

公报文章

Restoration to the Register of Companies and Winding Up Order 恢复至公司登记册及清盘令

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Introduction

In the recent judgment of *In the Matter of Margara Shipping Limited* (the “Margara Decision”)¹ the Cayman Islands Grand Court provided some useful guidance on the basis on which a company can be restored to the Register of Companies (the “Register”) and subsequently wound up pursuant to section 159 of the Companies Act (2021 Revision) (the “Companies Act”) and the Grand Court Rules (2022 Consolidation) (“GCR”), Order 102, Rule 18.

The Legal Basis to Restore and Wind Up A Company

Section 159 of the Companies Act provides that:

“If a company or any member or creditor thereof feels aggrieved by the company having been struck off the register in accordance with this Act, the Court on the application of such company, member or creditor made within two years or such longer period not exceeding ten years as the Cabinet may allow of the date on which the company was so struck off, may, if satisfied that the company was, at the time of the striking off thereof, carrying on business or in operation, or otherwise, that it is just that the company be restored to the register, order the name of the company to be restored to the register, on payment by the company of a reinstatement fee equivalent to the original incorporation or registration fee and on such terms and conditions as to the Court may seem just...”

Order 102, Rule 18(1) of the GCR provides that:

“An application by a creditor under Section 159 may be combined with an application under Section 94 of the Companies Act and may be made by petition in Form No. 68 of the Grand Court Rules – Volume II, in which case

简介

开曼群岛大法院最近对 *Margara Shipping Limited* 的判决（下称“Margara 判决”）¹为以下情况的法律依据提供了一些有用的指导，即根据《公司法》（2021 年修订版）（下称“《公司法》”）第 159 条以及《大法院规则》（2022 年合并版）（下称“《大法院规则》”）第 102 号命令第 18 条规则，公司可被恢复列入公司登记册（下称“登记册”），并可随后被清盘。

对公司进行恢复和清盘的法律依据

《公司法》第 159 条规定：

“如果某个公司或其任何成员或债权人对该公司依据本法被除名而感到受屈，那么对于该公司、成员或债权人在公司除名之日起两年内或内阁可能允许的不超过十年的期限内提交的申请，如果法院满意该公司在被除名时正在开展业务或在运营中，或者将公司恢复到登记册是公平的，那么法院可以下令将公司的名称恢复至登记册，由公司支付相当于原始成立费或注册费的恢复费，并遵守在法院看来似乎是公正的条款和条件...”

《大法院规则》第 102 号命令第 18(1) 条规则规定：

“债权人根据第 159 条提交的申请可以与根据《公司法》第 94 条提交的申请合在一起，并可通过《大法院规则》第二卷第 68 号表格的申请表提交，在此情况下，应采用《公司清盘规则》

¹ FSD 325 of 2021 (DDJ)

Order 3 of the Companies Winding Up Rules (as amended and revised) shall apply”.

(经修改和修订的) 第 3 号命令”。

The Margara Decision

The Margara Decision was the second reported Cayman Islands case that deals with the law surrounding the right of a company to be restored and thereafter wound up in the Cayman Islands. The case involved a company that was struck off the Register of Companies on 30 December 2011. Margara Shipping Limited (the “Company”) was incorporated solely for the purposes of ownership of a vessel, “the Margara”. Shipowners Insurance and Guaranty Company Ltd., a company registered in Bermuda was a creditor (and a prospective creditor) of the company (the “Petitioner”). The Petitioner applied for the restoration and subsequent winding up of the Company pursuant to Section 159 of the Companies Act and Order 102, Rule 18 of the GCR.

The Petitioner had provided the Company with a Certificate of Financial Responsibility (“COFR”), subject to certain standard terms and conditions (the “STCs”), for liability that may arise under certain United States (“US”) legislation. It was a term of the STCs that in the event that the Petitioner was called on to settle any claims, the Petitioner would be prima facie entitled to be indemnified by the Company in respect of such liabilities as well as the Petitioner’s expenses in responding to such demands. The Petitioner was subsequently called upon to settle liabilities incurred by the Company (as the owner of the vessel) resulting from the grounding of the vessel which caused significant damage to a coral reef in Puerto Rico (the “Underlying Claim”). Further, the Petitioner incurred legal fees and expenses in its efforts to negotiate and settle the Underlying Claim with the US authorities (the “Legal Fees Claim”). The Petitioner sought payment of the amounts demanded for the Underlying and Legal Fees Claim.

The Court referred to the helpful decision of Justice Quinn *In the Matter of OVS Capital Management (Cayman) Limited*² which states:

“The decision of Laddie, J. in the Chancery Division of the High Court of England and Wales in Re Priceland Ltd³ provides the following helpful guidelines to the court when considering whether to restore a company to the Register:

- (i) *Before the court can exercise its discretion to restore a company, it must first be satisfied that either the company was carrying on*

Margara 判决

Margara 判决涉及有关开曼群岛公司恢复及之后清盘的权利的法律，这是开曼群岛第二个报导的此类案件。该案涉及一家于 2011 年 12 月 30 日从公司注册册上除名的公司。Margara Shipping Limited (下称“该公司”) 的成立完全是为了拥有一艘名为“Margara”的船只。在百慕大注册的 Shipowners Insurance and Guaranty Company Ltd. (下称“呈请人”) 是该公司的债权人(和潜在债权人)。申请人根据《公司法》第 159 条以及《大法院规则》第 102 号命令第 18 条规则申请恢复该公司及随后的清盘。

呈请人已根据一定的标准条款和条件(下称“标准条款和条件”)向该公司提供了一份“财务责任证书”，以应对美国某些法律下可能产生的责任。标准条款和条件中的一项条款是，如果呈请人被要求清偿某项索赔，那么从表面上看，呈请人有权就此类责任以及呈请人处理此类索赔所产生的费用获得该公司的赔偿。呈请人随后被要求清偿该公司(作为船只所有人)因船只搁浅而对波多黎各的珊瑚礁造成重大损害而产生的责任(下称“潜在索赔”)。此外，呈请人在与美国当局谈判和清偿潜在索赔的过程中产生了法律费用和开支(下称“法律费用索赔”)。呈请人要求公司支付潜在索赔和法律费用索赔的金额。

法院参考了 Quinn 法官在 *OVS Capital Management (Cayman) Limited*² 一案所做的具有帮助性的裁决，该裁决指出：

“Laddie, J. 在英格兰和威尔士高等法院衡平法庭对 Re Priceland Ltd³ 的裁决为法院在考虑是否将公司恢复到登记册时提供了以下有用的指导：

- (i) *在法院可以行使酌情权恢复公司之前，必须首先确定公司当时正在开展业务或在运营中，或者要恢复公司是公平的。*

² 2017 (1) CILR 232

³ [1997] BCC 207

- business or in operation or alternatively that it is otherwise just to restore the company.*
- (ii) *Whether a company was carrying on business or in operation has to be considered by reference to the time of dissolution.*
 - (iii) *The words “in operation” should be given a broad meaning in order to give the court the widest possible powers to restore.*
 - (iv) *In considering whether it was just to restore a company to the register, the court is entitled to look at all the circumstances of the case and is not limited to any particular date.*
 - (v) *In an application to restore under either limb, absent special circumstances, restoration should follow and exercising the discretion against restoration should be the exception, not the rule...”*

The Court had to be satisfied that either the company was at the time of the striking off carrying on business or in operation, or otherwise that it was just that the company be restored. If an applicant succeeds in passing through on one or both of these gateways, then absent special circumstances restoration should follow⁴. The Court was satisfied that the Petitioner had standing to present the petition as a creditor in respect of the Legal Fees Claim and as a contingent or prospective creditor in respect of the Underlying Claim noting that “*creditor*” should be construed as widely as possible to include contingent creditors (see *Re Harvest Lane Motor Bodies Ltd* [1968] 2 All E.R. 1012).

The Court cited and relied on helpful authorities which supported the position that notwithstanding that a company was not carrying on business at the time of its strike off (which was the case in the Margara Decision) it might still be considered just to restore the company to the Register adopting the reasoning of Millet J in *City of Westminster Assurance Co Ltd v Registrar of Companies & Anor* [1997] BCC 960. In the Margara Decision, the Petitioner sought to restore the Company in order to seek indemnification in respect of the Underlying Claim and the Legal Fees Claim and the Court was content to make an order restoring the company on that basis.

The Court noted that the Registrar of Companies (the “Registrar”) had confirmed she had no objection to the reinstatement subject to the payment of outstanding fees and the filing of notice of a licensed service provider as registered office to be filed⁵. It was also noted that the Minister for Finance and Economics

- (ii) 公司是否正在开展业务或在运营中，必须参照其终止时间。
- (iii) “在运营中”一词应具有广泛的含义，以便赋予法院尽可能广泛的权力来恢复公司。
- (iv) 在考虑是否只是将公司恢复到登记册时，法院有权查看案件的所有情况，而不仅限于任何特定的日期。
- (v) 对于以上其中一种情况恢复公司的申请，如无特殊情况，应依循恢复，酌情不予恢复应为例外，而非规则……”

法院必须确信公司在被除名时正在开展业务或在运营中，或者要恢复公司是公平的。如果申请人符合其中一种情况或两种情况都符合，那么如无特殊情况，应予以恢复⁴。法院确信，呈请人有资格就法律费用索赔以债权人的身份提出申请，并就潜在索赔以未定债权人或潜在债权人的身份提出申请，并指出“债权人”应尽可能广泛地解释为包括未定债权人（参见 *Re Harvest Lane Motor Bodies Ltd* [1968] 2 All E.R. 1012）。

法院引用并依赖了有用的权威，这些权威支持一种立场，即尽管公司在被除名时并未开展业务（Margara 判决就是这种情况），但将公司恢复到登记册仍然可以被考虑为公平的，这采用了 Millet J 在 *City of Westminster Assurance Co Ltd v Registrar of Companies & Anor* [1997] BCC 960 案中的推断。在 Margara 判决中，呈请人寻求恢复该公司，以便就潜在索赔和法律费用索赔寻求赔偿，法院乐意在此基础上下令恢复该公司。

法院指出，公司注册处（下称“注册处”）处长已确认，她不反对恢复公司，但前提条件是，要支付未缴费用，并提交由持牌服务提供者作为注册办事处的通知⁵。还注意到的一件事是，财政与经济发展部长进一步表示，对恢复申请没有异议。⁶

⁴ Re Blue Note Enterprises Ltd [2001] 2 BCLC 427; Priceland Ltd [1997] 1 BCLC 467/

⁵ Prior to a reinstatement of a company, the application must provide notice of a licensed service provider to act as the registered office. 在恢复公司之前，申请必须提供持牌服务提供者作为注册办事处的通知。

Development had further stated that there was no objection to the restoration application.⁶

Appointment of Official Liquidators

The Court had to be satisfied that the evidence is sufficient not just for the reinstatement application but also to justify the appointment of official liquidators thereafter. In the Margara Decision, the Court was satisfied that the Petitioner had established a solid basis for the appointment of official liquidators and that it had standing to present the petition as a creditor in respect of the Legal Fees Claim and as a contingent or prospective creditor in respect of the Underlying Claim. It noted sections 94, 92(d) and (e) of the Companies Act and stated, “it appears that the company is unable to pay its debts but in any event it is also just and equitable for the company to be wound up”.⁷

Conclusion

The Margara Decision is a useful reminder of the steps that are required to be taken when a creditor is seeking to rely on section 159 of the Companies Act and GCR Order 102 R 18. The application is in effect a two-step process of ensuring that the necessary evidence and statutory requirements are in order not just for the reinstatement aspect of the application (pursuant section 159 of the Companies Act) but also for the application to wind up a company (pursuant to section 94 of the Companies Act). It is worth bearing in mind that notwithstanding that a company is sought to be put into official liquidation immediately following its reinstatement, following the Court order it nonetheless needs to provide the Register with notice of a licensed service provider to agree to provide registered office services before the reinstatement will be effective. Applications under section 159 of the Companies Act and GCR Order 102 Rule 18 can provide a useful avenue for creditors who have claims resting against a struck off entity to reinstate the entity and thereafter to ensure its orderly wind up where its proof of debt can be submitted in the usual way.

This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.

任命官方清盘人

法院必须确信，证据不仅足以申请恢复公司，而且还足以证明其后任命官方清盘人的合理性。在 Margara 判决中，法院确信，呈请人已为任命官方清盘人奠定了坚实的基础，并有资格就法律费用索赔以债权人的身份提出申请，并就潜在索赔以未定债权人或潜在债权人的身份提出申请。裁决提到了《公司法》第 94 条、第 92(d) 和 (e) 条，明确说明，“公司似乎无法偿还债务，但无论如何，公司清盘也是公正、公平的”。⁷

结论

Margara 判决是对债权人寻求依赖《公司法》第 159 条以及《大法院规则》第 102 号命令第 18 条规则时需要采取的步骤的一个有用的提醒。申请实际上是一个两步过程，以确保必要的证据和法定要求不仅适用于申请的公司恢复方面（根据《公司法》第 159 条），而且适用于申请公司清盘（根据《公司法》第 94 条）。值得铭记的是，尽管公司被要求在恢复后立即进行正式清盘，但在法院下令之后，仍然需要向注册处提交持牌服务提供者的通知，同意提供注册办事处服务，恢复才会生效。根据《公司法》第 159 条和《大法院规则》第 102 号命令第 18 条规则提出的申请可为债权人提供一个有用的途径，让那些对除名实体提出索赔的债权人能够申请恢复该实体，然后确保在按正常方式提交债务证明的情况下该实体有序清盘。

本文不应被视为法律建议或法律意见，其内容并非详尽无遗，仅可作为概览及一般参考资料。感谢您的垂阅。

⁶ Justice Doyle, noted in the Margara Decision that there had been a lapse in time from seeking the letter of no objection from the Minister of Finance and from filing the application. It was noted by the Court that “in future, petitioners would be wise to act expeditiously once the extension of time is granted”. The Court accepted that it was implicit that the Minister for Finance allowed a longer period of 2 years upon which to bring an application to reinstate the company but within the 10 year maximum.

Doyle 法官在 Margara 判决中指出，从寻求财政部长的无异议信件到提交申请过了一段时间。法院指出，“将来，一旦获准延长时间，申请人明智的做法是迅速采取行动”。法院认为，可以推测财政部长允许在2年以上的时间内提出恢复公司的申请，但最长不得超过 10 年。

⁷ Paragraph 14 of the Margara Decision.

Margara 判决第 14 段。

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