg s.218(A)(2) and (3) and s.218(B)(3)) that applications under s.218 for restoration is not limited to companies dissolved under s.216 but includes at least companies that have been dissolved following voluntary liquidation under s.208 of the Act or liquidation under the Insolvency Act 2003.
- [20] The Claimant says that ss.217(1) and (4) are not limited to companies struck off under s.213 of the Act and that these sections can be used in respect of a company struck off pursuant to the discontinuation provisions of s.184. The Registrar says that ss.217(1) and (4) are limited to companies struck off under s.213 because they are both part and parcel of the same Division of the Act. The Registrar also argues that because of the definition of “company” in s.3(1) of the Act<sup>2</sup>, the Company cannot take advantage of the restoration provisions in s.217.
- [21] I should add that Miss Nicholson also relied on ss.229 and 230 of the Act to submit that the Registrar’s duties are prescribed by the Act and this includes the maintenance of the Register (see s.230(1)(a)). It is implicit, so she says, that the Register must be complete and accurate and, if it is not, the Court has inherent jurisdiction to ensure that the Registrar’s statutory duty is complied with.

### **Analysis**

- [22] The Company currently is not incorporated or treated as incorporated under any jurisdiction including both the BVI and Cyprus. Yet it still holds assets and may have liabilities, so it must have an existence somewhere. I am told and accept that there is no chance now of the Company being continued in Cyprus pursuant to the current application. And a fresh application cannot now be made to the Cyprus Registrar because the requisite certificate of good standing could not be obtained from the BVI Registrar as her view is that the Company has been discontinued.

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<sup>2</sup> Section 3(1) states that “unless this Act expressly provides otherwise” excluded from the definition of company is “a dissolved company and a company that has continued as a company incorporated under the laws of a jurisdiction outside the Virgin Islands in accordance with section 184”.

[23] The only way out of this situation appears to be by restoring the Company to the Register. I find it difficult to believe that both the Registrar and the Court are powerless to act in response to this unfortunate position that the Company has got itself into. It is the Company's or its agent's fault that it is in this position as it only needed to make sure that the Certificate of Discontinuance was filed in Cyprus in time. The Registrar says that it is not her problem and the Company cannot be restored to the Register. She says that there is a comprehensive statutory scheme laid down by Parliament, that "*there are no gaps left by the law*", and that Parliament did not legislate for the restoration of a discontinued company to the Register.

(a) Has the Company discontinued under the Act?

[24] Section 184(2) of the Act is a little confusing. It does not deal with discontinuance as such; rather it attempts to define when a company will "*cease to be a company incorporated under this Act*". Furthermore it must be contemplating that this will happen at some point after discontinuance because the third condition in subparagraph (c) refers to the certificate of discontinuance and by s.184(4A)(b) this is *prima facie* evidence that the company was discontinued on the date specified in the certificate. Therefore s.184(2) must be looking at a time after the date of discontinuance. However, the Act does not state precisely when a company ceases to be incorporated under the Act; nor does it identify the different consequences of discontinuing and ceasing to be incorporated under the Act.

[25] Instead of saying that a company will cease to be a company incorporated under the Act when the three conditions in subparagraphs (a) to (c) are fulfilled, s.184(2) puts it the other way round by prescribing that those three conditions must be fulfilled before it can cease to be a company incorporated under the Act. That seems to me to leave open the question as to when the conditions are to be tested. Furthermore, the section clearly contemplates that a company can both be continuing in another jurisdiction while still being a company incorporated in the BVI under the Act. The opening words are important: "*A company that continues as a company incorporated under the laws of a jurisdiction outside the Virgin Islands...*" which implies another condition to the three set out, namely that the company is actually continuing in another jurisdiction.

- [26] The Company is not presently and cannot continue as a company incorporated under the laws of Cyprus. Accordingly, since the deadline for filing the Certificate of Discontinuance with the Cyprus Registrar expired, the Company does not satisfy that preliminary condition referred to in the previous paragraph. Ms Dawson on behalf of the Registrar says that, at the time of the issue of the Certificate of Discontinuance, the Company was so continuing in Cyprus and she refers to the passage from Ms Antoniou's Opinion (quoted from in paragraph 4 above) where the effect of the Temporary Certificate is said to be that the Company is considered to be incorporated pursuant to Cyprus Company Law and to have all the powers of a company which is registered pursuant to Cyprus Company Law. Ms Dawson submits essentially that time stops at the date of issuance of the Certificate of Discontinuance and because the Company satisfied all the conditions of s.184(2) at that date (i.e. 28 March 2018), it has actually discontinued and ceased to be incorporated under the Act.
- [27] However, as I have said above, s.184(2) must be dealing with a later time and it is crucially dependent on the Company actually continuing in Cyprus. The section therefore leaves open the possibility that the Temporary Certificate upon which the Registrar was entitled to rely under s.184(2B) does not become final for whatever reason and the preliminary condition in s.184(2) is not satisfied. Hence Parliament could be said to have anticipated the possibility that what is called the "*provisional certificate of continuance (however described)*" (s.184(2B)) – the Temporary Certificate in this case – does not become final, such that the company does not actually continue as a company incorporated under a foreign jurisdiction. In that situation, s.184(2) recognises that a company cannot be left stateless and it does not cease to be incorporated under the Act.
- [28] I agree with Miss Nicholson that the conditions in subparagraphs (a) to (c) of s.184(2) are cumulative and they must all be satisfied, together with the preliminary condition, before a company will cease to be incorporated under the Act. The Company did not comply with the laws of Cyprus in respect of continuation because it did not file the Certificate of Compliance before the deadline. It had complied with those laws until the deadline had passed and while it had the Temporary Certificate but the test as to whether it had fully complied can surely only be taken when a final certificate is issued. The fact that it is a temporary or provisional certificate indicates

that there is a possibility that it might not become final, in which case there must be a mechanism for keeping the Company incorporated under the Act.

[29] This could also be the reason why the Certificate of Discontinuance is only *prima facie* evidence of discontinuance. This can be compared to the certificate of continuation issued by the Registrar under s.182(2) of the Act which is “*conclusive evidence*” that a company is continued as a company incorporated under the Act. If the Certificate of Discontinuance is only *prima facie* evidence of discontinuance, it is subject to contrary evidence that may disprove the discontinuance. In this case, the fact that the Company has not actually continued in Cyprus is strong proof that discontinuance under the Act has not taken place.

[30] The Registrar need only satisfy herself that the Company has complied with the requirements of the Act in order to issue the Certificate of Discontinuance under s.184(4). The Registrar cannot be expected to inquire into whether the laws of Cyprus have been complied with. That is why the Registrar properly issued the Certificate of Discontinuance. But if it turns out that Cyprus law has not been complied with and the Company has not continued in Cyprus, s.184(2) enables the Company to prove that it has not actually been discontinued.

[31] The Registrar is required to strike off a company when she issues a certificate of discontinuance under s.184(4). It is automatic once the Registrar has decided to issue the certificate of discontinuance. It is essentially an administrative act in anticipation of the company ceasing to be a company incorporated under the Act. There is nothing in Part X about restoring a company to the Register if it turns out that it has not actually been discontinued. But there must be power to do so, and the only such power is contained in s.217 of the Act.

(b) Can the Claimant rely on s.217 of the Act?

[32] Ms Dawson submitted that s.217 does not apply to discontinued companies that have been struck off pursuant to s.184(4). She says that s.217(1) and (4) only apply to companies that have been struck off by the Registrar pursuant to her powers under s.213 of the Act. Ms Dawson submitted

that if s.217 applies to discontinued companies that would mean that the whole of Division 3 would have to apply and this would create an absurdity, for example if the s.215 effects of a striking off would have to apply to discontinued companies. Finally, Ms Dawson submitted that because of the definition of “company” in s.3(1), a discontinued company cannot avail itself of s.217.

[33] I do not agree. Dealing first with the definition of “company” point, the Company has not continued under the laws of Cyprus. It is not therefore excluded from the definition.

[34] As to s.217 being confined to companies struck off under s.213, in my view there are contrary indications to this as follows:

- (1) Under s.214, any person aggrieved by a striking off by the Registrar “*under section 213*” can appeal to the Court within 90 days; there is express reference to s.213 when Parliament wanted to confine the operation of the section;
- (2) Similarly, in s.216, there is express reference to a company being struck off under s.213; in the case of a discontinued company, the striking off does not need to lead to dissolution because in the normal course of events, the company would have ceased to be incorporated under the Act;
- (3) Neither s.217(1) nor (4), (which is dependent on (1)), refer to a company struck off under s.213;
- (4) S.217(2) deals with a particular form of striking off under s.213(1)(a)(i);
- (5) S.217(3) refers to the time within which an application to restore has to be made and this does expressly refer to the notice published pursuant to s.213(5); such a notice has also to be published under s.184(4)(c) but this is not expressly applied; however, the reason for the 7 year time limit is to tie it into the dissolution provision in s.216 which, as I have said, is inapplicable to discontinued companies;
- (6) As pointed out above, ss.218 to 218B are clearly not confined to companies struck off and then dissolved under ss.213 and 216 – they also apply to companies dissolved following liquidation under the Act and even liquidation under another Act, the Insolvency Act.

[35] So Division 3 is clearly not self-contained. The main operative provisions that are sought to be relied upon, ss217(1) and (4) contain no limitation to companies struck off under s.213. It is only the procedural s.217(3) that could be said to confine their operation to companies struck off under s.213. As for the s.215 point, it seems to me that combined with s.184(5), this does not lead to an absurd conclusion and the sections could work together, if necessary, in relation to on-going legal disputes.

[36] As I have concluded above that s.184 contemplates the possibility of a discontinuance being reversed, it necessarily follows that there must be a mechanism under the Act for restoring a company to the Register in that situation. I do not see why s.217 cannot be used for such purpose. I do not imagine that this same scenario will arise much in the future but I do consider that the Act does give power to the Registrar and the Court to resolve this unusual predicament. I therefore hold that the Claimant can apply under s.217(4) to overturn the Registrar's refusal to restore the Company to the Register. Furthermore I am satisfied that it would be just in the circumstances for the Company to be restored to the Register.

(c) The Court's inherent jurisdiction

[37] Given that I have decided that the Court has jurisdiction under s.217(4) to restore the Company to the Register, I will not say much about the Claimant's alternative basis for the application, an appeal to the Court's inherent jurisdiction. If I am wrong about s.217 and there is no statutory power to restore the Company to the Register, is there still an inherent jurisdiction, perhaps based on public law principles, to control the way in which the Registrar carries out her statutory duties and to ensure that the Register is accurate? Miss Nicholson's submissions were largely based on the well-known decision of Hoffmann J (as he then was) in **Re Calmex Ltd**<sup>3</sup> in which a winding up order was made by mistake against the wrong company and the learned Judge, having found the order to be a nullity, ordered the removal of the winding up order from the registrar's records.

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<sup>3</sup> [1989] BCLC 299

[38] I do not consider this to be a similar case. In relation to discontinuation, striking off and restoration to the Register, there is a comprehensive statutory code and procedure dealing with those matters. I agree with Ms Dawson where she says that the inherent jurisdiction cannot be used to undermine the will of Parliament. Maybe I am influenced by the fact that I have found that the Act does provide for this situation. But I would have been most reluctant to find an extra-statutory jurisdiction to do that which Parliament has thought fit not to provide for in the Act.

### **Conclusion**

[39] In my judgment, the Company was not validly discontinued in the BVI. It therefore continues to be incorporated under the Act and the provisions of s.217 can be used to restore it to the Register.

[40] Accordingly, I will make the orders as sought: rescinding and declaring void the Company's discontinuance and restoring the Company to the Register upon payment of all outstanding fees and penalties. In the usual way, the Claimant will pay the Registrar's costs of this application.

**Hon Mr Justice Michael Green QC**  
**Commercial Court Judge [Ag]**

**By the Court**

**Registrar**