

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **FINANCIAL SERVICES DIVISION**

3
4 **Cause No: FSD 207/2016 (CQJ)**
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6 **IN THE MATTER OF s.159 AND s.124 OF THE COMPANIES LAW (2016 REVISION)**
7 **AND IN THE MATTER OF OVS CAPITAL MANAGEMENT (CAYMAN) LIMITED**
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10 **Appearances:** **Ms. Caroline Moran and Ms. Grace Boos of**
11 **Maples and Calder for the Petitioners**
12

13 **Before:** **The Hon. Mr. Justice Charles Quin Q.C.**

14 **Heard:** **22nd February 2017**

15 **Decision:** **22nd February 2017**

16 **Judgment delivered:** **28th February 2017**
17



18 **HEADNOTE**

19 *The Companies Law – Reinstatement of a Company – s. 159 of the Companies*
20 *Law – Voluntary Winding Up and Rebuttable Presumption of Insolvency – s.123*
21 *and s.124 of the Companies Law – Voluntary Winding Up – Declaration of*
22 *solvency – Need for supervision order.*
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JUDGMENT

INTRODUCTION

1. On the 22nd February 2017 I heard the Petition presented by Mr Samuel Morland ("Mr Morland") and ManagementPlus (Cayman) Limited ("ManagementPlus") on the 9th of December 2016 for the restoration of OVS Capital Management (Cayman) Limited (the "Company") to the register of members and further that the voluntary liquidation of the Company can continue without the need for Court supervision.
2. The Petition was supported by the affidavits of Mr Morland dated the 6th of December 2016, Mr Frank Balderamos ("Mr Balderamos") dated the 8th of December, 2016, Ms. Grace Boos ("Ms Boos") dated the 9th of December, 2016 and Ms. Rachel Catherine Baxendale ("Ms Baxendale") dated the 17th of January 2017.
3. I am very grateful for the detailed written and oral submissions of Counsel Ms. Caroline Moran for the Petitioners and for her helpful and careful chronology much of which I have adopted for the purpose of this ruling.
4. This Petition seeks the reinstatement of the Company which was a solvent company that was placed into voluntary liquidation. The Company was struck off the Register of Companies for failure to file annual returns before the liquidation process was complete. The voluntary liquidator also failed to file the declaration of solvency. At the time of the strike off, the Company was solvent and held assets that had not been distributed.



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5. It is in these circumstances that the Petitioners apply for the Company to be reinstated. In addition the Petitioners also seek permission of the Court to continue the voluntary liquidation without the need for Court supervision.

6. The First Petitioner, Mr Morland, is the shareholder and one of two directors of the Company. The Second Petitioner, ManagementPlus, was appointed as the voluntary liquidator of the Company. An officer of the Second Petitioner, Mr Balderamos, is the second director of the Company.

7. The Petitioners, by their Petition dated the 9th December 2016 seek the following orders:

- (a) That the Company be restored to the register of companies;
- (b) That the voluntary liquidation of the Company can continue without the need for Court supervision.





BACKGROUND

8. The Company is a Cayman Islands exempted limited company that was incorporated on 31st March 2010. Prior to the voluntary liquidation, the Company, under the control of Mr Morland, carried on the business of acting as investment manager to another Cayman Islands company, OVS Capital Master Fund. The Company was the holding company in an investment management company structure.

9. At the end of 2014, Mr Morland decided to retire and wind down the business of the Company. On 24th December 2014, Mr Morland, as the sole shareholder resolved that:

(a) The Company be placed into voluntary liquidation; and

(b) ManagementPlus be appointed voluntary liquidator.

10. The evidence of Mr. Morland and Mr. Balderamos and the company records exhibited to Ms. Boos' affidavit disclose that at the date of the liquidation, the Company was solvent with cash of £1,418,306.76 held in a bank account in England and a receivable of £90,000 due from the liquidation of its subsidiary OVS Capital Limited (the "Subsidiary"). In addition Mr Morland and Mr Balderamos confirm in their affidavits and the Company's records disclose that the Company's sole liability was a loan of £100,000 due to Mr Morland.

11. On the 24th of December 2014 a declaration of solvency was signed by the First Petitioner as director of the Company which is exhibited to Ms Boos' affidavit.

1 12. On the 19th of January 2015 notice of the commencement of the voluntary liquidation,
2 the appointment of ManagementPlus as voluntary liquidator, and a notice of the final
3 general meeting of the Company were advertised in the Cayman Islands Gazette.

4
5 13. Given that the Company was the holding company in the management company
6 structure, it was intended that the Company would not be dissolved until the Company
7 had received the £90,000 distribution from the liquidation of the Subsidiary and had
8 passed on these assets to Mr Morland as its sole shareholder.

9
10 14. However, this is not what occurred. Despite the advertisements in the Cayman Islands
11 Gazette the evidence discloses that:

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13 (a) There is no record of the notice of the voluntary liquidation, the voluntary
14 liquidator's consent to act, or the declaration of solvency having been filed with the
15 Registrar of Companies;

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17 (b) The declaration of solvency was never signed by Mr Balderamos as the second
18 director of the Company;

19
20 (c) The Company was struck off the register of companies on the 31st March 2015 for
21 failure to pay its annual returns.

22 15. It appears that the failure to make these filings was due to an administrative error on
23 behalf of the voluntary liquidator ManagementPlus.





1 16. It is clear from the evidence of Mr. Morland, Mr Balderamos and the Company's
2 records that at the date of the strike off, the Company was solvent and still held assets
3 comprising of £1,418,306.76 held in a bank account with Barclays Bank in England
4 and £90,000 due to be received as a distribution on its shares in the liquidation of OVS
5 Capital Limited which it had not distributed to Mr. Morland as the sole shareholder.
6 The assets and liabilities set out in Mr Balderamos' affidavit confirm that the only
7 liability was a loan of £100,000.00 from Mr Morland.

8 17. In around July 2015, Mt. Morland learned that the Company had been struck off from
9 the register of companies.

10 18. On 10 September 2015, notwithstanding that the Company had been struck off,
11 £1,417,000.00 was transferred from the Company's bank account to Mr. Morland in
12 repayment of a loan made by him to the Company, and as the sole shareholder of the
13 Company. Mr Morland also purported to transfer the shares held by the Company in
14 the subsidiary to him.

15 19. Given that the Company had been struck off, it was not in a position to validly effect
16 such transactions. Mr Morland's English solicitors have advised him that because the
17 Company had been struck off, shares in the Subsidiary (being a Company incorporated
18 in England) vested in the Crown but that if the Company was reinstated it would be
19 considered to continue to hold the shares in the Subsidiary and can receive
20 distributions.

21 20. Accordingly, the Petitioners apply to the Court in order to reinstate the Company so
22 that the assets of the Company can be properly realised and transferred to Mr Morland.

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COMPANY REINSTATEMENT

21. Section 159 of the Companies Law (2016 Revision) permits a company, member or creditor to apply for orders that a struck off company be restored to the register, if the Court is satisfied that the company was, at the time of the striking off thereof, carrying on business or in operation, or otherwise, that it is just that the company be restored to the register.

22. The decision of Mr Justice Laddie in the Chancery Division of the High Court of England and Wales in *Re Priceland Ltd, Waltham Forest London Borough Council v Registrar of Companies*¹ provides the following helpful guidelines to the Court when considering whether to restore a company to the Register:

(a) Before the Court can exercise its discretion to restore a company, it must first be satisfied that either the company was carrying on business or in operation or alternatively that it is otherwise just to restore the company;

(b) Whether a company was carrying on business or in operation has to be considered by reference to the time of dissolution;

(c) The words "in operation" should be given a broad meaning in order to give the Court the widest possible powers to restore. However, if the company is completely dormant, this particular avenue for founding jurisdiction is not made out;



¹ [1997] 1 BCLC 467

1 (d) In considering whether it was just to restore a company to the register, the Court is
2 entitled to look at all the circumstances of the case and is not limited to any
3 particular date;

4 (e) In an application to restore under either limb, absent special circumstances,
5 restoration should follow and exercising the discretion against restoration should
6 be the exception, not the rule.

7 23. The Court in *Priceland* also considered what activities might fall short of carrying on
8 business, but nevertheless constitute being "in operation." The Court considered that a
9 company that had ceased trading but was trying to secure a tax refund for the benefit of
10 its creditors or assign a lease would be considered to be "in operation."

11 24. As at the date of strike off, the Company in this case held assets and was due to receive
12 a distribution from the liquidation of the Subsidiary. It is my view that the fact the
13 Company was seeking to secure the distribution from the liquidation of its Subsidiary
14 and distribute assets to its shareholder is sufficient to constitute being "in operation".
15 Furthermore when I review all the facts and the history of this Company I agree with
16 counsel for the Petitioners that in all the circumstances it is "just" that the Company
17 should be restored to the register to allow the voluntary liquidator to continue to realise
18 the assets and distribute them to Mr Morland. This will allow the Company to be
19 reinstated to the register of companies so that the voluntary liquidation can continue as
20 intended.



1 25. The Court notes that the Assistant Registrar of Companies has advised that the
2 Registrar of Companies does not oppose the restoration of the Company and confirms
3 that provided that the outstanding annual return fees of \$3,166.69 are paid the
4 Company can be reinstated.

5 26. In the event that the Company is restored to the register of companies, the proposed
6 registered office of the Company is Maples Corporate Services Limited, PO Box 309,
7 Ugland House, South Church Street, George Town, Grand Cayman, KY1-1104,
8 Cayman Islands.

9 27. Accordingly, for the above reasons, and following the helpful guidelines in *Priceland*,
10 I am satisfied that the Petitioners' application comes within s.159 of the Companies
11 Law in that the Company, at the time of the striking off was "in operation" and
12 furthermore it is "just" that the Company be restored to the Register of Companies.



REQUIREMENT TO APPLY FOR AN ORDER OF SUPERVISION

28. As at the date of commencement of the voluntary liquidation the Company was solvent and Mr Morland duly signed the declaration of solvency as required by s.123(1)(c) of the Companies Law.

29. However, this was not signed by Mr Balderamos as the second director of the Company, nor was it filed by the voluntary liquidator within 28 days of commencement of the liquidation as required by s.123(1)(c) of the Companies Law.

30. If the Company is restored to the register, it is deemed to continue in existence as if it had never been struck off. As a result, because the declaration of solvency had not been filed in accordance with s.123(1) of the Companies Law, the voluntary liquidator would be obliged to apply for an order that the liquidation continue under Court supervision under s.124 of the Companies Law.

31. However, the evidence discloses that the Company is solvent and the failure to file the declaration of solvency was as a result of an unfortunate administrative oversight by the voluntary liquidator. Consequently Mr Morland avers that in light of the errors made by ManagementPlus in the voluntary liquidation Mr Morland intends to remove ManagementPlus as voluntary liquidator and appoint Maples Liquidation Services Limited in its place. I note that on the 6th of December 2016 Mr Morland and Mr Balderamos re-executed a declaration of solvency.



1 32. In light of the solvency of the Company, the Petitioners have also submitted that,
2 should the reinstatement of the Company be granted, the voluntary liquidation be
3 permitted to continue without the need for Court supervision.

4 33. In this regard, the voluntary liquidator is obliged to make the application for a
5 supervision order, it is submitted that the Court still has the discretion to allow the
6 voluntary liquidation to continue where the company is solvent. The Petitioners'
7 counsel submits that this was the approach taken by Jones J on the 3rd of April 2014 in
8 *Pan Ji China Fund LP (in voluntary liquidation)*². Although I have been informed
9 that there are no written reasons, the Order granted by Jones J declares at paragraph 3
10 that the General Partner's failure to sign a declaration of solvency within 28 days, gives
11 rise to a rebuttable presumption of insolvency. Furthermore it is apparent that Jones J
12 went on to dismiss the application for a supervision order because he was satisfied that
13 the limited partnership was solvent.

14 34. Counsel for the Petitioners has drawn my attention to certain obiter comments made by
15 Jones J in *AJW Master Fund II Limited*³ which preceded his decision in *Pan Ji China*
16 *Fund LP* by three years. In that case, Jones J stated at paragraph 10 of his judgment:

17 *"For these purposes a company is deemed to be insolvent as a matter of law*
18 *(whether or not it is actually insolvent in the sense that the realizable value of its*
19 *assets in fact exceeds the amount of its liabilities) if its directors fail to make a*
20 *declaration of solvency (in CWR Form No. 21) and deliver it to the voluntary*
21 *liquidators within 28 days. It follows that s.124 of the Law imposes a duty upon*
22 *every voluntary liquidator to make application for a supervision order if the*
23 *directors fail, for whatever reason, to make and deliver a valid declaration of*
24 *solvency to him within the prescribed period. In these circumstances, the court*
25 *must make a supervision order. It has no discretion in the matter."*

² FSD 31 of 2014, 3 April 2014

³ [2011] (1) CILR 363 W

1 35. I accept counsel for the Petitioners' submission that these comments by Jones J in
2 *AJW Master Fund* were obiter and related to a supervision order that had already been
3 granted by me. Furthermore the sole question before Jones J in *AJW Master Fund*
4 was whether KPMG should be removed as liquidator. In *Pan Ji China Fund LP* some
5 three years later Jones J declared:

6 *"the General Partner's failure to sign a declaration of insolvency within 28 days of*
7 *the commencement of the dissolution of the Limited Partnership gives rise to a*
8 *rebuttable presumption of insolvency and a requirement that the Liquidators must*
9 *apply to the Court pursuant to Section 124(1) of the Companies Law (2013*
10 *Revision) for a supervision order"*.

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12 36. I agree with the submission made by counsel for the Petitioners that Jones J took the
13 correct approach in *Pan Ji China Fund* when required to decide specifically on this
14 issue in holding that the failure to file the declaration of solvency only gives rise to a
15 rebuttable presumption of insolvency.

16 37. The Court has a discretion, after reviewing all the facts and surrounding circumstances,
17 to decide whether or not to make a supervision order. Furthermore if the Court had no
18 discretion one would expect to find some mandatory language contained within s.124
19 of the Companies Law removing the court's discretion. The primary purpose of a
20 supervision order is to ensure that an insolvent company is brought under the
21 supervision of the court so as not to allow an insolvent company to continue in the
22 voluntary unsupervised process. Insolvent companies should not be allowed to wind
23 down voluntarily.



1 38. In this case a declaration of solvency has been filed, a full inquiry into the Company's
2 affairs has been carried out and it is clear from the affidavit evidence filed in support of
3 the Petition, that once the Company is restored to the Register, it will be able to pay its
4 debts in full with interest at the prescribed rate – within such period, not exceeding 12
5 months from the commencement of the Winding Up.

6 39. The evidence filed in support of the Petition clearly confirms that the company is
7 solvent. It comes within the *Priceland* guidelines and s.159 of the Companies Law and
8 I find that in all the circumstances of this case no proper purpose is served by bringing
9 it under the supervision of the court.

10 40. Accordingly, I order that the Company be restored to the Register of Companies and
11 further that the voluntary liquidation can continue without the need for Court
12 supervision.
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14 Dated this the 28th February 2017

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17 Honourable Mr. Justice Charles Quin Q.C.
18 Judge of the Grand Court