# WHAT IS DEAD MAY NEVER DIE: REVIVING STRUCK OFF COMPANIES AND STAY OF WINDING UP

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## RECAP: VARIABLE CAPITAL COMPANIES

The Monetary Authority of Singapore and the Accounting and Corporate Regulatory Authority launched the VCC framework on 14 January 2020.

If you wish to know more about this new corporate structure, you may wish to get a copy of our earlier article or reach out to us for more information.

## INTRODUCTION

During economic downturns, it is unsurprising that businesses may be forced to shut, and the company consequently struck off or wound up. More persistent entrepreneurs may start new companies and new businesses when the economy recovers. Is this cycle really necessary? Is there no way for the entrepreneurs to resurrect the existing company where much goodwill has accumulated?

We look at the two cases of *Re Asia Petan Organisation* [2018] 3 SLR 435 ("**Re Asia Petan**") and *GVR Global Pte Ltd v Wayne Burt Pte Ltd and Anor* [2020] SGHC 87 ("**Wayne Burt**"), which our team from Tito Isaac & Co LLP was involved in, as to possible mechanisms an applicant may take to revive companies that have been struck off or ordered to be wound up.

In *Re Asia Petan*, the applicant, who was the former director-shareholder of the struck off company, was desirous of reviving the company in order to commence proceedings against another former director for alleged breach of fiduciary duties. The applicant was represented by Mr Hariz Lee from our Dispute Resolution Practice, and was successful in his application.

In *Wayne Burt*, the controlling shareholder of the wound-up company sought, *inter alia*, an indefinite stay of the winding up order made against the wound-up company and the petitioning creditor of the winding up application (the "**Petitioner**"). The Petitioner was represented by Mr Tito Isaac, Managing Partner, and Mr Ramesh s/o Varathappan and Ms Jaspreet Kaur from our Dispute Resolution Practice in resisting the application. Likewise, the Petitioner was successful in his application.

## WHAT IS STRUCK OFF BUT NOT STRUCK OUT

Section 344(5) of the Companies Act allows any person who feels aggrieved by a company being struck off to apply to court within 6 years to have that company restored.

Often such aggrieved persons seek to pursue a claim accruing to the struck-off company or benefits that may only be made to the struck-off company and thus will require the company to be restored.

While there are a multitude of reasons why an applicant may be desirous to restore a company, how does one actually achieve it?

Although section 344(5) of the Companies Act has been in force since 2002, the ambit of section 344(5) was only clarified, 15 years later, in *Re Asia Petan*.

In allowing the application, the High Court helpfully set out who qualified as an "*aggrieved person*" under the section and when it would be just to restore the company.

### Who Can Strike Back

An applicant under section 344(5) has to demonstrate some proprietary or pecuniary interest arising from the struck off company's restoration. Such interest need not be firmly established or highly likely to prevail, but it must not be merely shadowy.

The test for an aggrieved person would be easily satisfied for applicants whom were former shareholders. In *Re Asia Petan*, the applicant qualified as an aggrieved person as any benefit that accrues to the company, if its claims against the other director were successful, would also accrue indirectly to the applicant qua shareholder.

In *Ganesh Paulraj v Avantgarde Shipping Pte Ltd* [2019] 4 SLR 617, the High Court added to the category of persons, and held that a director of the struck-off company, by his position alone, has sufficient connection and proximity to the Company that would independently furnish some basis for standing as an applicant. After all, the performance of the functions and duties of a director in relation to a possible claim would be a sufficient basis as his failure to pursue claims or matters in the interest of the company may expose him to liability.

### When Can the Company Strike Back

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

## WHAT IS WOUND UP BUT NOT DOWN

Following the High Court decision in *Interocean Holdings Group (BVI) Ltd v Zi-Techasia (Singapore) Pte Ltd (in liquidation)* [2014] 2 SLR 485 ("**Interocean**"), a winding up order could not be set aside but only stayed as section 279 of the Companies Act expressly provided for it.

A recent decision has recognised that the position in *Interocean* is unsatisfactory as permanent stay leaves the wound-up company in some astral void, legally dead but physically alive and trading – a zombie company. Unfortunately, the applicant in *Wayne Burt*, abandoned its argument for the winding up order to be set aside and thus opportunity for greater clarity on this issue is lost.

Nonetheless, the High Court reiterated the test to obtain a stay of a winding up order under section 279 of the Companies Act being the applicant has to show the following:

(a) First, that the state of affairs that required the company to be wound up no longer exists.

(b) Second, a stay will be refused if granting a stay would be detrimental to "commercial morality" and the interests of the public at large. For example, the court would have to be satisfied that it would be reasonable to entrust the affairs of the company to the directors under whose management the company had previously been subjected to an order for winding-up, and to the court have to be satisfied that the trading operations of the company have been "fair and above board", particularly when there has been a failure by the directors in their obligations to furnish information to the official receiver.

## Contact Us

Please do not hesitate to contact us should you have any queries or require any clarification.

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(c) Third, a stay will be refused if the interests of the creditors, the members and the liquidator are not protected.

In *Wayne Burt*, the applicant argued that the debt claimed by the Petitioner, which formed the basis of the statutory demand, was not a debt actually owed by the wound up company but was part payment of a purchase of shares in another company.

Not only was the applicant unable to convince that Court that the debt claimed by the Petitioner was not a true debt, the applicant also failed to prove the solvency of the wound up company as (a) there was not cash in the bank accounts or any employees, (b) the last audited financial statements showed that the its liabilities exceeded its assets and (c) the directors failed to render any cooperation with the liquidator.

## THE COMPANY THAT IS DEAD MAY NEVER DIE

It is thus entirely possible for companies that have been struck off or liquidated to be restored and resume trading.

For struck off companies, it may be easier for aggrieved person to justify the reasons in reviving the company but it is unlikely that all reasons would qualify as just reasons.

The problem of proving solvency of a wound up company would undoubtedly be much harder as the number of creditors and debt amount increase.

Whilst it is uncommon, the Companies Act does allow a liquidator to apply for a scheme of arrangement. It is entirely open for former directors to work with the liquidator to come up with an acceptable scheme of arrangement to ensure as part of the stay of the winding up order.

While prevention is better than cure, business owners may take comfort in the fact that all is not truly lost when it comes to a company's lifespan.

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