IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 204

Originating Summons No 1289 of 2016

In the matter of Section 344 of the Companies Act (Cap 50)

And

In the matter of Asia Petan Organisation Pte Ltd

SONG SEOK WON

… *Applicant*

GROUNDS OF DECISION

[Companies] — [Power to restore company struck off the register] – [Factors in determining restoration of company]

TABLE OF CONTENTS

Re Asia Petan Organisation Pte Ltd

[2017] SGHC 204

High Court — Originating Summons No 1289 of 2016
Audrey Lim JC
20 February; 15 May; 20 June 2017

21 August 2017

Audrey Lim JC:

1 Asia Petan Organisation Pte Ltd ("the Company") was struck off from the register referenced in s 344 of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act"), pursuant to an application made by one of its two directors, Tan Chung Hoe ("Tan"), under s 344 of the said Act. The other director, Song Seok Won ("Song"), upon discovering that the Company had been struck off the register, applied to restore the Company to the register pursuant to s 344(5) of the Act. By the time of Song's restoration application, s 344A of the Act which governed applications by companies to strike themselves off the register came into force. Tan, who was allowed to intervene in the application, opposed the restoration of the Company to the register.

2 Two issues arose for determination in this application:

(a) Does a court have the power to restore a company struck off by its own application in the light of s 344A of the Act?

(b) What factors should a court take into account in determining whether such an application should be granted?

3 After considering the parties' arguments, I granted Song's application. Applications of this nature are not uncommon but it is my view that it would be useful to clarify the ambit of the court's power in this area. I therefore set out the reasons for my decision.

Background

4 The Company was incorporated in July 2013 in Singapore, with Song (a South Korean national) and Tan (a Singaporean) as the two directors and shareholders. As Song was based in South Korea, Tan largely managed the Company's affairs in Singapore. Song contributed the Company's entire paid-up capital of $50,000[1], and at least another $80,000 to the Company.[2] The Company conducted some business for around two to three months. Tan subsequently applied to strike the Company off the register and prepared the relevant documents for striking off which he forwarded to Song to execute. However, Song did not respond and hence on 23 June 2015, Tan proceeded to lodge the application for striking off.[3] Song claimed that it was only in November 2015 that he became aware that the Company had been struck off. He thus applied to restore the Company as he claimed that Tan had breached his fiduciary duties as a director of the Company by drawing unauthorised salaries, making other unauthorised withdrawals from the Company and failing to

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[1] Song's 1st affidavit of 15 November 2016 ("Song's 1st affidavit"), at para 8; Tan's 1st affidavit dated 10 April 2017 ("Tan's 1st affidavit"), para 5.

[2] Song's 1st affidavit, para 8 and p 15 (Para 2 of letter from Tan's lawyers dated 20 July 2015).

[3] Song's 2nd affidavit of 7 February 2017 ("Song's 2nd affidavit"), para 20 and p 22.

account for the Company's revenue and profits. Song wished to commence an action in the Company's name against Tan pursuant to s 216A of the Act.

The parties' positions

5 Song argued that s 344(5) of the Act was applicable to restoring a company to the register even when the said company had been struck off on its own application. In considering whether it is just to restore a company to the register, a court should look at all the circumstances of the case, and should only in exceptional cases exercise its discretion against such restoration. A court should also consider whether some benefit would accrue to the members and creditors of the company, and whether there is prejudice to any party as a result of that restoration. Song relied on English cases such as *Re Priceland Ltd* [1997] BCC 207 ("*Re Priceland*") and *In Re Boxco Ltd* [1970] 2 WLR 959. Song argued that there were grounds to believe that Tan was in breach of his duties as a director and so the Company should be restored to enable Song to pursue Tan's breaches on behalf of the Company.

6 Although Tan was not a party to the application, I allowed him to intervene as he would be affected if I were to allow the restoration of the Company. Tan made what should rightly be considered a preliminary objection to the application (though it was not framed as such), which was premised on the application of s 344A(7)(*a*) of the Act. Tan argued that s 344A(7)(*a*) of the Act preserved the liability of every officer and member of the company and therefore rendered the current application unnecessary. Tan also opposed the application on the basis that Song had been given ample notice of Tan's intent to strike off the Company but had not registered any objections at the material time.[4] At the time the application to restore was taken out pursuant to s 344(5),

the Act had been amended to introduce s 344A. Hence Tan argued that there was no provision in s 344A of the Act to allow the court to restore a company which had been struck off on its own application. Further, there was no merit in Song's claim that Tan had breached his fiduciary duties as a former director of the Company.[5] Finally, Tan also argued that there would be prejudice to him if the Company were to be reinstated.

My decision

Preliminary objection – s 344A(7) of the Act

7 I will first deal with why I did not find Tan's argument based on s 344A(7) of the Act persuasive. Tan argued that Song's intended suit against him for breach of duties was not "hampered by the fact that the Company has been struck off". Section 344A(7)(*a*) states:

> (7) Notwithstanding the dissolution of the company under subsection (6) –
>
> > (a) the liability, if any, of every officer and member of the company shall continue and may be enforced as if the company had not been dissolved;...

8 I note that there is no local guidance on the interpretation of s 344A(7), nor is the intent behind enacting this particular subsection apparent from the Parliamentary Debates or a perusal of the key documents which gave rise to the insertion of s 344A as a whole (see [17]–[18] below). I also note that s 1003(6) of the United Kingdom Companies Act 2006 (c 46) ("UK Companies Act 2006") is an almost identical provision to s 344A(7). The precursor to s 1003(6)

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[4] Tan's submissions dated 13 May 2017, para 4(i)

[5] Tan's submissions dated 13 May 2017, para 4(ii)

is s 652A(6)–(7) of the Companies Act 1985 (c 6) ("the UK Companies Act 1985")

9 Likewise, the accompanying note to s 601AD(1) of the Australian Corporations Act 2001 (Cth) ("Australian Corporations Act 2001") regarding the effect of deregistration, which states that "officers of the company may still be liable for things done before the company was deregistered", is somewhat similar to s 344A(7). However, I was not referred to relevant case law interpreting s 601AD(1). On the other hand, there is useful case law interpreting the repealed s 574(1) of the Australian Corporations Act 1989 (Cth), which is almost identical in language to s 344A(7) of the Act. I now turn to consider these cases.

10 In *CTQ Pty Ltd & Ors v Yamamori (Hong Kong) Pty Ltd* (1992) 10 ACSR 534 ("*CTQ*"), at first instance, the plaintiff company successfully obtained leave to amend its writ of summons and was granted an extension of time for instituting its action, while the first defendant company failed in its application for summary judgment against the plaintiff. It was then discovered, at the hearing for the first and second defendants' application for leave to appeal against the first instance court's orders, that the first defendant had been deregistered after its application for summary judgment against the plaintiff had been instituted, but before the said application was dealt with by the judge at first instance. The Court of Appeal of the Northern Territory ordered the removal of the first defendant as a party to the proceedings on the basis that the first defendant was "a litigant with no standing" to pursue orders (at 535).

11 In *Sweeney & Vandeleur Pty Ltd v BNY Australia Ltd* (1993) 11 ACSR 356 ("*Sweeney"*), which also approved *CTQ*, the company had been

deregistered and dissolved pursuant to s 574 of the Corporations Law, prior to the filing of a summons purportedly by the company seeking a certain declaration. The defendant filed a notice of motion seeking to strike out the summons as an abuse of process. Cole J, in the Equity Division of the Supreme Court of New South Wales, held that from the date of dissolution pursuant to s 574(1) until the date on which the registration of a company may be reinstated, a company does not exist and has no power to commence proceedings. He therefore found the proceedings to be an abuse of process, being proceedings instituted on behalf of a non-existent entity. Cole J explained (at 359) that:

> …while ever the company remains ``dissolved'' it has no power to take proceedings. Section 574(3) contemplates that a ``person... aggrieved by the cancellation of the registration of a company'' may apply to have the registration reinstated. That does not contemplate an application by the company but rather by a person aggrieved by its cancellation. It is necessary to reinstate the corporate being before it has a power to act. *From the date of the dissolution pursuant to s 574(1) until such date upon which the registration may be reinstated, the company does not exist…*
>
> [emphasis added]

12 Cole J cited with approval the holding of Scrutton LJ in *Banque Internationale de Commerce de Petrograd v Goukassow* [1923] 2 KB 682 (at 691) that: "A non-existent person cannot sue," and went on to elaborate (at 360) that:

> The fact that there exists a statutory provision which may result at some future time in a resurrection from dissolution effective, because of the statutory provision, from the date of dissolution does not mean that, pending that future occurrence flowing from a possible future exercise of the statutory power to resurrect, the company continues to exist.

13 I found the reasoning in *CTQ* and *Sweeney* persuasive. It is inconceivable and illogical that a company would be able to act following its

striking off, simply by virtue of s 344A(7)(*a*) of the Act. This goes against the very purpose of striking out a company. It is important to bear in mind that the underlying purpose of Song's application for restoration was to allow the commencement of an action by the Company against Tan, and not by Song *in his personal capacity* against Tan. If it were the latter, it is not difficult to see that s 344A(7)(*a*) would allow for the enforcement of Tan's obligations as a result of his position as an officer or member of the Company, even if the Company is not restored. But that was not the case here. In order for a company to bring a claim against a director for breach of his or her duties to the company, the company must be a party to the action, and in that regard the company has to be in existence. Thus, the requirement of the Company being in existence, so as to bring the derivative action that Song intended, rendered restoration of the Company necessary.

The court's power to restore a company struck off on its own application

14 Section 344(5) of the Act states:

> If *any person* feels *aggrieved by the name of the company having been struck off the register*, the Court, on an application made by the person at any time within 6 years after the name of the company has been so struck off may, *if satisfied that the company was, at the time of the striking off, carrying on business or in operation or otherwise that it is just that the name of the company be restored to the register*, order the name of the company to be restored to the register …
>
> [emphasis added]

15 Section 344(5) empowers the court to restore a company which has been struck off. It is part of s 344 which empowers the Registrar of Companies ("the Registrar") to strike off a company that the Registrar has reason to believe is no longer carrying on business or not in operation. In contrast, s 344A of the Act, which came into force on 3 January 2016 and empowers the Registrar to strike

off a company on its own application, does not have an equivalent restoration provision to s 344(5). In the present case, the Company was struck off (albeit on its own application) under s 344 of the Act, but the application to restore was taken out on 13 December 2016, after s 344A had come into force.

16 The lack of an equivalent restoration provision in s 344A therefore precipitates the question: does a court have the power under s 344(5) to restore a company that was struck off on its own application? In my judgment, the answer is in the affirmative; s 344(5) is a general provision empowering the court to restore a company that was previously struck off by virtue of its own application, whether pursuant to s 344 or the new s 344A.

17 It is necessary to examine the legislative intent behind s 344A, which was introduced *via* the Companies (Amendment) Act 2014 ("Amd Act 2014"), and, as noted above, came into effect on 3 January 2016. The Explanatory Statement to the Companies (Amendment) Bill 2014 states that the Amd Act 2014 was intended to implement the recommendations of the Steering Committee for the Review of the Companies Act, principally set out in the Ministry of Finance's Responses to the Report of the Steering Committee for Review of the Companies Act dated 3 October 2012 ("the 2012 Report"). The 2012 Report arose from the Ministry of Finance's Consultation Paper in June 2011 on the Report of the Steering Committee for Review of the Companies Act ("2011 Consultation Paper"). Therefore, it would be useful to look at the 2011 Consultation Paper and 2012 Report in understanding the ambit of s 344A.

18 Prior to the introduction of s 344A of the Act, a company that wished to initiate a striking off would have relied on s 344 of the Act to do so, although the ultimate decision lies in the hands of the Registrar. The 2011 Consultation

Paper (at [60]) acknowledged that striking off applications could be submitted by the company's directors. Under the existing framework at the time, it followed that an application to reinstate a company would have to be made under s 344(5), whether the company was struck off on its initiation or on the Registrar's initiation. The plain reading of s 344 also supports such a wide reading. Section 344(1) does not limit its application to a case where the *Registrar initiates* the striking off, although what is required to trigger a striking off under s 344(1) is that the Registrar must have "reasonable cause to believe that a company is not carrying on business or is not in operation". The wording of s 344(5) does not limit a restoration application by an aggrieved person to only situations where the company was struck off *at the Registrar's initiation*. It also does not limit the persons who could make such applications; they could be creditors of the company or persons with potential legal claims against the company, so long as they could be considered "aggrieved".

19 Section 344A was enacted to deal with the existing situation in which a company applies to the Registrar to strike itself off. The 2011 Consultation Paper recommended (at [60] to [64]) that for the purposes of transparency and clarity, the legislation should provide the criteria for a company to meet if its directors were to apply for a striking off, alongside the criteria for the Registrar to adopt when identifying and reviewing companies for striking off (see also the 2012 Report at [84] to [85]). This recommendation was adopted and enacted as s 344A of the Act, with the conditions for striking off prescribed under the Companies (Striking Off) Regulations 2015. Thus, s 344A now governs applications for striking off made by a company, which were previously made under the auspices of s 344.

20 The fact that s 344A does not contain a similar restoration provision to s 344(5) to restore a company struck off on its own initiation does not mean that such an application could no longer be made under s 344(5). I considered Tan's submissions regarding similar legislation in foreign jurisdictions like the United Kingdom and Australia having provisions that explicitly provide for restoration of a company previously struck off on its own application (see, eg, s 1029(1)(*c*) of the UK Companies Act 2006 and s 601AH(2)(*a*) of the Australian Corporations Act 2001 (Cth)). Tan argued that the absence of similar provisions in our context indicates that s 344(5) should not apply to a company previously struck off on its own application, in light of the introduction of s 344A of the Act. I did not accept this argument, because these instances did not form part of the considerations behind the 2011 Consultation Paper or the 2012 Report, the implementation of which recommendations gave rise to s 344A. The recommendations that gave rise to s 344A *did not* include any suggestion of removing the court's existing power to restore a company to the register, where the company was previously struck off on its own application. Such intention was also not expressed when Parliament debated the Companies (Amendment) Bill 2014 (see *Singapore Parliamentary Debates, Official Reports* (8 October 2014) vol 92). In absence of legislative intent to the contrary, the court's broad existing power to allow a restoration of a company to the register (whether struck off by the Registrar previously or on the company's own initiation) under s 344(5) should not be read as being curtailed by the introduction of s 344A.

21 As a matter of principle, this approach to s 344(5) makes sense. There can be good reasons for a company to seek to restore itself to the register even if it was previously struck off on its own application. For instance, a company that has ceased to operate may be struck off on its own application, but if it subsequently transpires that a director of the company had breached its duties

to the company, the company (now struck off) may need to commence an action, in its own name, against that director. The company may also have been struck off by virtue of mistake or fraud on the part of one of its directors or based on a material non-disclosure which affected the company's decision to apply for a striking off. If s 344(5) were read any differently, a company which was struck off by its own application can *never* be restored even with good reason. In addition, to exclude the application of s 344(5) to a company struck off by its own application could also unfairly shut out *bona fide* claims of third parties, such as a creditor of the defunct company or a person with a potential legal claim against the defunct company.

22 Therefore, I hold that an application can be brought under s 344(5) of the Act to restore a company which has been struck off on its own application, whether pursuant to s 344 or the new s 344A, and a court has the power under s 344(5) to order the restoration of the said company provided the necessary requirements are met.

Considerations in determining whether to restore a company

23 Section 344(5) of the Act 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". I note that there is no local guidance regarding what an aggrieved person means in this context and the relevant considerations before granting the restoration application. I thus turn to consider the cases from foreign jurisdictions.

What is "just"?

24 In *Re Priceland*, the court gave a broad interpretation to the restoration provision in force at the time, s 653(2) of the UK Companies Act 1985, and held (at 213H) that exercising the discretion against restoration should be the exception and not the rule, so long as either of the conditions set out in s 653(2) (of the court being satisfied that: (a) the company was, at the time of striking off, carrying on business or in operation; or (b) that it is just that the name of the company be restored) were met. Section 653(2) of the UK Companies Act 1985 is worded similarly to s 344(5) of the Act.

25 In considering whether it would be "just" to restore a company to the register, the court in *Re Priceland* held (at 211D) that a court should look at all the circumstances of the case. It cited with approval (at 211G-H) Millett LJ's holding in the English case of *City of Westminster Assurance Co Ltd v Registrar of Companies* [1997] BCC 960 ("*City of Westminster Assurance*") at 964A that regard was to be had to the intention of the section to "provide a remedy for a person who has a claim, whether against the company or a third party, which can be enforced only if the company is restored to the register". In *City of Westminster Assurance*, Millett LJ considered the fact that the application for restoration was for the purpose of being able to pursue the defunct company's guarantor, and found it just that the company be restored, and so ordered. In *Re Priceland*, the court considered the fact that the application for restoration was for the purpose of the landlord being able to pursue the original tenant that assigned the lease to the defunct company which defaulted, and ordered that the company be restored.

26 Although *Re Priceland* concerned the interpretation of s 653(2) of the UK Companies Act 1985, which deals with the restoration of a company

previously struck off by the registrar's action, the reasoning in *Re Priceland* was applied by Neuberger J (as he then was) in *Re Blenheim Leisure (Restaurants) Ltd (No. 2)* [2000] BCC 821 ("*Re Blenheim*") at 829–830, to a members' application for restoration of a company under s 653(2B) of the same Act, where the company was previously struck off on an application by the same members. Neuberger J went on to summarize (at 830F–G) that:

> "… a member seeking restoration of a company need not establish that, if restored, the company will on the balance of probabilities be solvent … However … where a member is relying on the benefit to him of the company being restored, the court does have to look into the matter where there is a real issue as to the prospects of restoration doing any good …"

27 In support for this general statement, Neuberger J cited Hoffmann LJ's (as he then was) statement in *Re Forte's (Manufacturing) Ltd Stanhope Pension Trust Ltd v Registrar of Companies* [1994] BCC 84 ("*Re Forte's*") at 90A–B that "the interest of an applicant under s 651 in having the company revived does not have to be firmly established or highly likely to prevail. It is sufficient that it is not 'merely shadowy'…" Although *Re Forte's* concerned an application under s 651 of the UK Companies Act 1985, which is *in pari materia* with s 343 of the Act, I am of the view that the principle enunciated therein is applicable to applications under s 344(5), because the effect of s 343 is not dissimilar to s 344(5) of the Act, in that the company would be treated as if the dissolution or striking off had not occurred. Neuberger J's summary in *Re Blenheim* was cited with approval by the Chancery Division in the later case of *Witherdale Ltd v Registrar of Companies* [2006] BCC 412, which concerned an application to restore a company to the register under s 653(2) of the UK Companies Act 1985.

28 In Australia, the Supreme Court of New South Wales (Equity Division) observed in *Australian Competition and Consumer Commission v Australian Securities and Investments Commission* 34 ACSR 232 (at 237) that s 601AH(2)(*b*) of the Australian Corporations Act 2001 (Cth), which states that the Court has to be "satisfied that it is just that the company's registration be reinstated", confers upon a court a wide discretion. The Supreme Court approved of cases taking into account "the circumstances in which the company came to be dissolved; whether, if the order were made, good use could be made of it; and whether any person is likely to be prejudiced by the reinstatement".

29 On the issue of prejudice to any persons, the reasoning in *Re Priceland* at 215B–C is illuminating. There, one of the arguments was that the original tenant that assigned the lease to the defunct company would suffer prejudice if the company were revived, because the original tenant would be liable for substantial arrears under the terms of the lease. The court did not accept that there would be prejudice *because of* the restoration; rather, the financial loss to the original tenant would simply be "a result of the terms of the lease it entered into", and it was not unfair prejudice to keep the tenant to the terms of his lease.

Who is an aggrieved person?

30 The Supreme Court of New South Wales (Equity Division) has held in *Arnold World Trading Pty Ltd v ACN 133 427 335 Pty Limited* [2010] NSWSC 1369 at [43] that whether an applicant is a "person aggrieved" by the deregistration of a company under s 601AH(2)(*a*)(i) of the Australian Corporations Act 2001 (Cth) is "considered by reference to legal rights and legal interests". This means that the applicant's interest must have been affected by the dissolution of the company, in the sense of some right of value or potential

value having gone out of existence. The Supreme Court also cited the English case of *In re Wood & Martin (Bricklaying Contractors) Ltd* [1971] 1 WLR 293 at 297 in support of its statement that the applicant was expected to have "an interest of a proprietary or pecuniary nature in resuscitating the company". I accepted these statements of principle.

Summary

31 In the light of the above, I hold that s 344(5) of the Act should be interpreted broadly. To demonstrate *locus standi*, a 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. When considering whether it would be just to restore a company to the register, a court has to have regard to all the circumstances of the case, including but not limited to: (a) the purpose of restoring the company; (b) whether there would be any practicable benefit arising from the restoration; and (c) whether there would be prejudice to any persons. If the court were so satisfied, it should order a restoration unless there are exceptional countervailing circumstances. These principles are applicable in the context of an application to restore a company to the register pursuant to s 344(5) of the Act, regardless of whether the company was previously struck off under s 344 or the new s 344A, on its own application or by the Registrar.

Application to the facts

32 Turning to the facts of the case, since the application for restoration was brought by Song, a former shareholder and director of the Company, he had to, short of an unusual or exceptional situation, establish at least a conceivable proprietary or pecuniary (and not merely shadowy) interest in the Company

being restored. I was satisfied that he could be considered an "aggrieved" person under s 344(5) of the Act, because any benefit that accrues to the Company if its claims against Tan were successful would also accrue indirectly to Song, a shareholder who is asserting his entitlement to the Company's funds before it was struck off the register. Song sought to restore the Company in order to commence proceedings in its name, by way of a derivative action under s 216A of the Act, against Tan for his various alleged breaches of director's duties. As the facts of *City of Westminster Assurance* and *Re Priceland* indicate, it can still be just to restore a company even if the restoration is only a means to an end.

33 Tan argued that there is no merit in Song's allegation that Tan had breached his fiduciary duty as a director of the Company. I was of the view that whether the Company's claim against Tan was meritorious was a matter to be decided at another forum and another time. The court should not, at this stage, be required to examine the substantive merits of a potential claim to see whether it is likely to succeed. That said, the court has to be satisfied that there is a *prima facie* case for the claim that would purportedly be commenced after the Company's restoration, and that the claim is not spurious. It was not disputed that Song had contributed to the Company's entire paid-up capital of $50,000[6] and at least another $80,000 to the Company, which sum was deposited into Tan's personal account.[7] When the Company's corporate account was closed, the balance in that account was withdrawn by Tan. This gave rise to a dispute as to what had become of the moneys withdrawn by Tan (from both Tan's personal account and the Company's bank account), among other things. I was

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[6] Song's 1st affidavit at para 8; Tan's 1st affidavit at para 5.

[7] Song's 1st affidavit at para 8 and at p 15 (Para 2 of letter from Tan's lawyers).

of the view that the putative claim by the Company after its restoration was not spurious.

34 Tan further objected to the application on the basis that Song had knowledge of Tan's application to strike the Company off and did not raise any objections at the material time. Tan claimed that the closure of the Company was initiated by Song in early 2014. In late 2014, there was some dispute between the parties regarding the Company's accounts and revenue. In November 2014, Tan forwarded to Song the documents for the striking off, for Song's execution.[8] Song did not execute the documents. Tan also sent a reminder to Song in March 2015 to inform Song that he would be proceeding with the striking off application.[9]

35 I had to take all the circumstances of the case into account. Even if Song had mentioned discontinuing the Company to Tan, the evidence before me showed that there was, at best, a discussion and no agreement was reached. At the material time, there was a dispute between Song and Tan regarding the Company's accounts, revenue and expenses, which was evident from the correspondences between their lawyers. Song had refused to execute the documents for the striking off, and had on more than one occasion (through his solicitors) informed Tan that he intended to commence proceedings against Tan for various breaches.[10] This included a letter dated 9 June 2015, shortly before Tan had lodged the application for striking off on 23 June 2015. The parties' dispute over Tan's handling of the Company and its accounts continued

[8] Letter from Tan's solicitors dated 18 November 2014 (see Song's 2nd affidavit, p 10)

[9] Email from Tan's solicitors dated 20 March 2015 (see Song's 2nd affidavit, p 14).

[10] Letters from Song's solicitors dated 6 February and 9 June 2015 (see Song's 2nd affidavit, p 13; and Song's 1st affidavit, p 21).

thereafter. Hence, it was not a case where Tan did not know of Song's grievances against him; Song's grievances were why Song refused to sign the forms for the striking off application. It was also not a case in which Song had willingly agreed to the striking off, or one where he did not challenge the state of affairs. Tan had proceeded with the application to strike off, despite knowing Song's grievances and his intent to commence legal proceedings against Tan.

36 Tan argued that there was no reason why Song should be given the liberty of time to contemplate his legal options while not complying with the requirements of the Act to notify his objection to the striking off application. I accepted that the issue of delay and the resultant prejudice were relevant considerations. Song's case was that he first became aware in November 2015 that the Company had been struck off. He then gave notice to Tan on 28 March 2016 of his intent to take out an application under s 216A of the Act, and then filed the present application in December 2016. Song explained that he did not file the present application earlier as he took some time to contemplate whether to commence legal proceedings against Tan.[11] He did not wish to incur unnecessary costs in addition to the monies that he had already expended on the Company. Acting on legal advice, he then decided to pursue an action against Tan. Undoubtedly, the delay from the time Song had notice of the striking off till he commenced the present application was not insignificant. However, Song's conduct which contributed to the delay was not unreasonable. Having contributed to the Company's entire paid up capital of $50,000 and a further $80,000 to the Company, Song would have naturally wished to weigh the costs and benefits of expending further resources to bring legal proceedings (in the Company's name) against Tan. In any event, Song consistently maintained his

[11] Song's 2nd affidavit, paras 21–23.

position regarding Tan's alleged breaches of director's duties by explicitly reserving his legal rights before and after the Company was struck off.

37 Pertinently, I was of the view that the delay in bringing this application did not result in prejudice to Tan. The fact that the Company would be able to commence an action against Tan for potential breaches such that he would have to defend himself was relied upon as an instance of prejudice. However, any potential claim against Tan and any subsequent liability arising therefrom cannot be said to have been caused by the restoration of the Company, but would simply be the result of Tan's alleged acts (if subsequently proven) whilst he was a director of the Company (see *Re Priceland* at 215B–C). Likewise, there was no evidence of any prejudice or detriment that a third party might suffer if the Company were to be restored.

38 In addition, this was also not a case where the Company's potential claims against Tan were statute-barred (as a result of the six-year requirement in s 344(5) of the Act) or where the limitation period had come to pass. Therefore, to disallow an application to restore at this point, because of some delay by Song in contemplating his legal options, would be to effectively shut out a potential claim even before the expiry of its limitation period. As the court stated in *Re Blenheim* at 830, "Where it would be otherwise right to do so, refusal to restore a company to the register on the grounds that it was the company's own fault, or the fault of its advisers, that the company was struck off may in many circumstances … be too great a penalty to impose".

Conclusion

39 In the light of the above, and based on all the circumstances of the case, I was of the view that it was just to order a restoration of the Company, and I granted Song's application accordingly.

Audrey Lim
Judicial Commissioner

Hariz Lee (Tito Isaac & Co LLP) for the plaintiff;
Shah Bahvini Jayakant (Bahvini S Law Practice) for the non-party.