

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)**

CLAIM No: BVIHC (COM) 2021/0219

IN THE MATTER OF CREATIVE PRO MANAGEMENT LTD

BETWEEN:

TRADE MANAGEMENT LTD

Claimants

and

THE REGISTRAR OF CORPORATE AFFAIRS

Defendant

Appearances:

Mr. John Carrington QC for the Claimant

Ms. Valerie Georges-Thomas for the Defendant

2022: January 28
February 2

JUDGMENT

[1] **JACK, J [Ag.]**: By a fixed date claim form dated 14th December 2021, the claimant seeks restoration of Creative Pro Management Ltd (“the Company”) pursuant to section 218 of the **BVI Business Companies Act 2004**.¹ On 1st November 2013 the company was struck off for non-payment of fees due in 2012. It was dissolved with effect from 31st October 2020.

¹ No 16 of 2004, Laws of the Territory of the Virgin Islands.

[2] The claimant is the company secretary of the Company. In her main affidavit in support of the application, Ms. Ng Kwan Wai Fanny, an officer of the claimant, says that the Company indirectly holds valuable shares in a Hong Kong company. She says that the claimant is concerned that it failed to remind the directors of the Company to pay the corporate registration fees and that it may therefore bear some responsibility for the striking off and subsequent dissolution of the Company. In a supplemental affidavit she says that the claimant was earning fees as company secretary from the Company which it has now lost. Further, she says that the shareholders in the Company have approved the application and instructed her to make it.

[3] The relevant provisions of the Act, so far as material, provide:

“218(1) Application may be made to the Court to restore a dissolved company to the Register by

(a) a creditor, former director, former member or former liquidator of the company; or

(b) any person who can establish an interest in having the company restored to the Register.

(2) An application under subsection (1) may not be made more than ten years after the date that the company was dissolved.

...

218A(1) Subject to subsection (2), on an application under section 218, the Court may

(a) restore the company to the Register subject to such conditions as it considers appropriate; and

(b) give such directions or make such orders as it considers necessary or desirable for the purpose of placing the company and any other persons as nearly as possible in the same position as if the company had not been dissolved or struck off the Register.

(2) Where the company was dissolved following the completion or termination of its voluntary liquidation under this Act or its liquidation under the **Insolvency Act, 2003**,² the Court shall not restore the company to the Register unless

(a) the applicant nominates a person to be liquidator of the company, if it is restored to the Register;

(b) the person nominated as liquidator consents to act, and is eligible to act, as liquidator of the company on its restoration; and

² No. 5 of 2003, Laws of the Territory of the Virgin Islands.

(c) satisfactory provision has been made or will be made for the expenses and remuneration of the liquidator, if appointed.”

- [4] In my judgment (and ultimately counsel did not demur from this), when deciding whether to restore a company there is a two-step process. First, the Court has to consider whether the claimant has standing under section 218. Second, if the claimant does, the Court has to exercise its discretion under section 218A.
- [5] In the current case, the Registrar’s main attack is on the first question. The key issue, she submits, is whether the claimant has an interest in *the restoration* of the Company. It does not suffice for a claimant merely to have some connection with the Company. Mrs. Georges-Thomas for the Registrar submitted that the “assertion that the claimant is interested in restoring the Company to avoid allegations of liability in circumstances where such liability is neither pending nor threatened, is merely a fanciful assertion without proof and not sufficient to place the claimant within section 218(1)(b)...”
- [6] Ellis J considered what constituted an “interested person” in **Paulo Maluf v Registrar of Corporate Affairs**.³ In that case, the claimant was the settlor of a trust and the company whose restoration was sought was the trustee. The Court applied the approach of Megarry J in **Re Test Holdings (Clifton) Ltd**⁴ and in **Re Wood & Martin (Bricklaying Contractors) Ltd**.⁵ In the former case, Megarry J held that the expression “interested person” was of “great amplitude”. In the second, he was dealing with an application by someone who had, without having been properly appointed, purported to act as liquidator of the company whose restoration he sought. Megarry J held:

“...it nonetheless seems to me that it would be somewhat unreal to say that this application has no interest of a proprietary or pecuniary nature in resuscitating the company. The situation is unusual, but the possibility of a claim being made by the applicant and the possibility of a claim being made

³ BVIHCV 2021/0078 (unreported, determined 20th October 2021).

⁴ [1970] Ch 285.

⁵ [1971] 1 WLR 293.

against him, when added together, seem to me to remove him from the category of person who cannot fairly be regarded as having any proprietary or pecuniary interest of this kind. It does not, I think, have to be shown that the interest is one which is firmly established or highly likely to prevail: provided it is not merely shadowy, I think it suffices for the purpose of [the English statutory provision]. With a little hesitation, I feel justified in saying that the interest cannot be regarded as being merely shadowy, so that it appears to me that the applicant has brought himself within the terms of [the statutory provision].”

That passage was approved by the English Court of Appeal in **Re Forte’s (Manufacturing) Ltd; Stanhope Pension Trust Ltd v Registrar of Companies**.⁶

[7] In my judgment, the claimant here falls within Megarry J’s category of an interested person. Mrs. Georges-Thomas submits that, because section 218(1)(b) provides that an applicant must be a “person who can establish interest in having the company restored, the interest of the claimant must be in the *restoration* of the Company. If the claimant was interested in the Company when the Company was dissolved, it will continue to be interested in the Company after it is restored, in the absence of special circumstances occurring during the interregnum. All that is required is an interest in the Company, which will exist after restoration; it is not necessary that the interest be specifically in the Company’s *restoration*. A company secretary who fails to arrange for the payment of the corporate registration fees for the Company whose paperwork is entrusted to it faces a far from shadowy risk of liability in my judgment.

[8] Accordingly, I hold that the claimant is an interested person for the purposes of section 218(1)(b).

[9] I turn then to the exercise of my discretion as to whether to restore under section 218A. Here all the factors in my judgment favour ordering restoration. The Company has valuable assets in Hong Kong. The failure to pay the registration fees

⁶ [1994] BCC 84 at p 90, [1994] 1 BCLC 628 at p 635.

was an oversight. The shareholders support the claimant's application. Looking at all the factors in the round, in my judgment it is appropriate to order restoration.

[10] I will add this comment, lest it be thought I am critical of the approach taken by the Registrar in her consideration of who qualifies as an "interested person". I am not. One does not need to sit long in our Commercial Court to see cases where attempts have been made to hijack BVI companies. It is entirely proper for the Registrar to exercise vigilance in considering applications for restoration by people who do not fall within the obvious categories listed in section 218(1)(a).

[11] This consideration also feeds into the costs order which I make. The Registrar in restoration cases which are not contested usually seeks a conventional sum from the claimant of \$1,500 costs in the Commercial Division and \$1,000 in the Civil Division. If the restoration claim becomes contentious, then her costs may be more. However, if the Registrar loses, in my judgment the **Baxendale-Walker** principles become relevant.⁷ Costs are of course always in the Court's discretion, but in general it would be wrong to award costs against the Registrar just because she has lost, so long as she has acted reasonably. She is a regulator acting in the public interest. In the current case, it is thus appropriate that the claimant should still pay the conventional sum of costs in the sum of \$1,500.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar

⁷ Baxendale-Walker v Law Society [2007] EWCA Civ 233, [2008] 1 WLR 426.