Restoration of a company in Guernsey

Briefing Summary: Under The Companies (Guernsey) Law, 2008 (the "**Companies Law**"), when a company has been dissolved and removed from the register, all property (physical and incorporeal) held by it or held on trust for it pass to the Crown *bona vacantia* (which literally means 'vacant goods') by operation of law, unless His Majesty's Receiver-General directs otherwise.

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Ordinarily, companies holding property or other assets tend to be struck off due to failure to comply with the provisions of the Companies Law, this would typically include:

- Failure to maintain an effective registered office;
- Failure to complete an annual validation; or
- Failure to comply with the requirement to have a resident agent.

There is a mechanism under the Companies Law which allows for a dissolved company to be restored, and whereby property which has become *bona vacantia* (belonging to the Crown) can be returned to the company.

How can a company be restored?

There are two ways in which a company can be restored to the register in Guernsey:

- An application to Royal Court
- An application to the Registrar of Companies

As applications to the Registrar are only available in the case of a company struck off in error, the window for this tends to be very short and relates only to genuine administrative errors. The majority of restorations are by way of application to the court.

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Reasons to restore a company

There are a number of reasons why companies may be restored to the register having been struck off or wound up previously. Common examples include:

- To pursue a litigation in the name of the company, e.g. against former directors for breach of directors' duties;
- To realise property held by the company at the time of dissolution, i.e. for shareholders to retrieve property that has passed ***bona vacantia*** to the Crown - typically this would be, land, real estate, shareholdings or cash held bank accounts; or
- Sometimes it is as simple as the company wishing to recommence trading.

On occasion, a company that has undergone a compulsory or voluntary winding up (via a former member, director or creditor) may subsequently discover a cause of action or previously unknown or undisclosed assets and may require to be restored to the Register in order to pursue or realise these.

When can a company be restored?

Generally, any company can be restored up to 10 years after the date on which it was struck off. The primary exception to this is companies which are struck off under section 519 of the Companies Law for persistent and gross contraventions of the requirements of the Companies Law.

Who can apply to restore a company?

Under the Companies Law the following parties can apply to have a company restored:

- The company itself if it is struck off voluntarily or due to being defunct or defaulting;
- The company itself if it has been wound up, either a voluntary or a compulsory winding up;
- Any director, creditor or shareholder in the company;
- Any liquidator or administrator;
- In the case of a supervised company, the Guernsey Financial Services Commission (the "**GFSC**"); and
- Any other person appearing to the court to have sufficient interest.

With regard to the latter category of 'any other person appearing to have sufficient interest', while these cases will turn on the evidence presented, this criteria remains relatively unexamined by the Courts in Guernsey – the most pertinent example may be a former director or member (not immediately prior to the company being struck off). Equally, a potential creditor may wish to have a company restored, or even a former employee.

By contrast, the courts in England determined that an unconnected set of insolvency practitioner's seeking to restore 31 companies to the register in order to appoint themselves as liquidators, and self-fund a series of claims against the former liquidators of these companies for fees overcharged by the former liquidators, did not have the requisite standing to bring an application. The court held that this would potentially open the floodgates to similar applications from parties with no tangible interest. Although the court was quick to caveat that each case is fact-specific and to be determined on a case-by-case-basis, as a matter general principle, an applicant would appear to require a financial or propriety interest in the restoration.

The procedure for making an application to restore

Before an application can be filed with the court, notice of the application is required to be served on:

- The Guernsey Registry (the "**Registry**");
- HM Procurer;
- HM Receiver-General;
- In the case of a supervised or financial services company, the GFSC; and
- Any liquidator or administrator holding office at the time the company was struck off/dissolved.

Although the statutory requirement is simply to service notice, in practice the applicant should wait for a response from these bodies prior to filing the application. While there is no sanction for failing to acquire their consent, or failing to exhibit their response in evidence, there is an expectation from the court that an application ought to be accompanied by a positive response from the notified parties, confirming they have no objections to the restoration. In practice, this allows for the Registry to confirm there are no outstanding issues requiring to be addressed.

As a company is restored as if it was never struck off, it will be required to pay any outstanding fees, such as annual validations fees, prior to being restored. Any other irregularities or issues can be flagged during the intervening period between notifying the Registry and making the application.

Best practice, although again not strictly required by law, is to provide a draft copy of the affidavit with the notification of the application, otherwise the relevant public body (or liquidator) will not have any real basis for consenting, or objecting, to the application. There is an inherent risk of judicial criticism in adopting an approach whereby the Registry, HM Procureur and HM Receiver-General only receive minimal information, i.e. bare notice of the application, and may lead to a judge determining that they cannot grant an application 'on the papers' without hearing further representations from the applicant's advocate, or without fixing a hearing at which parties can appear and make representations.

The applicant is required to provide evidence in support of the application for restoration. This will need to set out, among other things:

- the purpose for the restoration;
- confirmation that the company satisfies the solvency test on a 'cash flow' and balance sheet basis;
- has the consent of the directors and resident agent of the company at the time of dissolution to reassume their previous roles; and
- confirmation of the asset position of the company including whether any assets are, or were, held overseas that now may have passed to the Crown ***bona vacantia*** or to the equivalent in a foreign jurisdiction.

In the event there are foreign assets or shareholdings, it is advisable to provide supporting affidavit evidence from these jurisdictions detailing the foreign law treatment of the assets.

Filing the application

The application can be filed in two ways. An application can be made to the non-contentious court, which sits on a Tuesday. The matter will then be determined with 'on the papers' without the requirement for an advocate to appear in court. Alternatively, the application can be listed in the Friday Ordinary Court with oral representations made in open court.

For straightforward restoration matters like those where the company was struck off due to an oversight at the time regarding its affairs or failed to comply with the provisions of the Companies Law, the non-contentious route will be the preferred option. For more complex matters, while these can still be filed in the non-contentious court, there is a greater risk that the judge may require further submissions to be made on behalf of the applicant and, upon review of the application and evidence, may wish the matter to be listed in the Ordinary Court. For example, this may include applications where the company held foreign assets and where the evidence submitted is not clear on how these assets are to be dealt with upon restoration. Where there is a party expressly opposing the restoration, the matter will be required to go before the Ordinary Court.

Factors considered by the court

Excluding the obvious factors such as fraud or persistent and gross violations of the Companies Law, the court will typically have regard to:

- The surrounding circumstances and reasons for the original strike off, and the subsequent reasons for its restoration;
- The solvency of the company, and whether the company will have the financial backing to operate as a going concern post-restoration;
- Whether there is a member and director buy-in supportive of the restoration;
- If the company can operate as it did pre-strike off or whether new officers are required to be appointed;
- The asset position of the company, where assets are located, and what their value is;
- Whether restoration would jeopardise the reputation of the Bailiwick of Guernsey as a financial centre; and
- Whether it is just and equitable to restore the company.

Order of the court

If the court is satisfied that a restoration order is appropriate and that the company ought to be restored to the Register, the company will be deemed to have continued in existence as if it was never struck off. While this creates a legal fiction, the company is in theory placed into the position that it would have been had it continued in the intervening period between its strike off and restoration. For companies that have been off the Register for a considerable period, there will be, for example, the back costs of filing annual validations.

Once a company is restored, it will be entitled to the return of its property, or where that property has been disposed of, the value of the property.

Timings

Overall, the process can take between three to four weeks. Much of this will hinge on two factors: i) how quickly the notification is responded to by the Registry, HM Procureur, HM Receiver-General and, if necessary, the GFSC; and ii) how long it takes to compile the supporting evidence. For companies that have been off the register for a considerable period, bearing in mind the restoration application can extend to company's who have been struck off up to 10 years previous, the necessary information or access to the former directors, may not be readily accessible.

For applications submitted to the non-contentious court (sitting on a Tuesday, as noted above), the application will be dealt with 'on the papers' without the need for a hearing and will ordinarily be granted on the day, with the Court Order provided usually a day or two thereafter.

The subsequent submission of the Court Order to the Registry and the formal restoration of a company to the register will usually take a day, assuming the outstanding fees have been satisfied and any necessary confirmation of the ultimate beneficial owners is provided.