
A Word to the Wise before you End Companies' Lives

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1. The Companies Office of Jamaica has introduced a procedure to bring about the dissolution of a company which otherwise would have resolved to be wound up voluntarily. This is simply by allowing a company, in lieu of commencing a members' voluntary winding up, to voluntarily apply to be struck off the register under section 337 of the Companies Act 2004 ("the Act").
2. The objective sought to be achieved by this procedure is understood. It reduces the length of time it would otherwise take to complete a members' voluntarily winding up and saves cost and resources. The procedure is fairly simple. If a company is not trading and does not have any assets or liabilities, then one should just apply to strike it off the register. All that is required is a letter from the directors or majority of them stating that the company has no assets or liabilities and a certificate from an auditor confirming the same. This is in any event the end product of a members' voluntary winding since the assets would be liquidated and all liabilities would be discharged and the company would have ceased trading.
3. It is curious however that section 337 under which this procedure is introduced does not seem to contemplate or support it. The section speaks to the power of the Registrar of Companies ("the Registrar") to strike a defunct company off the register. A "defunct company" is not defined in the Act and so one has to look at the literal meaning of the adjective "defunct" which means "no longer functioning or operating". The aim of this

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section as one can see is to impose striking off as a sanction. There is nowhere in the section that envisages a voluntary application on behalf of the company, unless, as may be implied, the company is applying to be struck off as defunct.

4. It may be implied that a company could voluntarily apply to be struck off as defunct. This however would have to be a deliberate act on the part of the company. Section 337 states that “*Where the Registrar has reasonable cause to believe that a company is not carrying on business or in operation, he may send to the company by post a letter inquiring whether the company is carrying on business or is in operation*”. There is a procedure to be followed if no response is received or if a response is received to the effect that the company is not carrying on business or in operation, which ultimately leads to it being struck off and in consequence dissolved. Reasonable cause is readily gleaned by the Registrar if the company is not up to date with its statutory filing obligations.
5. No doubt a company could take advantage of section 337 if it wishes to be removed from the register without having to go through the process of a voluntary winding up and the costs associated with it. The company could simply approach the Registrar and say that it is not carrying on business or in operation. This could be reasonable cause on the part of the Registrar which no doubt is one of the bases for the introduction of this procedure.
6. Unless a company is applying to be struck off as defunct, which would be a rare case, the procedure may expose the company and its officers to undesirable, unanticipated and even unforeseen liabilities. In any event, the procedure requires the company, before it can be struck off, to bring its affairs up to date which include its statutory filing obligations. This would defeat the purpose of the section as the company could no longer be considered defunct.

7. In order to appreciate the difficulty with this procedure, it is important to understand in brief how the process of a members' voluntary winding up works. In order to commence a members' voluntary winding up, the company in general meeting has to resolve to be so wound up. Before passing the resolution, the directors would have to make a statutory declaration of solvency stating that they have enquired fully into the affairs of the company and have formed the opinion that the company will be able to pay its debts in full within twelve months from the commencement of winding up.
8. A liquidator would then be appointed whose role is to wind up the affairs of, and distribute the assets of, the company. When the affairs of the company are fully wound up, the liquidator is required to prepare an account of the winding up showing how it was conducted and the properties that were disposed of. He is then required to call a general meeting to present the account and provide an explanation. A week after the meeting the liquidator should send a copy of the account to the Companies Office for registration as well as a return of the holding of the meeting. The Registrar upon receiving the account and return is obligated to register them and within three weeks after registration the company is deemed to be dissolved.
9. Both striking off of a defunct company and members' voluntary winding up result in the company being dissolved. This too may be another reason for the introduction of the procedure. However, the effect of each mode of dissolution is different, which is why it is important to determine the route to ending a company's life voluntarily.
10. A company that is dissolved in consequence of a members' voluntary winding up has a statutory limitation period of two years after dissolution within which it can be restored

while a company that is dissolved in consequence of a strike off has a statutory limitation period of twenty years. It cannot be the intention of the members of a company in applying to be struck off to have twenty years within which the company can be restored, especially where unforeseen liabilities can arise.

11. A possible reason for the marked difference in the time limits is that during a voluntary winding up, all the assets of the company would come to light while a striking off, that is preceded by no winding up, may have unknown assets which do not come to light until many years after the company has been struck off.
12. Furthermore, the Court has the power to order a company which has been struck off to still be wound up. This too would defeat the purpose of a striking off and even result in significant costs where the company still has to be wound up. On the other hand, while the court has the power to restore a company which has been dissolved in consequence of a winding up, it does not have the power to make a winding up order in respect of a company that has been voluntarily wound up.
13. The Act expressly provides for the liabilities of directors, managing officers and members to continue and be enforced as if the company had not been dissolved in consequence of a striking off. There is no such express provision for the continuation of liability where a company has been voluntarily wound up. This may be so since powers of the directors would cease upon the appointment of the liquidator. Upon restoration of a company that was struck off, the officers may still be liable for its statutory filing obligations for the period during which the company was struck off the register.

14. From the foregoing, while it is clear the objective sought to be achieved by the Companies Office, one has to think carefully since the procedure of striking off may expose the company and its officers to undesirable, unanticipated and even unforeseen liabilities. For this procedure to work, it would require an amendment to the Act to expressly provide for voluntary applications by a company to be struck off as is the case in the United Kingdom.