COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2017/CLE/gen/00684

BETWEEN

IN THE MATTER OF SOOTHSAYER LIMITED
(Dissolved)

MR BIDZINA IVANISHVILI

1st Plaintiff

AND

MRS EKATERINA KHVEDELIDZE

2nd Plaintiff

AND

TSOTNE IVANISHVILI
(a minor, acting by EKATERINA KHVEDELIDZE, his mother and next friend)

3rd Plaintiff

AND

GVANTSA IVANISHVILI

4th Plaintiff

AND

BERA IVANISHVILI
(as beneficiaries of the MANDALAY TRUST)

5th Plaintiff

AND

THE REGISTRAR GENERAL

1st Defendant

AND

CREDIT SUISSE TRUST LIMITED (SINGAPORE)

2nd Defendant

AND

BUKIT MERAH LIMITED
(as Liquidator and Former Director of Soothsayer Limited)

3rd Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Dr. Peter Maynard and Mr. Colin Jupp for the Plaintiffs
Mr. Audirio Sears of the Attorney General's Chambers for the 1st Defendant
Mr. Vann Gaitor of Higgs & Johnson for the 2nd and 3rd Defendants

Hearing Dates: 12, 15, 25 September, 2, 26 October, 7 November 2017

Company Law – Voluntary Winding-up – Dissolution of Company – Company struck off the Register - International Business Companies (Amendment) Act, 2010, ss. 166 - Restoration of Companies struck off for non-payment of fees not dissolution

Application brought under inherent jurisdiction of court - Allegation of Fraud – Conclusive Evidence – Equitable Remedies – Whether just to restoration company - Standing of Plaintiffs to bring proceedings - Liquidator as Defendant supports application

The Company was incorporated on 3 December 2004 as an International Business Company. Its sole purpose was to hold certain assets, namely funds and investments of the Mandalay Trust. The Plaintiffs are the sole beneficiaries of the Trust. The Company maintains accounts at the Singapore branch of Credit Suisse AG.

The Company was voluntary dissolved on 21 May 2015. Four months after its dissolution, the First Plaintiff discovered that there had been fraudulent activity in the management of his accounts held with the Bank including unauthorized purchases of shares, imprudent trading activity and false reporting. An employee of the Bank admitted guilt in a criminal matter before the Swiss Court. In the interim, civil action has commenced against the Bank in the High Court of the Republic of Singapore. The Plaintiffs seeks a restoration of the Company to the Register for the sole purpose of joining in proceedings currently before the High Court of Singapore.

The Registrar-General objects to the application for restoration on the grounds that (i) there is no conclusive evidence of fraud and (ii) the Plaintiffs are not the proper parties to bring the action and, as such, they have no standing even though the liquidator has stepped in and supports the application for restoration of the Company.

The Registrar-General accepts that there is no provision in the International Business Companies Act, 2000 and its subsequent amendment in 2010 to restore dissolved International Business Companies to the Register and the Court, under its inherent jurisdiction, may do so

where it is conclusively determined that such company was in fact dissolved on the basis of fraud.

HELD: making the Order for the restoration of the Company for the limited purpose of commencing, defending or joining in litigation which has already commenced before the High Court in the Republic of Singapore;

[1] **In the absence of legislation dealing with the restoration of dissolved companies, the Court has an inherent jurisdiction to make an order for restoration of a company which has been voluntarily wound up and dissolved where the dissolution can be impeached on the ground of fraud. See: *In re Pinto Silver Mining Company* (1878) 8 Ch. D. 273; *In re London and Caledonian Marine Insurance Company [1879] 11 Ch. D.140 at page 144 and In re Cornish Manures Ltd [1967] 1 W.L.R. 807 at page 811* applied.**

[2] **It is not uncommon to find that equitable remedies may sometimes be embodied in statutes or where they are not found, the Court corrects an error where there is a need or lacuna in a statute so as to bring about a just and reasonable result: *Randy Stilman v The Attorney General and The Financial Services Commission*, BVI HCV COM 96/2011 and *Higham (Bahamas) Limited v Attorney General of the Commonwealth of The Bahamas* 2014/COM/com/ 00002 relied upon.**

[3] **Once a Court has been persuaded that it is just to restore a company, absent special circumstances, restoration should follow: *Re Priceland Ltd; Walterham Forest Borough Council v Registrar of Companies and Others* (1997) I BCLC 467 applied.**

[4] **Under common law principles, a person with an interest may apply to restore a company to the Register: *Re London and Caledonian Marine Insurance Company* [supra]. The Plaintiffs are therefore proper parties to bring this application. In any event, the liquidator, unarguably a proper party, supports the application for restoration of the Company.**

JUDGMENT

Charles J:

Introduction

[1] On 7 November 2017, I gave an oral ruling in this matter ordering among, other things, that Soothsayer Limited, a dissolved company ("the Company") be restored to the Register of Companies, for the limited purpose of commencing, defending or joining in proceedings before the Courts of the Republic of Singapore, provided that it pays all outstanding fees and penalties in full. I also ordered that the Company is deemed to have continued in existence as if its

name had not been struck off the Register and that the Registrar-General is to advertise this Order in the Gazette.

[2] I promised a written ruling. I do so now.

[3] By Originating Summons filed on 1 June 2017, the Plaintiffs applied to the Registrar of Companies ("Registrar") to restore the Company to the Register of Companies ("the Register"). The application is supported by the Affidavit of Adam Charles Rooney ("Mr. Rooney") filed on 8 June 2017.

[4] When the Plaintiffs initially made their application on 12 September 2017, they were under the mistaken belief that the application was straight-forward but since the appearance of Counsel for the Registrar, the application has been vehemently contested resulting in it being a lengthy, protracted and expensive application.

[5] The Registrar opposed the application on two discrete grounds namely (i) under the International Business Companies Act, 2000 ("the IBC Act, 2000") and the International Business Companies (Amendment) Act, 2010 ("the IBC (Amendment) Act, 2010") an International Business Company ("IBC") which has been dissolved cannot be restored to the Register but the Court, under its inherent jurisdiction, may restore an IBC to the Register where it is conclusively determined that such company was in fact dissolved on the basis of fraud and (ii) the Plaintiffs are not the proper parties to bring the action and as such, they have no standing.

[6] As *locus standi* became an issue, the Plaintiffs expeditiously moved to add Credit Suisse Trust Limited (Singapore) ("the Bank") and Bukit Merah Limited, a former director and Liquidator of the Company ("the liquidator") as the Second and Third Defendants respectively. These two Defendants are represented by learned Counsel, Mr. Gaitor of Higgs & Johnson and they support the Plaintiffs' application for the restoration of the Company to the Register. Despite the

liquidator being added as a party, *locus standi* still remained a live issue as will become evident later on in this judgment.

Some salient facts

[7] The Company was incorporated on 3 December 2004. Its sole purpose was to hold certain assets, namely funds and investments of the Mandalay Trust (the "Trust"). The First, Second, Third, Fourth and Fifth Plaintiffs, along with the First Plaintiff's further issue, are the only beneficiaries of the Trust. The Company maintained accounts at the Singapore branch of Credit Suisse AG.

[8] The Company was voluntarily wound up and dissolved on 21 May 2015. Subsequently its name was struck off the Register.

[9] Four months after the dissolution of the Company, the First Plaintiff ("Mr. Ivanishvili") discovered that there had been fraudulent activity in the management of his accounts held with the Bank, including unauthorized purchases of shares, imprudent trading activity and false reporting. Such fraudulent activity affected the Company's accounts and caused the Trust to suffer significant losses.

[10] In December 2015, the Bank in Switzerland commenced a criminal complaint against its former employee, Patrice Lescaudron, who was the client relationship manager and led the team which dealt with investments in the accounts of the Trust, including the Company accounts.

[11] Mr. Lescaudron admitted guilt in relation to fraud committed in the course of employment, false reporting and fraudulent management of accounts.

[12] By Originating Summons, the Plaintiffs seek an Order pursuant to the inherent jurisdiction of the Court for the restoration of the Company to the Register. The Plaintiffs request the restoration of the Company to allow joinder of the Company in proceedings, if necessary, which they might bring as beneficiaries of the Trust in respect of the losses sustained on the accounts. This would include the civil action recently brought against the Bank in the High Court of the Republic of

Singapore, case no HC/S 790/2017, which asserts the rights of the dissolved Company.

The issues

[13] Three principal issues arise for consideration namely:

1) Whether a dissolved IBC can be restored to the Register of Companies in The Bahamas under its current statutory regime;

2) If it cannot, does the Court have an inherent jurisdiction to restore a dissolved IBC to the Register and if so, whether the circumstances of this case are such that the Company ought to be restored to the Register and;

3) Whether the Plaintiffs are the proper parties to make this application for restoration of the Company to the Register.

Legislative framework

[14] A good starting point is section 166 of the IBC Act, 2000 (repealed) as it was the only section which contained provisions for the restoration to the Register of a company which has been dissolved. Section 166(3) provided as follows:

> **"If a company has been dissolved or the period of five years has expired under subsection (1), the company or a creditor, member or liquidator thereof, may apply to the court to have the name of the company restored to the Register."**

[15] The entire section 166 (which contained the above subsection) was repealed and replaced by a new section 166 of the IBC (Amendment) Act, 2010. The new section 166 states as follows:

> **"166. Restoration to Register.**
>
> **(1) If the name of a company has been struck off the Register under section 165(2), the company, or a creditor, member or liquidator thereof, may within five years immediately following the date of the striking off, apply to the Registrar to have the name of the company restored to the Register. "**

[16] Plainly, this section relates to companies that have been struck off under section 165 (2). Section 165 (2) refers to the section under the IBC Act, 2000 because section 165 was not repealed. Section 165(2) provides for the striking off of companies which have failed to respond to an order for compliance from the Registrar. It does not speak to the situation where companies have been voluntarily dissolved.

[17] The new section 166 (2) states that "*if upon an application under subsection (1), the Registrar is satisfied that it would be* ***fair and reasonable*** *for the name of the company to be restored to the Register, the Registrar shall restore the name of the company to the Register and upon restoration, the name shall be deemed never to have been struck off the Register*."

[18] The new section 166 (3) provides as follows:

> **"If the name of the company has been struck off the Register under section 165(3B), the company, or a creditor, member or liquidator thereof, may within five years immediately following the date of the striking off, apply to the Registrar to have the name of the company restored to the Register, and upon payment to the Registrar of -**
>
> **(a) the restoration fee specified in the *First Schedule*;**
>
> **(b) the licence fee stated in the notice referred to in section 165(3A); and**
>
> **(c) the licence fee in the amount stated in the notice referred to in paragraph (b) for each year or part thereof during which the name of the company remained struck off the Register,**
>
> **the Registrar shall restore the name of the company to the Register and upon restoration of the name of the company to the Register, the name of the company shall be deemed never to have been struck off the Register."**

[19] A reading of the ensuing sub-sections clearly refers to the restoration of companies to the Register for the non-payment of fees. Indeed, the entire section 166 speaks to the restoration of companies for the non-payment of fees. Unfortunately and for unknown reasons, the new section 166 has no

provision for restoration of dissolved companies as was its former counterpart: section 166(3) of the IBC Act, 2000.

[20] The short answer is that the IBC Act, 2000 and the IBC (Amendment) Act, 2010 contain no provision for companies which have been dissolved.

Inherent jurisdiction: the position at common law

[21] All parties are agreed that, under its inherent jurisdiction, the Court may, after considering the circumstances under which an IBC was dissolved, restore that company to the Register once it is satisfied that such dissolution was perpetuated by fraud. This is the position at common law.

[22] In the early English authority of **In re Pinto Silver Mining Company** (1878) 8 Ch. D. 273, in considering whether the Court has jurisdiction to restore a company which has been dissolved in compliance with statute, James L.J. opined at pages 283-284:

> **"Where there has been a *de facto* winding-up; liquidators appointed; the accounts of the liquidators laid before a meeting, as required by the *Companies Act*, 1862, s. 142; a return duly made to the Registrar, and the statutory period of three months elapsed, it would need a great deal of argument to satisfy me that the Court can go behind the return. The provisions of the Act as to dissolution would be of very little value if a creditor could, after that period, come and open the whole matter because, through mistake, some formality has been omitted, some creditor had not come in, or some asset has been left undiscovered. The only case in which it is desirable that what has been done should be undone is where there has been a fraud by which some one is injured. Such a fraud must be the fraud of somebody, and the person guilty of it would be personally liable; but it may be that it would also invalidate the proceedings."**[Emphasis added]

[23] About a year later in March 1879, James L.J. in **In re London and Caledonian Marine Insurance Company** [1879] 11 Ch. D 140, again had to consider a similar application. At page 144, he had this to say:

> **"…we thought that there was no power to go behind the dissolution except in the case which I suggested as a possible case – the case of absolute fraud – fraud which the company could be fixed with. If there were a case**

> **of that kind, then very likely the whole thing might be set aside; that is to say, it might, on proper proceedings being taken, be made clear that the whole winding-up was null and void, and then the company would be restored again to its position, subject to claims of creditors and contributories, or any other persons who might have rights to enforce or equities to be adjusted in relation to the company. But in the absence of fraud of that kind it seems to me that the Court has no jurisdiction whatever."**

[24] Pennycuick J restated and applied the dictum of James LJ in **In re Cornish Manures Ltd** [1967] 1 W.L.R 807 at page 811.

[25] Additionally, Baggallay L.J. on page 145 in **In re London and Caledonian Marine Insurance Company** [supra] agreed with the decision of James L.J. and further stated that "*where some particular reason exists why that which has been done should be undone, as in a case, for instance of fraud in connection with the proceedings, there should be some way of setting aside those proceedings*…."

[26] Furthermore, James L.J. in **In re Pinto Silver Mining Company** 1878 8 Ch. D. 273, explained on pages 283-284 that *"… the only case in which it is desirable that what has been done should be undone is where there has been a fraud by which someone is injured. Such a fraud must be the fraud of somebody and the person guilty of it would be personally liable…"*

Discussion

[27] The Company was voluntarily wound up and dissolved on 21 May 2015 and subsequently its name was struck off the Register. In or about mid-September 2015, some four months after the dissolution of the Company, as previously mentioned, fraudulent activity was discovered regarding the Company.

[28] Learned Counsel Dr. Maynard submitted that, as set out in Mr. Rooney's affidavit, at paragraphs 18-22, the Bank in Switzerland initiated a criminal complaint against Mr. Lescaudron alleging that he had committed various offences in fraudulently mismanaging the accounts of the Company in that:

(i) The Bank, through its employees, fraudulently misrepresented the value of the accounts under its care (including the Company Accounts) to Mr. Ivanishvili;

(ii) The fraudulent misrepresentations were done to hide losses which had been caused by the Bank's own fraudulent activity;

(iii) The employees of the Bank had stolen monies from and engaged in unauthorized trading of Company accounts particularly in respect of purchases of Raptor Pharmaceuticals Inc ("Raptor") securities;

(iv) No purchase of Raptor stock specifically on or for the Company Accounts was ever expressly authorized;

(v) The Bank knew of the unauthorized trading because Mr. Lescaudron brought the same to the attention of his superiors at the Bank but they allowed it to continue;

(vi) The Bank permitted the unauthorized trading to continue so that huge commissions could be made and "kick- backs" obtained;

(vii) Over half of Raptor shares had been purchased without authorization within a 5 month period of January 2012 to May 2012;

(viii) Despite having no instructions to trade in Raptor shares and despite Raptor having been placed on a restricted list, the Bank continued to trade without authorization in respect of Raptor shares; and

(ix) Mr. Lescaudron attempted to cover some of his unauthorized activity by forging signatures and including false reports in the Bank's daily log suggesting that he had received instructions to trade when he had not.

[29] Dr. Maynard next submitted that, as a result of such wrongful fraudulent activity, the Trust (the sole asset of the Company) has suffered significant losses including losses associated with the assets held in the Company's accounts. In addition to losses associated with the fraudulent activity in Raptor referred to above, the Bank also caused significant multi-million dollar losses to the Company Accounts in 2009 by accepting (but then failing) to execute instructions to convert what was then a majority fixed-income portfolio into full equity.

[30] In the course of criminal proceedings in Switzerland on 8 February 2017, regarding this matter, Mr. Lescaudron admitted his guilt to the fraudulent activity

perpetrated, specifically, (a) Fraud committed in the course of employment and aggravated abuse of confidence contrary to articles 146 and 138 respectively of the Swiss Criminal Code; (b) False reporting, contrary to article 251 of the Swiss Criminal Code; and (c) Fraudulent (disloyal) management [of accounts] contrary to article 158 of the Swiss Criminal Code: see pages 267 – 306 of ACR-1. Mr. Lescaudron will be formally sentenced in Switzerland later this year, according to Mr. Rooney.

[31] Learned Counsel for the Registrar, Mr. Sears submitted that given the averments as contained in the affidavit of Mr. Rooney, there is no evidence that the dissolution of the Company was the result of fraud and, as such, the Court should not exercise its discretion to restore the Company to the Register even for the limited purpose of joining in litigation which has already begun in the High Court of Singapore.

[32] Mr. Sears next submitted that in order for the Court to exercise its discretion, the Court must be satisfied of the following:

1) That the dissolution was obtained by absolute fraud, being that fraud which the company could be fixed with; and,

2) That by virtue of such fraud, the dissolution of the Company has caused injury to someone.

[33] In light of the first consideration, Mr. Sears submitted that the Court should have complete regard for the statutorily defined procedure to wind-up and dissolve a company under the IBC Act, 2000 and its amendment in 2010 and also the general conduct of the company, its directors, members, officers, agents and liquidators throughout that statutory process.

[34] Mr. Sears further submitted that where it appears *prima facie* that the Company's conduct contains *malice* or purports to disregard the statutory process for an IBC to be dissolved, an absolute fraud arises. Therefore, in the absence of proof before the Court that an IBC was dissolved by absolute fraud which resulted in

injury to someone, the Court has no jurisdiction, inherent or otherwise, to order the restoration of a dissolved IBC to the Register.

Analysis and Findings

[35] It is common ground that the IBC Act 2000 and its subsequent amendment, the IBC (Amendment) Act, 2010 contain no provision for the restoration of a company which has been dissolved and subsequently struck off of the Register.

[36] It is also common ground that, under its inherent jurisdiction, the Court may, after considering the circumstances under which an IBC was dissolved, restore that company to the Register once it is satisfied that such dissolution was perpetuated by fraud in respect of the Company. See: **In re London and Caledonian Marine Insurance Company**, **In re Cornish Manures Ltd** and **In re Pinto Silver Mining Company** [supra].

[37] Learned Counsel Mr. Sears submitted that Mr. Rooney alluded to the existence of uncertainty that the fraud purported to be linked to the Mandalay Trust, had or continues to have a direct effect on the Companies accounts and/or its dissolution. He submitted that, specifically, at paragraph 34 of Mr. Rooney's Affidavit, the Plaintiffs' evidence is:

> **"...That activity has resulted in losses to the trust of which the Plaintiffs are currently the only beneficiaries. The full extent of the fraud remains to be investigated."**

[38] Also, at paragraph 41 of Mr. Rooney's Affidavit, the Plaintiffs' evidence is:

> **"It cannot be said with certainty whether the Bank's employees stole any moneys from the Company Accounts, for example, because the Prosecutor has not looked at this specifically."**

[39] He submitted that the facts and circumstances of the instant case do not suggest that the dissolution of the Company was obtained by absolute fraud, and/or is directly the result of the purported fraudulent affairs of the Trust and, in the

absence of such evidence, the Court should not exercise its discretion to restore the Company to the Register.

[40] I do not agree with the submissions advanced by learned Counsel. First of all, it is not disputed that the sole asset of the Company is the Trust and until the dissolution of the Company in May 2015, the Bank was the trustee of the Trust. The Company maintained accounts at the Bank.

[41] There is no evidence to contradict Mr. Rooney's affidavit evidence that four months after the dissolution of the Company, Mr. Ivanishvili discovered that there had been fraudulent activity in the management of his accounts held with the Bank, unauthorized and/or imprudent trades and misreporting financial information in relation to the accounts. As a result of such wrongful fraudulent activity, the Trust has suffered significant losses including losses associated with the assets held in the Company's accounts. In addition to losses associated with the fraudulent activity in Raptor referred to above, the Bank also caused significant multi-million dollar losses to the Company Accounts in 2009 by accepting (but then failing) to execute instructions to convert what was then a majority fixed-income portfolio into full equity.

[42] The Bank in Switzerland itself commenced criminal proceedings on 8 February 2017 regarding this matter. Mr. Lescaudron admitted his guilt to the fraudulent activity perpetrated specifically (a) Fraud committed in the course of employment and aggravated abuse of confidence contrary to articles 146 and 138 respectively of the Swiss Criminal Code; (b) False reporting, contrary to article 251 of the Swiss Criminal Code; and (c) Fraudulent (disloyal) management [of accounts] contrary to article 158 of the Swiss Criminal Code: see pages 267 – 306 of ACR-1. Mr. Lescaudron will be formally sentenced in Switzerland later this year, according to Mr. Rooney.

[43] In my opinion, there is conclusive evidence to show that a fraud has been perpetrated in respect of the Company that led to its dissolution. The Plaintiffs'

sole purpose of wishing to restore the Company to the Register is to join in litigation which has already begun in the High Court of Singapore and to obtain information with respect to the Company. At paragraph 37 of his affidavit, Mr. Rooney stated as follows:

> **"…the Bank has failed to provide information with respect to the Company Accounts despite requests made over a period of nearly 18 months by (i) the Company's director; (ii) the Company's secretary; (iii) the Company's liquidator; (iv) the Trustee in its capacity as the Company's sole shareholder, and (v) the Trustee in its capacity as trustee notwithstanding that the requested documents are trust assets. It is clear to the Plaintiffs that the Bank will continue to delay and/or refuse to provide information even if a written opinion of Bahamian counsel is procured and provided by the Company's liquidator as now requested."**

[44] Mr. Rooney's affidavit must be read as a whole to ascertain the true picture of the fraudulence complained of. It is not fair to pick out sentences and/or paragraphs and then turn around and say that there is not conclusive evidence of fraud. The short answer is a fraud has been perpetuated on the Company and the Plaintiffs wish to join in proceedings in Singapore to investigate more about this fraud and to put the matter beyond doubt.

[45] That being said, I am of the considered opinion that this is a proper case for me to exercise my discretion and restore the Company to the Register for the limited purpose of commencing, defending or joining in litigation which has already begun in the High Court of Singapore.

[46] Even if I am wrong to come to this conclusion, I shall press on. As iterated earlier, section 166(3) of the IBC Act, 2000 dealt with a company that has been dissolved. However, that section was repealed and replaced in 2010 by a new section 166 which makes no provision for restoration of dissolved companies.

[47] It seems difficult to envisage that the omission was intentional rather than a mistake because a comparative study of other financial jurisdictions, for example, Jersey and the British Virgin Islands, to name just two; both have specific legislations providing for the restoration of dissolved companies. It would be

puzzling for this jurisdiction (which had a provision in its principal Act) to intentionally choose to remove it from the statute books when other competing financial jurisdictions have specific legislations.

[48] It is fallacious to believe that if judges have the discretion to restore a dissolved IBC to the Register, then the floodgates are opened. As Dr. Maynard jocularly stated, there must be a flood for the gates to open. In any event, in my considered opinion, judges already have that jurisdiction. To restore a dissolved company to the Register is always in the discretion of the Court.

[49] Take for example, the British Virgin Islands; once a company has been dissolved, it can only be restored to the Register by the BVI High Court, which must first declare the dissolution of the company to be void. Restoration, being a discretionary remedy, allows the court to impose conditions, or give directions on the restoration, if it considers it would be appropriate to do so. In exercising its discretion to restore a dissolved company to the corporate register, the BVI Court will consider whether it is in the interests of justice to do so. Generally, it remains a monumental task to convince the BVI Court to restore a dissolved company to the corporate register otherwise than for the purpose of enabling newly discovered assets to be distributed by the company or where a company has been voluntarily dissolved in fraudulent circumstances or where it may wish to join in proceedings or defend itself in proceedings. Only in exceptional cases would the BVI Court consider restoring a dissolved company purely so that its directors/owners could resume carrying on business as though nothing happened.

[50] Learned Counsel Mr. Gaitor who represents the Bank and the Liquidator makes some interesting submissions Able as he is, he submitted that indeed the standard in most legislation for restoration is not the high equitable standard of “just and equitable” but the lower standard of “just and reasonable” or “fair and reasonable” that a dissolved company be restored. The “fair and reasonable”

phrase is even used in the new section 166 (2) and elsewhere within the IBC (Amendment) Act, 2010.

[51] Mr. Gaitor submitted that it is arguable whether sections 166(6) and 168 of the IBC (Amendment) Act, 2010 may apply to restoration of a dissolved company to the Register. Section 166(6) provides:

> **"For the purpose of this Part, the appointment of an official liquidator under section 168 operates as an order to restore the name of the company to the Register."**

[52] Section 168 states:

> **"The court may appoint a person to be the official liquidator in respect of a company the name for which has been struck off the Register."**

[53] Notwithstanding that observation with respect to sections 166(6) and 168, learned Counsel Mr. Gaitor submitted that the Court, on multiple occasions, has restored dissolved companies to the Register even in the absence of legislation. In the intervening period and not to legislate from the bench, the Court must step in to cure the *casus omisus* which the statute has created, by obvious mistake, I believe, when section 166(3) of the IBC Act, 2000 was repealed and replaced by the new section 166 of the IBC (Amendment) Act, 2010 which makes no provision for dissolved companies to be restored to the Register. I do not believe that it was the intention of Parliament not to make any provision for dissolved companies.

[54] In the case of **Higham (Bahamas) Limited v Attorney General of the Commonwealth of The Bahamas** (2014/COM/com/00002), the application with respect to **Higham** was made on the grounds of (i) mistake and (ii) it was just and equitable and/or just and reasonable that the company be restored so as to enable it to distribute the assets which remained to be distributed and which ought to have been distributed before the company was dissolved as was done in at least two previous Bahamian cases, namely, **Rushmorehills Limited v. the Attorney General of the Commonwealth of the Bahamas**, Supreme Court

Action No 90 of 2011 and **Kato Holdings Limited v the Attorney General of the Commonwealth of the Bahamas**, Supreme Court Action No. 107 of 2011. These cases, though not binding on this Court, are precedents and persuasive authorities in this jurisdiction for restoration on the ground of mistake (and I will add fraud).

[55] In **Higham,** the mistake in liquidating the company before all assets were distributed was recognised by Mr. Justice Stephen Isaacs. In **Rushmorehills Limited** and **Kato Holdings Limited,** Barnett C.J. also recognised the mistake. Both learned justices accordingly declared the resolutions of the shareholders and directors of the companies to voluntarily wind up the companies and all subsequent acts *void* and ordered that the companies be restored to the Register.

Application of equitable remedies in cases of mistake/fraud

[56] Mr. Gaitor also persuasively submitted that it is not uncommon to find that equitable remedies may sometimes be embodied in statutes or where they are not so found, applied to correct an error where there is a need or *lacuna* in a statute so as to bring about a just, fair and reasonable result.

[57] Equity has long allowed the court to put right what was wrong. **Randy Stilman v. The Attorney General and The Financial Services Commission,** BVIHCV COM 96/2011, a case of the High Court of the British Virgin Islands, is instructive of this principle. An application was made by a liquidator of a limited partnership asking that the dissolution of the partnership be declared void and that the partnership be restored to the Register of Limited Partnerships to enable newly discovered assets of the Partnership to be distributed. There was no provision in the statute or regulations for restoring a limited partnership which had been struck off to the register as was in the case of a limited liability company or BVI Business Company. Bannister J. (Ag) at para 25 of his judgment stated:

> **"I do not think that that means that the Court is without power to put right what has happened. <u>Equity has long recognized the remedy of delivery up</u>**

> **and cancellation of documents which have been procured by fraud or which are the result of a mistake, provided that the document is wholly void. Similarly, a court of equity will set aside gifts made by mistake. In the present case incorrect information was by mistake supplied to the Registrar as a result of which she innocently issued a certificate which misrepresents the state of affairs as to the limited partnership and proceeded to strike its name from the register. Although it may not be possible to describe the certificate as void, in the strict sense of that term, it seems to me that the context of publicly issued certificates and publicly maintained registers the position is analogous, since the certificate purports to record a transaction which has not taken place and thus ought not to have currency. In context, it seems appropriate to treat the document as if it were void. The Liquidator has not been guilty of any inequitable conduct in bringing about this state of affairs and in those circumstances, I consider that I have jurisdiction to grant the equitable remedy to which I have referred, and to order the delivery up of the certificate to the Registrar of Corporate Affairs for her to cancel it. By way of necessary ancillary relief the register will be rectified accordingly."**[Emphasis added]

Restoration of Company to the Register because it is just to do so

[58] In the case of the restoration of a company which had been dissolved, section 651 of the English Companies Act 1985 contains the purposes for which the section could be invoked, namely: (1) to enable a liquidator to distribute an overlooked asset; or (2) to enable a creditor to make a claim which he had previously not made: **Stanhope Pension Trust Ltd. v Registrar of Companies** (1994) 1 BCLC 628.

[59] There are numerous cases of application under English statute for restoration of companies which had been dissolved. Even though there are statutory provisions in England for restoration, there are useful dicta to guide the court in meeting out justice whether pursuant to statute or not. Laddie J in the Companies Court of the Chancery Division in **Re Priceland Ltd.; Walterham Forest Borough Counsel v Registrar of Companies and Others** (1997) 1 BCLC 467 commented that once a court has been persuaded that it is just to restore a company, absent special circumstances, restoration should follow. He stated at p. 476: "*Exercising the discretion against restoration should be the exception, not the rule.*"

[60] In the circumstances and exercising my discretion in this case, I will grant the Order sought by the Plaintiffs that the Company be restored to the Register of Companies, for the limited purpose of commencing, defending or joining in proceedings before the High Court of the Republic of Singapore, provided that it pays all outstanding fees and penalties in full; and subject to the issue of standing which is dealt with below.

Standing of the Plaintiffs to make the application

[61] Learned Counsel for the Registrar, Mr. Sears submitted that when one considers the provisions of the IBC Act 2000, specifically sections 132, 134 and 140, relative to the winding-up and dissolution, and restoration of an IBC, the Plaintiffs are not proper parties to make an application for the restoration of the Company to the Register. He submitted that under those sections, the classes of persons who may be able to deal with the affairs of an IBC are limited to two classes: directors and members/shareholders. Consequently, the class of persons who may be able to deal with the affairs of an IBC must apply *mutatis mutandis* to persons making application to the Court for the restoration of an IBC under its inherent jurisdiction. According to learned Counsel, the Plaintiffs do not fall in either class.

[62] Mr. Sears submitted that the evidence in the present case does not support that any or all of the Plaintiffs is/are a director or shareholder of the Company. It is submitted that, in the absence of supporting evidence that any or all of the Plaintiffs is/are a director or shareholder of the Company, they do not have standing to bring this application (whether jointly or severely).

[63] Learned Counsel Dr. Maynard insisted that the IBC Act, 2000 and the IBC (Amendment) Act, 2010 do not apply but common law principles apply. Under common law, a person with an interest may apply to restore a company to the Register: **In re London and Caledonian Marine Insurance Company** [supra].

[64] Not only at common law but there seems to be a growing modern trend towards "**a person with an interest**" being a proper party. Countries that have passed legislations for the restoration of dissolved companies have included such phrase like "**by a person who can show an interest in doing so**" or "**any person who can establish an interest in having the company restored to the Register**". For example, the procedure which governs the reinstatement of a dissolved Jersey limited company is contained in Article 213 of the Companies (Jersey) Law 1991. Where a company has been dissolved (either by a winding up or having been subject to a declaration of désastre) or, has been struck off the register by the Registrar of Companies, in the case of non-filing of an annual return, the Royal Court has the power, **on an application of an interested party,** to declare the dissolution void and order the reinstatement of the company to the Register so that the company is returned to the position it would have been in as if it had not been dissolved.

[65] In addition, in the British Virgin Islands, under the BVI Business Companies Act, 2004, once a company has been dissolved, it can only be restored to the Corporate Register by the BVI High Court, which must first declare the dissolution of the company to be void. An application can be made by any creditor, former shareholder, director or liquidator of the company or **by a person who can show an interest in doing so.**

[66] Such a provision is contained in Section 71 of the Business Companies (Amendment) Act 2012 which repealed and substituted section 218 of the Business Companies Act, 2004 (which had a provision similar to the repealed section 166(3) of the IBC Act, 2000 (Bahamas). The new section 218 provides:

> **"(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."**

[67] Undoubtedly, Mr. Sears is correct that when one considers the provisions of the IBC Act 2000, specifically sections 132, 134 and 140, relative to the winding-up and dissolution, and restoration of an IBC, the Plaintiffs are not proper parties to make an application for the restoration of the Company to the Register. That section limits the classes of persons who may be able to deal with the affairs of an IBC to two classes: directors; and, members/shareholders.

[68] As stated before, the IBC Act 2000 and the IBC (Amendment) Act, 2010 are inapplicable to the case at hand as there is no provision in those Acts to restore IBCs which have been dissolved to the Register so recourse has to be had to common law. At common law, any person who can show an interest in making the application for restoration can do so. Therefore, it cannot be demurred that the Plaintiffs are interested parties. In addition, the former liquidator of the Company, Bukit Merah Limited, the 3rd Defendant in this application, unequivocally supports the application for restoration. On any view, whether at common law or under the inapplicable IBC Act, 2000 and its subsequent amendment in 2010, the liquidator is a proper party.

Conclusion

[69] In the premises, I make the following orders:

IT IS HEREBY ORDERED AS FOLLOWS:

1) The Dissolution of Soothsayer Limited is void ab initio.

2) The Certificate of Dissolution dated 21st May 2015 is null and void.

3) The name of the above-named company, Soothsayer Limited be restored to the Register of Companies, for the limited purpose of commencing, defending or joining in proceedings before the Courts of the Republic of Singapore, provided that it pays all outstanding fees and penalties in full;

4) Soothsayer Limited is deemed to have continued in existence as if its name had not been struck off.

5) An official copy of this Order be delivered to the Registrar General.

6) The Registrar General is to advertise this Order in the Gazette.

Postscript

[70] This protracted application was heard over a number of days, albeit not full days. Bearing in mind that this Order is necessary so that the Plaintiffs may apply to join in proceedings now in train before the High Court of Singapore, I feel impelled to urge the legislators of this country to move quickly to enact appropriate legislation to deal with the restoration of IBC's which have been dissolved if the financial industry wishes to remain competitive. Other financial jurisdictions, for example, Jersey and the British Virgin Islands (the only two that I examined) have detailed legislations in this regard. It is little wonder that the BVI is 'home' to over 500,000 IBC's. Perhaps, we may wish to follow suit and enact similar legislations which will make these applications less cumbersome and convoluted.

[71] Last but not least, I am grateful to all Counsel for their sterling contribution and comprehensive submissions to this Court.

Dated this 17th day of November 2017.

Indra H. Charles
Justice