

Private Client & Wealth Management BULLETIN

The International Business Companies (Amendment) Act, 2010

In a demonstration of its commitment to maintain The Bahamas as a leading international financial centre, the government of The Bahamas responded swiftly to correct an omission in the provisions of the International Business Companies Act, Chapter 309 of the Statute Laws of The Bahamas (the "IBCA"), highlighted by the recent ruling of His Lordship, Justice Neville Adderley of the Supreme Court of The Bahamas.

The Ruling and its Effect

In the matter of The Teneshelles Trust et al vs. BDO Man Judd et al, the first and second defendants in the action raised as a preliminary issue the question of whether the second plaintiff, comprised of a group of companies (the "Fund Companies"), had juristic capacity to bring the action because at the time the action was commenced that the Fund Companies had been struck off the Register of Companies (the "Register") for non-payment of fees.

The Fund Companies had been struck off the Register on 31st August, 2002 and the writ to commence the action was filed on the 7th April, 2004. The Fund Companies were purportedly restored to the Register by the Registrar of Companies (the "Registrar") on 7th June, 2004 pursuant to the provisions of the IBCA.

Section 166(1) of the IBCA provided that the Registrar had the authority to restore the name of a company to the Register where such company had been struck off pursuant to section 165. Section 165 of the IBCA provided the Registrar the authority to strike a company off the Register where he had reasonable cause to believe that such company no longer satisfied the requirements prescribed under section 14(1) (requiring the articles of the company to be filed in a particular manner), section 38(1) (requiring a registered agent) or section 44 (requiring a register of officers and directors) of the IBCA. Additionally, while section 176(4) of the IBCA granted the Registrar the power to strike off a company for non-payment of fees, section 166(1) did not include authority for the Registrar to restore a company to the Register where such company had been struck off for non-payment of fees.

Therefore the question at issue was whether the Registrar could restore a company which had been struck off for non-payment of fees.

Justice Adderley concluded that it was "not open to the court to substitute its will for that of the legislature, as in this case, the language of the relevant provisions of the statute are clear and unambiguous."

Accordingly, he held that the purported restoration of the Fund Companies was a nullity as the Registrar had no power to restore the companies; consequently, the Fund Companies had no juristic capacity to sue. Recognizing the implications of his 16th November, 2009 ruling, Justice Adderley granted a four month stay before his decision would take full force and effect to enable Parliament a sufficient amount of time to react and respond.

Parliament's Reaction

On the 16th of March, 2010, exactly four months from the date of Justice Adderley's ruling, the government of The Bahamas passed the International Business Companies (Amendment) Act, 2010 which now makes it clear that a company which has been struck off for non-payment of fees can be restored to the Register by the Registrar provided that, inter

alia, fees are paid within five years of such striking off.

Conclusion

The IBCA as amended by the 2010 Amendment now provides, inter alia, for the restoration of a company which has been struck off for non-compliance with its provisions including restoration of a company to the Register which has been struck off for the non-payment of fees. The enhanced legislation is intended to aid in the efficient processing of an application for restoration making it clear which parties are able to apply for such restoration and providing clear terms for both the Registrar and the Court to determine the circumstances under which a company may be restored to the register. A more detailed analysis will be published in the next issue of Focus, our firm's newsletter.

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