

## Changes to the ability to restore a company to the register in Guernsey

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On 24 November 2014 Guernsey's Legislation Select Committee passed *The Companies (Guernsey) Law, 2008 (Amendment) Ordinance, 2014* with immediate effect. The long awaited Ordinance will widen the circumstances in which Guernsey companies can be restored to the register.

The requirement for the amendments to The Companies (Guernsey) Law 2008 (the **Companies Law**) was brought into sharp focus by an application for restoration made by Ogier in December 2012 *In the matter of Whitecliff Investments Limited (in dissolution)*. This matter concerned a company, Whitecliff Investments Limited (the **Company**) which had been struck off the register following a voluntary liquidation. Upon the discovery that certain construction contracts had not been properly assigned prior to the Company's dissolution, an application was made to the Royal Court to restore the Company to the register. The legislative framework at the time of the application did not allow for the restoration of companies that had been struck off the register following liquidation. In his judgment Deputy Bailiff McMahon sympathised with the position of the applicant but stated that it would not be a proper exercise of the Court's discretion *"to jump the gun and pre-empt the regime that must in due course be created by the legislature."*

There will no doubt be several companies on the island in a similar position to Whitecliff Investments Limited that will welcome the amendments to the Companies Law. In this briefing we will look at why companies are removed from the register, how they are restored and what the new Ordinance will mean for dissolved companies.

### In what circumstances will a company be struck off the register?

The Registrar of Companies can strike off companies which are either defunct or defaulting. Defunct companies are those which the Registrar has reasonable cause to believe are not

carrying on business or are not in operation. In the case of a company which is being wound up it will be considered defunct if the Registrar has reasonable cause to believe that no liquidator is acting or that the affairs of the company are fully wound up.

Defaulting companies are those companies:

- a. which fail to deliver to the Registrar an annual validation in accordance with the Companies Law before the end of January in any year;
- b. about which the Registrar receives notice from a corporate service provider stating that the registered office of the company is ineffective;
- c. about which the Registrar is of the opinion that there have been persistent or gross contraventions of the Companies Law; and
- d. which fail to comply with the provisions of the Companies Law in relation to the requirement to have a resident agent.

A company may also be voluntarily struck off following an application to the Registrar and upon such striking off, the company shall be dissolved.

## **Why restore a company to the register**

Typically, companies will need to be restored to the register where:

- a. a company has been struck off for failing to file its annual validation but its business continues to trade.
- b. a third party has an unresolved claim against the company and must take some action against the company to gain compensation or redress.
- c. the company had title to an asset when it was dissolved that is of value or importance to the operation of another company.

## **How are companies restored to the register?**

A company can be restored to the register following an application to the Royal Court or by application to the Registrar. In granting an order to restore a company to the register the Court may satisfy itself either that the company was, at the time of striking off, carrying on business or in operation or that it would be just and equitable for the company to be restored to the register. In making its decision as to whether or not to restore a company to the register the Court will have regard to the following:

- a. whether or not the company would satisfy the solvency test if restored (unless the

application is made by a creditor);

- b. whether the persons who were directors at the time the company was struck off consent to being directors if the company is restored;
- c. the circumstances in which the company was struck off;
- d. whether there were any gross violations of the Companies Law;
- e. whether the company was used for fraudulent purposes;
- f. whether restoration to the Register would jeopardise the reputation of the Bailiwick as a financial centre; and
- g. whether it would be just and equitable to restore the company to the Register.

The Registrar may restore a struck off company where he is satisfied that:

- a. the company was struck off in error or in circumstances in which it should not have been struck off;
- b. an application to the Court for the restoration of the Company would be successful but is not necessary for the fair disposal of the matter; and
- c. the restoration of the company would not prejudice any creditor or third party.

Given the requirement in (b) any application to the Registrar would need to address all of the points which would have been covered in an application to the Royal Court, such as violations of the Companies Law, etc.

The Registrar will only exercise his discretion to restore a company to the register where the error or circumstances which resulted in the company being struck off arose on the part of the Registrar and does not extend to errors or circumstances which arose on the part of the company, its directors or corporate services provider. This is probably why we do not see many restoration applications made to the Guernsey Registrar. This may change following the implementation of *The Companies (Guernsey) Law, 2008 (Amendment) Ordinance, 2014*.

## **What impact will the new Ordinance have?**

Prior to the amendments to the Companies Law the circumstances in which a company could be restored to the register were very narrow. The effect of the amendments will be to widen the restoration provisions and bring them closer to those in force in England and Wales. It will now be possible to restore companies where the strike-off circumstances have been remedied and also those companies which have been compulsorily or voluntarily wound up.

The Court will apply the same test as that outlined above when deciding to restore a company

save that in the case of a company that was in liquidation prior to being struck off, it will consider whether the liquidator will consent to act if the company is restored. It is likely that in light of the new provisions there may now be a flurry of restoration applications from parties that have been waiting for the Ordinance to be passed. Going forward, these provisions will be very useful for the Bailiwick in circumstances where there seemed to be no logical reason for their omission from the Companies Law.

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