

The Court's Power to Restore A Company That Has Been Struck Off

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Introduction

1. In *Re Asia Petan Organisation Pte Ltd* [2017] SGHC 204 ("**Re Asia Petan**"), the Singapore High Court restored a company that had been struck off the Register. The Company had previously been struck off by its own prior application to the Registrar (ACRA).
2. The Court considered the following issues:
 - a. Does a court have the power to restore a company struck off by *its own* application (as opposed to a striking off on the Registrar's initiation), in light of the enactment of Section 344A of the Companies Act ("**the Act**")?
 - b. What factors should a court take into account in deciding whether to restore a company to the Register?

Facts

3. Asia Petan Organisation Pte Ltd was incorporated in July 2013 in Singapore, with Song (the applicant in this case) and Tan (intervening party contesting the application) as the 2 directors and shareholders. After a few months of the Company conducting business, Tan prepared documents to apply to strike the Company off the Register and forwarded these to Song. When Song did not respond, Tan lodged the application for striking off on 23 June 2015. Song claimed that it was only in November 2015 that he became aware that the Company had been struck off.
4. Song and Tan had had disputes over the Company's accounts, revenue and expenses. Song had informed Tan that he intended to commence proceedings against Tan for various breaches, even before the striking off application was lodged.
5. After the Company was struck off (on Tan's application), Song then applied to Court to restore the Company under Section 344(5) of the Act. Song argued that Tan had breached his directors' duties to the Company and that the Company should be restored so that an action could be commenced against Tan.

Analysis

Issue 1: Does a court have the power to restore a company struck off by its own application, in light of the enactment of Section 344A of the Act?

6. After studying the legislative intent behind the relevant provisions, the Court held that it **does** have the power under Section 344(5) to restore a company that had been previously struck off by the company's own application (whether the previous striking-off application was made under Section 344 or the new Section 344A). The Court was of the view that Section 344(5) is a general restoration provision.
7. The Court made the following observations:
 - a. Section 344 empowers the Registrar to strike off a company that the Registrar has reason to believe is no longer carrying on business or not in operation. Section 344 contains Section 344(5), which is a restoration provision.
 - b. The Court noted that the new and additional Section 344A (which came into force on 3 January 2016), which empowers the Registrar to strike off a company on the company's own application, does not contain an equivalent restoration provision.
 - c. However, the Court was of the view that Section 344(5) is a *general* restoration provision – that is to say, the Court has power under Section 344(5) to restore companies that been struck off on the Registrar's initiation *as well* as companies that had been struck off on their own application.
 - d. The Court considered that it would have been the existing practice prior to the enactment of the new Section 344A that companies/their officers that wished to self-initiate a striking off, or a reinstatement/restoration, would have relied on Section 344(5) to do so.
 - e. In support of its finding that the Court does have the power under Section 344(5) to restore a company that had been previously struck off by the company's own application, the Court also commented that there can be good reasons why a company that has been struck off on its own application would seek to be restored (for example, the need to pursue claims against a director, and mistake, fraud or material non-disclosure in a prior application to strike off the Company).

Issue 2: What factors should a court take into account in deciding whether to restore a company to the Register under Section 344(5)?

8. Section 344(5) provides that on an application made by "any person [feeling] aggrieved by the name of the company having been struck off", the court may order the name of the company to be restored to the register, "if satisfied that the company was, at the time of striking off, carrying on business or in operation or otherwise that it is just that the name of the company be restored".
9. The Court set out helpful guidance on the factors to be considered in such an application, drawing from similar legislation, and case law, from other jurisdictions:

- a. Section 344(5) should be interpreted broadly.
 - b. To establish locus standi under Section 344(5), an “aggrieved person” must demonstrate some proprietary or pecuniary interest arising from the company’s restoration. Such interest need not be firmly established or highly likely to prevail, but it must not be merely shadowy.
 - c. In considering whether it would be “just” to restore a company to the Register, a company has to have regard to all the circumstances of the case, including but not limited to:
 - i. The purpose of restoring the company – the court may consider whether a remedy or claim would only be available or enforceable upon restoration;
 - ii. Whether there would be any practicable benefit arising from the restoration; and
 - iii. Whether there would be prejudice to any persons.
 - d. If the Court is satisfied of the above, it should order a restoration unless there are exceptional countervailing circumstances.
10. On the facts, the Court found that Song had locus standi to make the application. Any benefit that would accrue to the Company if the Company’s claims against Tan for breach of directors’ duties succeeded, would indirectly benefit Song (a shareholder).
11. Tan had also raised various objections to the application, which the Court rejected:
- a. In relation to Tan’s objection that the claim for breach of directors’ duties had no merit, the Court held that it simply had to be satisfied that there was a prima facie case for the claim that would be commenced after the Company’s restoration.
 - b. In relation to Tan’s objection that Song had known of the striking off application, the Court found that there was no agreement to strike off the Company. Tan had known of Song’s prior grievances in relation to the Company and proceeded with the striking-off nonetheless.
 - c. Tan asserted that Song’s delay in filing the application caused prejudice to Tan. The Court decided that any potential liability of Tan cannot be said to have been caused by the Company’s restoration, but would simply be the result of Tan’s alleged acts (if subsequently proven) whilst he was a director of the Company.

Other Issues

12. For completeness, we point out that Tan had made a preliminary objection under Section 344(7)(a) of the Act, that Song’s intended suit against him for breach of fiduciary duties was not hampered by the striking off of the Company and hence a Section 344(5) application was not necessary. Section 344(7)(a) of the Act states (in summary) that the liability of an officer of the Company continues notwithstanding the dissolution of the Company. The Court found that in order for a Company to bring a claim, it must be in existence, which rendered restoration necessary.

Conclusion

CASE UPDATE



13. This case provides useful guidance to parties that contemplate applying for restoration of a company to the Register, including regarding the circumstances under which a Court may or may not be inclined to grant such restoration.

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