

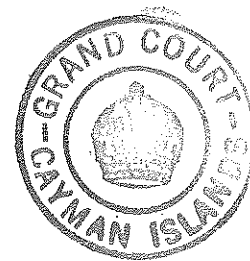
1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 FINANCIAL SERVICES DIVISION

3 CAUSE NO: FSD 42 OF 2013 (AEFJ)

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5 The Hon. Mr. Justice Angus Foster
6 In Chambers
7 24th April 2013

8
9 IN THE MATTER OF THE SECTIONS 94 AND 159 OF THE COMPANIES LAW (2012 REVISION)

10
11 AND IN THE MATTER OF GRENCORP LTD



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14 Appearances: Mr. David Butler and Mr. Andrew Jackson of Appleby for the Petitioner
15 Ms Jacqueline Wilson, Solicitor General, for the Registrar of Companies

16
17 **RULING**

18
19 1 Although there is apparently no appeal in this matter, I have been asked for my reasons for the order
20 which I made in April, 2013 because, it is said, they may be of general interest. The matter concerned
21 the terms and conditions which the court may impose in respect of the restoration of a company to the
22 register of companies on the application of a creditor who also seeks a winding up order upon such
23 restoration.

24 2 Grencorp Ltd, a Cayman Islands exempted company ("the Company"), was struck off the register of
25 companies ("the register") by the Registrar of Companies ("the Registrar") on 29th October 2010.
26 Biodiesel (L) Limited ("the Petitioner"), a Malaysian company, applied by petition dated 22nd March
27 2013 for the restoration of the Company to the register and thereafter for its winding up. The
28 Petitioner claimed to be a creditor of the Company in the sum of at least US\$2,859,348.64 and
29 possibly as much as US\$6.512m.

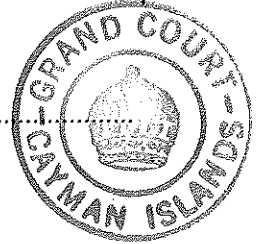
30 3 On hearing the petition I ordered that the Company should be restored to the register on payment by
31 the Petitioner of the re-instatement fee equivalent to the original incorporation or registration fee and
32 on condition that the Petitioner also paid the arrears of annual return fees and penalties as specified

1 by the Registrar. I also made a winding up order in respect of the Company to take effect upon its
2 restoration to the register.

3 4 As well as counsel for the Petitioner, the Solicitor General appeared at the hearing on behalf of the
4 Registrar. The issue in contention was whether the court may or should order such restoration to the
5 register to be on the condition of payment by the petitioning creditor of the arrears of annual fees and
6 penalties and, if so, whether it was appropriate for the court to do so in this case.

7 5 Section 156 of the Companies Law (2012 Revision) ("the Law") provides:

8 "(1) Where the Registrar has reasonable cause to believe that a company is not carrying on business
9 or is not in operation, he may strike the company off the register and the company shall thereupon be
10 dissolved



11
12 6 Section 159 Of the Law provides:

13 " If a company or any member or creditor thereof feels aggrieved by the company having been struck
14 off the register in accordance with this Law, the Court on the application of such company, member or
15 creditor made within two years or such longer period not exceeding ten years as the Governor in
16 Cabinet may allow, of the date on which the company was so struck off, may, if satisfied that the
17 company was, at the time of the striking off thereof, carrying on business or in operation, or otherwise
18 that it is just that the company be restored to the register, order the name of the company to be
19 restored to the register, on payment by the company of a re-instatement fee equivalent to the original
20 incorporation or registration fee and on such terms and conditions as to the Court may seem just, and
21 thereupon the company shall be deemed to have continued in existence as if its name had not been
22 struck off; and the Court may, by the same or any subsequent order, give such directions and make
23 such provisions as [may] seem just for placing the company and all other persons in the same position
24 as nearly as may be as if the name of the company had not been struck off". [My emphasis].

25
26 6 Sections 168, 169 and 170 of the Law provide:

27 " 168. In January of each year after the year of its registration each exempted company shall
28 furnish to the Registrar a return which shall be in the form of a declaration
29

30 " 169 (1) Every exempted company shall, in January of each year after the year of its
31 registration pay to the revenues of the Islands the annual fee specified in Part 4 of Schedule
32 5 [which sets out a range of fees depending upon the amount of the company's capital]

33 (2) Each such annual fee referred to in subsection (1) shall be tendered with the return
34 required by section 168

1 (3) An exempted company who defaults in submitting its annual return under
2 section 168 or the fee specified in subsection (1) shall incur a penalty
3 of.....

4 [And there are then set out a range of penalties up to 100% of the annual fee].

5 170 Any exempted company which fails to comply with section 168 or 169 shall be deemed
6 a defunct company and shall thereupon be dealt with as such under Part VI [which includes
7 section 159 set out above] but without prejudice to its being registered again as though it
8 were being registered for the first time."

9 7 O.102, r. 18 (1) of the Grand Court Rules provides that an application by a creditor to restore
10 a company to the register may be combined with an application for the winding up of the
11 company and may be made by petition. This was done in this case.

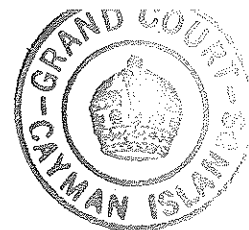
12 8 By letter dated 11th February 2013 the Assistant Registrar informed the attorneys for the
13 Petitioner that the fees payable in respect of the restoration of the Company to the register
14 were a re-instatement fee of \$470.00, being an amount equivalent to the original
15 incorporation or registration fee, together with the arrears of annual fees and penalties
16 totalling \$5,240.00. This resulted in a total sum payable by the Petitioner of \$5,710.00. In
17 their letter in response the Petitioner's attorneys accepted the obligation pursuant to section
18 159 of the Law to pay the re-instatement fee equivalent to the original incorporation or
19 registration fee of \$470.00 but contended that the Section 159 of the Law did not require the
20 Petitioner, as a creditor of the Company, to pay its outstanding annual fees and penalties as
21 a condition of the restoration of the Company to the register.

22 9 Section 159 of the Law, clearly requires payment by a company of a re-instatement fee
23 equivalent to the original incorporation or registration fee as a condition of the restoration of
24 the company to the register. The Petitioner's attorneys accepted that in their letter to the
25 Assistant Registrar referred to above and also at the hearing before me and there was no
26 issue about that.

27 10 Counsel for the Petitioner also accepted that, although Section 159 refers to such re-
28 instatement fee as being payable by the company, the fee was in fact payable by the
29 Petitioner, whether or not it is a creditor. He sought to distinguish the position with regard to
30 payment of arrears of annual fees and penalties on the ground that the section makes no
31 reference to them. However, given that they are, of course, equally payable by the Company
32 pursuant to the Law, I was not entirely clear why, if the re-instatement fee is in fact payable
33 by the Petitioner, as was accepted, it was not appropriate or just to require the arrears of
34 annual fees and penalties also to be paid by the Petitioner.

35 11 It was submitted on behalf of the Petitioner that since Section 159 only specifies payment of
36 the re-instatement fee as a condition of restoration to the register, where the company is
37 insolvent the Registrar should rank as a creditor of the Company in respect of the arrears of
38 annual fees and penalties. It was pointed out that, pursuant to Section 141 and Schedule 2,
39 Category 3 of the Law, on insolvency the Company's liability for the arrears of annual fees
40 and penalties would rank as a preferred debt payable in priority to other debts (albeit ranking
41 equally with the other preferred debts described in Schedule 2: see Section 141 (2) (a) and
42 (b)).





1 12 Counsel for the Petitioner also drew attention to the fact that the Companies Law of 1964
2 (Cap. 22) made no reference to a requirement for the payment of a re-instatement fee
3 equivalent to the original incorporation or registration fee as a condition for restoration of a
4 company to the register but simply provided for such restoration to the register to be *on such*
5 *terms and conditions as to the court may seem just* (see Section 175 of the 1964 Law). That
6 wording is, of course, also replicated in the present Law. Counsel was unable to say
7 precisely when the specific requirement for payment of the re-instatement fee first appeared
8 in the Companies Law but it was there by the time of the 2003 Revision. It was argued that
9 this demonstrated that sometime between 1964 and 2003 the Legislature had decided to cap
10 the fee payable for restoration of a company to the register at an amount equivalent to the
11 original incorporation or registration fee.

12 13 It seemed to me that the consequence of this argument, namely that Section 159 should be
13 interpreted as creating a cap on what is payable by an applicant for restoration of a company
14 to the register, would be to put a fetter on the general provision in the Law which follows the
15 reference to payment of a re-instatement fee, namely that the court may order the restoration
16 "*on such terms and conditions as to the Court may seem just*". It was my view that the
17 provision clearly creates a general discretion on the part of the court to impose whatever
18 terms and conditions it considers just on an order for restoration to the register. The provision
19 is expressed as an addition to the requirement to pay the re-instatement fee and, in my view,
20 clearly gave the court a wide discretion to impose such further terms and conditions as it
21 considers just. In my opinion the specific requirement for payment of a re-instatement fee
22 does not restrict or limit this general discretion. It does not impose a cap on what further or
23 other payments the court may consider it just to require to be paid. If one of the terms and
24 conditions which the court considers to be just is to require an applicant for restoration to pay
25 the arrears of annual fees of the relevant company, for example, there is nothing in the
26 provisions of Section 159 of the Law which, in my judgment, prevents the court from so
27 ordering.

28 14 The terms of Section 159 apply equally to an application for restoration of a company to the
29 register by a shareholder but it has never, to my knowledge, been previously submitted, still
30 less held, that it is not open to the court to order that such an applicant should also pay
31 arrears of annual fees because there is a cap on what the court may order as a result of the
32 express provision mandating payment of a re-instatement fee. In fact it has been standard
33 practice for many years to require such an applicant to pay the arrears of annual fees and
34 penalties due by the company concerned as specified by the Registrar. I therefore
35 considered that the court had jurisdiction to require an applicant for restoration of a company
36 to the register, whether or not a creditor, to pay such other sum due by the company as
37 specified by the Registrar as a term or condition of the restoration to the register as it
38 considered just

39 15 In light of my opinion above I turned to consider whether it was just that the Petitioner should
40 be required to pay the Company's arrears of annual fees and the penalties due as a
41 condition of restoration of the Company to the register. In this regard, I noted that section 159
42 of the Law provides that upon restoration to the register a company is deemed to have
43 continued in existence as if it had not been struck off. Furthermore the court is expressly
44 empowered to make such provisions as seem just to place the company in the same position
45 as if it had not been struck off. In light of these provisions it seemed to me to be wrong in
46 principle to compel the Registrar to restore a company to the register which was not in good

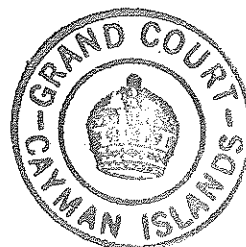
1 standing at the time of restoration. In my view it was appropriate and desirable that the
2 company should be placed in that position by terms and conditions imposed by the court
3 pursuant to its general discretion explained above. I did not consider that the fact that the
4 applicant for restoration was a creditor or that the company was to be put into winding up
5 after its restoration detracted from this. The Company was struck off by the Registrar inter
6 alia for non-payment of its annual fees and consequent penalties and it did not seem right to
7 me to order the restoration of the Company to the register while the same defaults, the very
8 reasons why it was struck off, persisted. To my mind for the court to require restoration of a
9 company to the register while the annual fees and consequential penalties remained
10 outstanding would defeat the very intent of Sections 156 and 170 of the Law.

11 16 The submission by counsel for the Petitioner that the Registrar should simply rank as a
12 creditor in the liquidation of the Company in respect of the arrears of annual fees and
13 penalties did not address my opinion expressed above that in principle the Registrar should
14 not be compelled to restore to the register a company which has not in or been placed in
15 good standing at the time of such restoration. The restoration of company to the register
16 must obviously take place before any winding up of the company can take effect.

17 17 Furthermore, I saw no reason why the payment of arrears of annual fees and penalties
18 should await the unknown outcome of a company's winding up. In this case there was no
19 evidence before me of the likely ability of the Company to pay the arrears of annual fees and
20 penalties and I would not have expected there usually to be such evidence available on such
21 an application. The only evidence was as to the Company's substantial indebtedness to the
22 Petitioner. Also, if the Registrar was required to rank as a creditor in respect of the arrears of
23 fees and penalties there would inevitably be significant delay in recovering the debt as well
24 as cost to the Registrar in such a course. In addition, any benefit from ranking as a preferred
25 creditor, in the absence of any information at all about other possible preferred creditors of
26 the Company or about the Company's assets, would also be entirely uncertain. I did not
27 consider that to order the restoration of the Company to the register and require Registrar to
28 have to rank as a creditor for the arrears of annual fees and penalties was at all appropriate.

29 18 Counsel for the Registrar referred me to two authorities. The Irish case of *Re Haltone (Cork)*
30 *Limited etc [1996] 1 IR 32* concerned an application by a creditor for restoration of the debtor
31 company to the register of companies. The applicant creditor had a judgment which it wished
32 to enforce against the company and its officers. The relevant provision of the Irish
33 Companies Act was very similar to the Law in providing that on restoration to the register the
34 company would be deemed to have continued in existence as if it had not been struck off
35 and in providing also that the court might by an order for restoration of the company to the
36 register give such directions and make such provisions as seemed just for placing the
37 company in the same position as if it had not been struck off. In the Irish High court O'Hanlon
38 J. on ordering the restoration of the company to the register directed that the applicant
39 creditor should be responsible for all fees payable to the registrar of companies in respect of
40 the restoration.

41 19 A similar provision in the English Companies Act 1948 was considered by Megarry J (as he
42 then was) in *Re Test Holdings (Clifton) Ltd [1970] Ch 285*. The issue was whether the
43 applicant creditor seeking restoration of the company to the register should be liable for the
44 legal costs of the registrar of companies. Megarry J said:



1 *"He who seeks the revival of a defunct company must face the prospect of bearing the costs*
2 *of whatever has to be done to ensure that restoration is properly effected"*

3 Although the circumstances were somewhat different in that it was payment of the registrar's
4 legal fees by the applicant creditor that was in issue, the general statement seemed to me to
5 be of equal applicability with respect to payment of statutory fees and penalties due by the
6 company concerned. It was my view that in order for restoration of the Company in this case
7 be properly effected the Company would have to be in good standing and not in default of its
8 obligations as a registered company.

9 20. In light of all my views as set out above I concluded that the Company should be restored to
10 the register on payment by the Petitioner of the re-instatement fee of \$470.00 and that it was
11 just that such restoration be on the term and condition the Petitioner should also pay the
12 arrears of annual fees and penalties totaling \$5,240.00. I therefore so ordered.

13

14 Dated 15th August 2013

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17 
18 The Hon. Mr. Justice Angus Foster
 JUDGE OF THE GRAND COURT

