IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 218

Originating Summons No 1498 of 2018

Between

Bijynath s/o Ram Nawal

… *Plaintiff*

And

Innovationz Pte Ltd

… *Defendant*

And

Accounting and Corporate Regulatory Authority

… *Intervener*

GROUNDS OF DECISION

[Companies] — [Directors] — [Disqualification] — [Section 344G(3) Companies Act (Cap 50, 2006 Rev Ed)]
[Companies] — [Directors] — [Disqualification] — [Section 155A Companies Act (Cap 50, 2006 Rev Ed)]

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Bijynath s/o Ram Nawal
v
Innovationz Pte Ltd
(Accounting and Corporate Regulatory Authority, intervener)

[2019] SGHC 218

High Court — Originating Summons No 1498 of 2018
Ang Cheng Hock J
25 March, 2, 12 April 2019

18 September 2019

Ang Cheng Hock J:

Introduction

1 This was an application by the plaintiff for relief from disqualification as a director pursuant to s 344G(3) of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act"). The plaintiff had been a director of the defendant, a company which had been struck off the register but then later restored. The striking off had resulted in the plaintiff being disqualified under s 155A(1) of the Act. Having considered the circumstances of the case, I found it just to declare that the plaintiff be placed in the same position as director as if the defendant had never been struck off the register. I also made the consequential declaration that the plaintiff is not disqualified under s 155A of the Act.

2 I now set out the grounds for my decision.

Facts

The parties

3 The plaintiff is Mr Bijynath s/o Ram Nawal, a practicing lawyer. At the time of the application, he was practicing at Oxon Law LLC ("Oxon"), which is his own law practice, for which he is the only member and director. Prior to Oxon, the plaintiff had practiced at Camford Law Corporation ("Camford"), a boutique corporate law practice, where he was a director.

4 The defendant, Innovationz Pte Ltd, is a Singapore incorporated company, where the plaintiff served as the only resident director.

5 The intervener is the Accounting and Corporate Regulatory Authority ("ACRA").

The background to the application

6 Camford offers nominee directorship services for its foreign clients intending to incorporate companies in Singapore.[1] This is to enable the clients to satisfy the regulatory requirement of having an ordinarily resident director in Singapore.

7 It had always been part of the plaintiff's corporate practice to serve as the resident nominee director of various companies for clients, even though this was not the core or bulk of his practice.[2] In his 20 years of practice, the plaintiff

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1 Bijynath s/o Ram Nawal's ("Mr Nawal") 1st Affidavit, para 5.

2 Mr Nawal's 2nd Affidavit, para 5.

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had, at various times, been the resident nominee director for 12 companies.[3] For two of these companies, the plaintiff only served as a director for one day. This was in the course of setting up the companies on an urgent basis for the clients.

8 When the plaintiff was employed by Camford, he agreed to be appointed as a nominee resident director of the defendant. He was appointed on 23 August 2010.[4] He was responsible for approving director resolutions related to the filing of annual returns with ACRA and provided any assistance that was usually required of a nominee director.[5] The plaintiff did not have any day-to-day management roles or responsibilities over the defendant's business.

9 The corporate secretarial functions of the defendant were under the charge of the company secretary, Mr S Natarajan ("Mr Natarajan"), who was also a lawyer and director at Camford. The secretarial executive employed at Camford who did the relevant filings and lodgements with ACRA reported to Mr Natarajan.[6] The latter also acted as Camford's relationship partner for the client who set up the defendant and he handled all of Camford's correspondence with the client and the defendant. The plaintiff did not manage Camford's client relationship in respect of the defendant.

10 Sometime in February 2017, the plaintiff left Camford. Prior to his departure, he instructed Mr Natarajan to follow up with the defendant's executive directors on their statutory filing requirements, which had not been

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3 Mr Nawal's 2nd Affidavit, para 5.

4 Mr Nawal's 3rd Affidavit, BRN-3, Tab 1, pp 32-33.

5 Mr Nawal's 1st Affidavit, para 7.

6 Mr Nawal's 1st Affidavit, para 8.

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complied with.[7] The company's annual returns had not been filed. Shortly thereafter, he was informed by Mr Natarajan that the defendant's directors were uncontactable.

11 Sometime in July 2018, the plaintiff attempted to file his prospective appointment as director of a new company but this was rejected by ACRA's online system. The plaintiff assumed that this was a technical glitch and wrote to ACRA to resolve the issue. However, on 10 August 2018, the plaintiff was notified by email that he had been disqualified pursuant to s 155A of the Act for a period of five years, with effect from 4 December 2017.[8] Section 155A provides:

> **Disqualification for being director in not less than 3 companies which were struck off within 5-year period**
>
> **155A.**—(1) Subject to subsection (5), a person —
>
> (*a*) who was a director of a company (Company A) at the time that the name of Company A had been struck off the register under section 344; and
>
> (*b*) who, within a period of 5 years immediately before the date on which the name of Company A was struck off the register under section 344 —
>
> (i) had been a director of not less than 2 other companies whose names had been struck off the register under section 344; and
>
> (ii) was a director of those companies at the time the names of the companies were so struck off the register,
>
> shall not act as director of, or in any way (whether directly or indirectly) take part in or be concerned in the management of, any company or any foreign company … for a period of 5 years commencing after the date on which the name of Company A was struck off.
>
> …

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7 Mr Nawal's 1st Affidavit, para 9.

8 Mr Nawal's 1st Affidavit, para 10; BRN-1, Tab 1.

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> (3) A person who is subject to a disqualification under subsection (1) may apply to the Court for leave to act as director of, or to take part in or be concerned in the management of, a company or a foreign company …
>
> [emphasis in original]

12 This initial notification was followed by a letter from ACRA dated 5 September 2018, which the plaintiff first saw on 17 September 2018.[9] The letter explained that the plaintiff had been listed as a director of three companies which the Registrar of Companies ("the Registrar") had reasonable cause to believe were not carrying on business or were not in operation. The annual returns of these companies, including the defendant, had not been filed for a number of years.[10] They had accordingly been struck off by ACRA pursuant to s 344(1) of the Act. The struck off companies were:

Name of company	**UEN No**	**Date company was struck off by Registrar**
Spartan Trading Pte Ltd	201209803G	4 October 2016
Mango Games Pte Ltd	201130495H	16 March 2017
Innovationz Pte Ltd	201017791D	4 December 2017

This triggered s 155A(1) and formed the basis for the plaintiff's disqualification.

13 The relevant provisions in s 344 of the Act provide that:

> **344.**—(1) Where the Registrar has reasonable cause to believe that a company is not carrying on business or is not in operation, the Registrar may send to the company, and its

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9 Mr Nawal's 1st Affidavit, para 11; BRN-1, Tab 1.

10 Mr Ramesh Ethan s/o Ananda Suppiah's ("Mr Ethan") Affidavit, para 4.

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> directors, secretaries and members, a letter to that effect and stating that, if an answer showing cause to the contrary is not received within 30 days after the date of the letter, a notice will be published in the *Gazette* with a view to striking the name of the company off the register.
>
> (1A) Without prejudice to the generality of subsection (1), in determining whether there is reasonable ground to believe that a company is not carrying on business, the Registrar may have regard to such circumstances as may be prescribed.
>
> (2) Unless the Registrar receives an answer within one month from the date of the letter to the effect that the company is carrying on business or is in operation, he may publish in the *Gazette* and send to the company by registered post a notice that at the expiration of 60 days after the date of that notice the name of the company mentioned in that notice will unless cause is, in the form and manner specified in section 344C, shown to the contrary be struck off the register and the company will be dissolved.
>
> [emphasis in original]

14 Similar to his responsibilities vis-à-vis the defendant, the plaintiff was a resident nominee director of Spartan Trading Pte Ltd ("Spartan Trading") and Mango Games Pte Ltd ("Mango Games"), acting on the instructions of Camford's clients. The corporate secretarial functions for these companies were also carried out by Camford's corporate secretarial executive, who reported to Mr Natarajan as the company secretary for both these companies.[11]

15 At this stage, I should briefly highlight the circumstances which led to Spartan Trading and Mango Games being struck off the register. According to ACRA, since their incorporation, the annual returns for Spartan Trading and Mango Games had not been filed for three years and four years respectively.[12] It is undisputed that the plaintiff had been *unable* to ensure the filing of these

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11 Mr Nawal's 1st Affidavit, para 14.

12 Mr Ethan's Affidavit, para 4.

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returns because of a lack of instructions from one of Camford's foreign clients, Sand Hill Counsel ("Sand Hill"). Sand Hill is a foreign law firm which had instructed Camford in relation to Spartan Trading and Mango Games.

16 From July to October 2015, Mr Natarajan repeatedly wrote to Sand Hill requesting for instructions in relation to the two companies. The foreign lawyers were asked for the "action plan" in relation to the companies, that is, what was going to be done to finalise the accounts of the companies before taking steps to wind them up or otherwise.[13] In December 2015, Mr Natarajan made it clear to Sand Hill that, with recent changes to the law in Singapore, the plaintiff could face repercussions if Singapore filing and regulatory requirements were not complied with. Mr Natarajan warned that Camford would have little choice but to inform ACRA that the overseas directors and shareholders for Spartan Trading and Mango Games were not contactable.[14] There was no substantive response from Sand Hill, who in turn was unable to reach the overseas directors and shareholders of the two companies.[15]

17 In September 2016, the plaintiff wrote to Sand Hill four times to explain that he wished to be replaced as a nominee director of Mango Games, given the lack of any action by Sand Hill or the ultimate clients to regularise the outstanding filings.[16] It appears that he had been informed that Spartan Trading was going to be struck off the register imminently. He could not resign by reason of s 145(1) of Act – Spartan Trading and Mango Games required at least

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13 Mr Nawal's 3rd Affidavit, para 16(a); BRN-3, Tab 5, pp 60-69.

14 Mr Nawal's 3rd Affidavit, para 16(e); BRN-3, Tab 5, p 60.

15 Mr Nawal's 3rd Affidavit, para 18.

16 Mr Nawal's 3rd Affidavit, para 16(f); BRN-3, Tab 5, pp 70-73.

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one locally resident director. With no replacement director having been nominated to take his place, the plaintiff was in a bind. As he wrote in an email to Sand Hill on 13 September 2016, it was "[b]est…to have [the] client's concrete action plan because I do not have options at this stage".[17]

18 Without further instructions from Sand Hill or their clients, Spartan Trading was struck off the register on 4 October 2016. Sand Hill continued to face difficulties in obtaining instructions from their clients in respect of Mango Games. In fact, Camford only received instructions in late January 2017 that Mango Games' board of directors was reviewing the plans for the company and would decide whether to revive the business or wind up the company.[18] Mr Natarajan informed ACRA of the same on 23 January 2017.[19] ACRA responded on 26 January 2017 to state that a director had to lodge an objection against the striking off. But, Camford could not get instructions from Sand Hill as to whether their clients wished to lodge the objection and the reasons to be given.

19 The plaintiff left Camford's employ shortly thereafter in February 2017. He was consequently not privy to further developments although his understanding was that Mr Natarajan continued to chase Sand Hill for instructions. Evidently, these instructions were not forthcoming and Mango Games was struck off the register in March 2017.

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17 Mr Nawal's 3rd Affidavit, BRN-3, Tab 5, p 70.

18 Mr Nawal's 3rd Affidavit, para 19; BRN-3, Tab 6, p 75.

19 Mr Nawal's 3rd Affidavit, BRN-3, Tab 7, pp 77-78.

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The defendant's restoration

20 I now come back to the defendant, which was struck off the register on 4 December 2017 by the Registrar under s 344 of the Act.

21 Section 344D of the Act provides that a former director or former member of a company that has been struck off the register under s 344 may apply to the Registrar for the name of the company to be restored to the register. This is an alternative to an application to court under s 344(5) of the Act for restoration.

22 On 7 and 8 August 2018, three applications for such "administrative restoration" were taken out jointly by the plaintiff and two of the former directors and members of the defendant, Mr Sriwastawa Sharad Kumar ("Mr Sriwastawa") and Mr Bhatia Vinod Kumar ("Mr Bhatia"). These applications were made pursuant to s 344D of the Act on the basis that, *inter alia*, the "company was at the time of striking off, carrying on business or was in operation",[20] which is a ground for restoration under Regulation 6 of the Companies (Striking Off) Regulations 2015. Mr Natarajan acted on behalf of Mr Sriwastawa and Mr Bhatia.

23 In support of these applications, certain documents were submitted to ACRA to demonstrate that the defendant had conducted financial transactions during the financial year of 2017.[21] This was notwithstanding the fact that annual returns had not been filed for three years. Evidence of financial activity

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20 Mr Nawal's 1st Affidavit, paras 16-17; BRN-1, Tab 2.

21 Mr Nawal's 1st Affidavit, para 23; BRN-1, Tab 5.

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demonstrated that the defendant remained a going concern, and had a live business.

24 On 13 September 2018, the plaintiff wrote to ACRA to enquire as to the status of the defendant's restoration. He was informed that ACRA required details as to who the defendant intended to appoint as its locally resident director in the event that it was restored.[22] In response, Mr Natarajan then wrote to ACRA to confirm that another local resident director, besides the plaintiff, would be appointed. Given that he would have no future involvement with the defendant, the plaintiff left the application for administrative restoration to Mr Natarajan and the latter's clients, and he did not pursue his own application.

25 On 8 October 2018, Mr Sriwastawa's and Mr Bhatia's applications were approved and the defendant was restored to the register under s 344E(2) of the Act.[23] Section 344E provides that, if the Registrar's decision is that the name of the company is to be restored to the register, the restoration takes effect from the date he gives notice to the applicant of his decision.

The plaintiff's application

26 On 10 October 2018, the plaintiff wrote to ACRA to enquire as to the status of his disqualification under s 155A of the Act. On 12 October 2018, ACRA informed the plaintiff that his disqualification would remain. It set out its explanation, premised on its interpretation of s 155A, in its email[24]:

> Please note that the successful restoration of a company's name to the register under section 344(5) or section 344E does not

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22 Mr Nawal's 1st Affidavit, paras 19-20.

23 Mr Nawal's 1st Affidavit; BRN-1, Tab 4.

24 Mr Nawal's 1st Affidavit; BRN-1, Tab 6.

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> have any effect on a person who is disqualified from acting as a director due to the striking off the company under section 155A(1), that is, such a disqualified person remains disqualified. This is because under section 155A(1)… restoration of a struck off company does not change the fact that the company has been struck off the register.

27 On 6 December 2018, the plaintiff filed the present originating summons seeking relief that he should be placed in the same position, as nearly may be, as a director as if the defendant had not been struck off, and also for a declaration that he is not disqualified under s 155A of the Act from acting as a director.[25] This was pursuant to s 344G(1) and (3) of the Act, which states:

> **Effect of restoration**
>
> **344G.**—(1) If the name of a company is restored to the register under section 344E(2) or 344F, or on appeal to the Court under section 344E(5), the company *is to be regarded as having continued in existence as if its name had not been struck off the register.*
>
> …
>
> (3) On the application by any person, the Court may give such directions and make such orders, *as it seems just for placing the company and all other persons in the same position (as nearly as may be) as if the company had not been dissolved or its name had not been struck off the register …*
>
> [emphasis added in italics]

28 Although the defendant had initially intended to appoint another local director following its restoration (see [24] above), the defendant's shareholders subsequently expressed their support for the plaintiff to continue as director.[26] On 13 December 2018, the plaintiff also received a letter from the current director and shareholder of the defendant, Ms Ramani Baggialakshmi,

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25 Originating Summons filed on 6 December 2018; Mr Nawal's 1st Affidavit para 28.

26 Mr Nawal's 1st Affidavit, BRN-1, Tab 7.

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confirming that the defendant had no objections to the plaintiff's present application in this originating summons.[27] The defendant did not appoint counsel to appear in the proceedings before me.

29 The plaintiff subsequently amended his application to add an alternative relief, that is, he also sought leave under s 155A(3) of the Act to continue acting as a director, or to be allowed to be a director, of several companies, including Oxon, in which he had been a director at the time he was informed of his disqualification. He had not acted as a director nor had he carried out the roles and responsibilities of a director in respect of these companies since he had been given notice of his disqualification.[28]

30 This had placed several limitations on the plaintiff. Most significantly, he could not act as a director of Oxon, his current law practice, and Oxon Global Pte Ltd, Oxon's subsidiary. This prevented him from pitching for legal projects, pursuing banking facilities for Oxon and from approving compliance related statutory filings with ACRA and the Inland Revenue Authority of Singapore on behalf of Oxon.[29] At the time of the hearing, there were also concerns over the plaintiff's ability to renew his practising certificate.[30]

31 A copy of the plaintiff's application was served on the intervener. It then applied for and was granted leave to intervene in this originating summons because it wished to object to the plaintiff's application. After the addition of the alternative relief sought under s 155A(3) as described at [29], counsel for

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27 Mr Nawal's 2nd Affidavit, para 4; Exhibit BRN-2, Tab 1.

28 Mr Nawal's 6th Affidavit, para 4.

29 Mr Nawal's 3rd Affidavit, para 29.

30 Minute sheet, 25 March 2019, p 1.

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the intervener informed the Assistant Registrar, who granted leave to amend, that they should also be regarded as also acting for the Minster for Finance as he should be a respondent to an application under s 155A(3) even though he was not added as a party. Parties were happy to proceed on that basis.

The plaintiff's case

32 The plaintiff's main argument was that the underlying premise for his disqualification under s 155A(1) had fallen away.[31] According to him, the logical interpretation of s 344G(3) meant that, following the defendant's restoration, the plaintiff ought to have been returned to the *status quo ante*.[32] The court declaring that the plaintiff was not disqualified would place him as close to the position as he would have been in had the defendant not been struck off.

33 The plaintiff argued that it was not relevant for the court to consider the statutory purpose(s) of s 155A in determining whether to exercise its discretion under s 344G(3).[33] The focus of s 344G(3) is whether it is *just* to grant the relief sought and, on the facts, the answer to this was in the affirmative. On the other hand, s 155A(3) considers the suitability of the plaintiff to act as director, and in this regard, entails an examination of the conduct of the plaintiff in the circumstances leading to his disqualification and his capacity for compliance in the future. It was contended that all these considerations were not relevant for an application under s 344G(3).

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31 Plaintiff's Written Submissions ("PWS"), para 27.

32 PWS, para 20.

33 PWS, paras 30-31.

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34 Alternatively, the plaintiff argued that he should be granted relief pursuant to s 155A(3) of the Act. As a non-executive, nominee director, there was nothing the plaintiff could have done to prevent the defendant's striking off and his eventual disqualification. It was argued that the plaintiff's conduct was not of the type that s 155A was intended to address. Hence, the court should exercise its powers under s 155A(3) to grant leave to the plaintiff to act as director of the companies in which he was director at the time he was notified of his disqualification.

The intervener's case

35 The intervener argued that s 344G(3) permitted the court to reverse *specific* effects that had been caused by the company having being struck off the register, and did not operate as a "blanket reversal" of all the consequences of striking off. Hence, the restoration of the defendant did not automatically remove the premise of the plaintiff's disqualification under s 155A(1).

36 However, the intervener was in agreement with the plaintiff that the court has the discretion to grant the plaintiff relief that he sought under s 344G(3), that is, to remove his disqualification under s 155A(1). Such discretion must be exercised in accordance with considerations of justice. The disagreement with the plaintiff lay with the interaction between s 344G(3) and s 155A(3). In essence, the intervener argued that the court should effectively apply the *same* test in deciding whether to grant relief under s 344G(3) as that for an application under s 155A(3).

37 Hence, consistent with s 155A(3), the intervener submitted that the discretion under s 344G(3) had to be exercised sparingly, *ie*, where the applicant

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was "entirely blameless" in respect of the striking-off.[34] The plaintiff's conduct did not meet these requirements. It was argued that allowing the plaintiff's application under s 344G(3) would aid him in escaping the rightful consequences of his breach of statutory obligations. The defendant's restoration did not reverse the deficiencies in the plaintiff's conduct.[35] Accordingly, it submitted that the plaintiff's disqualification should remain.

Issue to be determined

38 The central issue before me was whether it was appropriate for me to exercise my discretion under s 344G(3) of the Act in favour of the plaintiff to place him in the position as director, as if the defendant had never been struck off the register, such that the plaintiff should not be regarded as being disqualified under s 155A(1).

39 To decide this issue, there are two questions to consider. The first is the appropriate test to be applied when the court exercises its discretion under s 344G(3). The second is whether the facts and circumstances of this case justified the exercise of the court's discretion in the plaintiff's favour.

40 The remaining issue was whether, alternatively, the court should grant leave to the plaintiff under s 155A(3) so that he could act as a director of the companies set out in his application.

The applicable principles under s 344G(3)

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34 Attorney-General's Submissions ("AGS"), paras 11(c).

35 AGS, para 53.

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41 I first determined what principles would apply when the court exercises its discretion under s 344G(3).

42 Section 344G is a relatively new provision which was introduced, along with ss 344D to 344F, by way of the Companies (Amendment) Act 2014 (No 36 of 2014). These provisions came into force on 3 January 2016**.** Counsel did not cite any local case law which would provide guidance on s 344G's operation. Neither was the scope of s 344G's application specifically discussed during the second reading of the Companies (Amendment) Bill 2014 ("Amendment Bill") in Parliament.

43 The language of the section itself thus becomes paramount. For present purposes, the most relevant provisions are ss 344G(1) and (3). There are two points to be noted in relation to the language used. First, s 344G(1) imposes a statutory fiction whereby the *effect* of restoration is that the company is retrospectively treated as having never been struck off in the first place; "the company is *to be regarded as having continued in existence as if* its name had not be struck off the register" [emphasis added].

44 Secondly, on its plain reading, s 344G(3) gives the court a very broad discretion, confined only by whether it considers it just, to place the company and *all other persons* in as close a position as they would have been in had the company not been struck off. The breadth of the language used in that sub-section bears emphasis. The application there can be made by "*any* person", and the court "may *give such directions and such orders*, *as it seems just* for placing the company and all other persons *in the same position (as nearly as may be) as if the company … had not been struck off the register*" [emphasis added].

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45 The corresponding English statutory framework is similar. The wording of s 344G mirrors that of s 1032 of the Companies Act 2006 (c 46) (UK). The effect of these sections is the same. Where a company is restored under s 1032(1), it is treated as though it was never dissolved (*Gore-Browne on Companies* (Lexis Nexis, 45th Ed, 2019) at para [60(15A)]). More significantly, under s 1032(3), a court "may give such directions and make such provision *as seems just*" [emphasis added] to place all other persons in the same position they would have been in had the company not been dissolved or struck off.

46 The effect of ss 1032(1) and 1032(3) (corresponding to our s 344G(1) and 344G(3)) was discussed by the English Court of Appeal in *Joddrell* v *Peaktone Limited* [2013] 1 WLR 784 ("*Peaktone*"). Mr Joddrell commenced an action against his former employer, a company, for having suffered noise induced hearing loss which he alleged was attributable to his employment. At the time Mr Joddrell commenced his action, he did not realise that his former employer had been dissolved and struck-off the register. Having discovered the striking off, Mr Joddrell then successfully applied for the former employer to be restored. The former employer argued that the proceedings issued against it whilst it was dissolved were a nullity and could not be retrospectively validated by way of s 1032(1). Both the court at first instance and the Court of Appeal disagreed. The language of s 1032(1) clearly reflected an intention by Parliament to allow for the effect of retrospective validation (at [41]–[42]). It was *deemed* as if it had never been struck off the register in the first place. The "sweeping effect" of s 1032(1) was also supported by the language of s 1032(3) which provided a "powerful and illuminating indication of the policy which Parliament had in mind" (at [46]). Lord Justice Munby added:

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> [a]s Sir Raymond Evershed observed in *Tyman's Ld v Craven* (page 111) of the corresponding provision in section 353 of the 1948 Act, these words
>
> > 'seem to me designed, not by way of exposition, to qualify the generality of that which precedes them, *but rather as a complement to the general words so as to enable the court* (*consistently with justice*) *to achieve the fullest extent the "as-you-were position," which, according to the ordinary sense of those general words, is prima facie their consequence*.'
>
> [emphasis added]

47 This passage I have cited from *Peaktone* outlines two key points. The court's discretion under s 1032(3) is necessarily general. This is to achieve, as far as possible, the full effect of a company having been restored to the register. Further, in exercising its discretion, the court is guided by the objective of restoring all interested parties to their pre-dissolution or pre-striking-off positions, bounded by the constraint only that it must be in the interests of justice to do so. This limitation was also emphasised by the English Court of Appeal in *Davy v Pickering and others* [2017] All ER (D) 104 at [39], as per David Richards LJ:

> The judge was right, in my view, to emphasise that the discretion conferred by section 1032(3) is not unlimited but must be exercised only for its stated purpose ("for placing the company and all other persons in the same position (as nearly as can be) as if the company had not been dissolved or struck off the register") and, assuming a direction would meet that purpose, only if such direction "seems just".

48 I adopted the same approach in applying s 344G(3) of the Act. I found that the discretion conferred by the sub-section, while broad, is not unlimited. It should be exercised only for the stated purpose of placing, in this case, the plaintiff in the same position (as nearly as can be) as if the defendant had not been struck off the register. In this case, it is *possible* for a direction to be made that the plaintiff be treated as not being disqualified under s 155A(1) of the Act

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as a consequence of the restoration of the defendant to the register. Both the plaintiff and the intervener were *ad idem* on this. But, in my judgment, I should *not* grant such a direction under s 344G(3) *unless* I am satisfied that it "seems just" for me to do so. Other than this, I found that there are *no* other specified limits placed upon the court in the exercise of its discretion.

49 I therefore could not accept the submission by the intervener that the approach to be taken in considering the plaintiff's application under s 344G(3) in this case is the same as if it were an application under s 155A(3) of the Act. If the intervener is right, that would immediately shackle the exercise of my discretion such that I can only take into account factors such as the plaintiff's conduct in the circumstances giving rise to the disqualification, and his capacity for compliance in the future, which both the plaintiff and the intervener submitted are the relevant factors to be taken into account for an application under s 155A(3). Such an approach would unjustifiably narrow the otherwise broad language in s 344G(3). I did not think that a sufficiently good reason had been proffered by the intervener as to why I should adopt such a restrictive reading of that sub-section.

50 The intervener argued that a laxer test should not apply just because the plaintiff had chosen to make an application under s 344G(3) rather than under s 155A(3). Otherwise, it would provide a backdoor way in which the plaintiff could escape the consequences of his disqualification. It was contended that this could not have been Parliament's intention. I could not agree with this submission.

51 In the first place, there is nothing at the second reading of the Amendment Bill, which ushered in s 344G(3) and re-enacted s 155A(3), that suggests that this was the intent of Parliament. Quite the contrary, given that

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both provisions were introduced at the same time, and it was not thought fit to subject the application of s 344G(3) to s 155A(3), one would have surmised that Parliament must have intended for both provisions to operate within their own spheres. In other words, they apply to different situations.

52 In my judgment, s 155A(3) provides the general route by which an applicant may seek the court's leave to be permitted to act as a director even though he has been disqualified under s 155A(1). In exercising its discretion under s 155A(3), the court will take into account the applicant's culpability, so to speak, in the circumstances leading to his disqualification and his likelihood of compliance with the statutory requirements for filings going forward. In this regard, I accepted the submissions of both counsel that these are the predominant factors to consider for an application under s 155A(3).

53 On the other hand, s 344G(3) deals with the specific situation where the Registrar or the court has already determined, in accordance with the provisions of the Act, that a defunct company should be restored to the register. In this specific context, the court is empowered under s 344G(3) to place all persons in the "as-you-were" position as if the company had never been struck off, provided that it "seems just" to do so. That would cover the situation of a director who has been disqualified under s 155A(1), and now seeks to reverse that particular consequence that has been caused by the striking off. That such a scenario would arise must surely have been contemplated by Parliament, which decided, in its wisdom, to allow the two provisions to co-exist, without subjecting one to the other. Given this, I did not accept the intervener's submission that the approach under both provisions must be the same, such that when the court decides what seems just in exercising its discretion under s 344G(3), it should consider only the same factors that it would consider had it been an application under s 155A(3).

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54 I shall briefly address the intervener's argument that an application under s 344G(3) was the inappropriate means for the plaintiff to seek relief. It was the intervener's position that, since the plaintiff was seeking to set aside a disqualification under s 155A, the plaintiff should have relied on the specific procedure set out in that section, *ie*, s 155A(3). As I have already explained, ss 155A and 344G each operate within their respective spheres - the latter in the more specific situation where a company has been restored to the register by the court or the Registrar. As such, the plaintiff is not confined to only seeking leave to act under s 155A(3) given the particular circumstances of this case, where the defendant was restored to the register under s 344E. In any event, as pointed out by both counsel during the hearing, there was a recent unreported decision, *Re Phua Teck Chew* (Originating Summons Nos 1176 and 1181 of 2018), where an application by a disqualified director under s 344(5), which is *in pari materia* with s 344G(3), to be relieved from his disqualification under s 155A(1) was unopposed by ACRA and granted by the Court. This shows that the intervener itself accepts that the path to relief from disqualification imposed by s 155A(1) is not confined to s 155A(3) in cases where the defunct company is restored to the register.

Should the court's discretion be exercised?

55 Having ascertained the principles guiding s 344G(3)'s operation, I then considered the appropriateness of exercising the court's discretion in this case, that is, whether it would be just to grant the relief sought by the plaintiff.

56 Despite initially arguing that the factors such as plaintiff's conduct in relation to the striking off of the defendant being irrelevant to the exercise of the court's discretion under s 344G(3), counsel for the plaintiff did make arguments to the effect that the plaintiff's actions were not blameworthy and

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relief under s 344G(3) was justified. According to counsel, the plaintiff's predicament was the product of unfortunate circumstances. By reason of being a nominee director, he was not involved in the day-to-day management of the defendant and did not have the necessary information required to comply with the defendant's statutory filing requirements. He could not file the annual returns of the defendant because to do so, he would need to have access to the financial and accounting records of the company, which he did not have. Thus, he was not in a position to prepare the financial statements of the company and get them audited. Such audited financial statements had to be filed together with the annual return, as required by Regulation 36(2) of the Companies (Filing of Documents) Regulations (Cap 50, Rg 7, 2005 Rev Ed). The plaintiff did not intentionally avoid his obligations, but this was a case where the directors and members of the defendant had gone incommunicado, and neither he nor Mr Natarajan could not get in touch with them to make the necessary statutory filings.

57 More significantly, the defendant had since been restored to the register. ACRA had also acknowledged that the defendant was still carrying on business at the time it was struck off.[36] It therefore stands to reason that, had the fact of its carrying on business been brought to the attention of ACRA *before* the Registrar acted to strike it off, the defendant would not have been struck off the register. The plaintiff submitted that, in light of the defendant's restoration, the basis on which the plaintiff was disqualified under s 155A(1) no longer existed. In the absence of any prejudice, the plaintiff argued that it would be just to allow him to act as a director. This position was consistent with a logical interpretation of s 344G(3), to give effect to the "as-you-were position".

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[36] AGS, para 10.

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58 The intervener submitted that the plaintiff was far from blameless in respect of the defendant's striking-off. As a director, the plaintiff had been obliged, under s 197(6) of the Act, to ensure that the defendant complied with its obligation to file its annual return. He had failed to do so for an extended period of time, from the time of his appointment until the defendant was struck off. Proper supervision would have prevented this outcome. The plaintiff had similarly failed to fulfil his duties in respect of Spartan Trading and Mango Games.[37]

59 During the hearing, counsel for the intervener suggested a number of measures which the plaintiff could have taken to avoid his predicament in relation to the defendant. It was argued that the plaintiff could have set out the conditions for his appointment, whether by contract or by having them written into the company's articles, such that he, as the sole resident director could act on behalf of the defendant to, for example, seek a voluntary winding-up. The plaintiff could also have ensured that he had access to the defendant's financial records and accounts, so that he could prepare financial statements and hence file annual returns on behalf of the company. Or, he could have insisted on the defendant having more than one resident director so that he could resign from the company. Or, he could also have taken up a nominal shareholding in the defendant so that he would have *locus standi* to wind it up, if necessary.[38] For all the limitations faced by the plaintiff, the intervener argued that he had willingly placed himself in this invidious position.[39]

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37 AGS, para 128.

38 Minute sheet, 2 April 2019, pp 4-5.

39 AGS, para 132.

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My decision

60 Under s 344G(1), the expressly stated effect of a restoration is that the company is regarded as never having been struck off. This deeming provision sets out what Parliament intended to achieve. On the facts of this case, the Registrar was satisfied based on evidence of business activity presented to it that the defendant should be restored. I accepted counsel for the plaintiff's argument that that it must follow that the Registrar would *not* have struck off the defendant had the evidence of business activity been presented to it *prior* to the decision to strike off the defendant. This must be so because, under Regulation 2 of the Companies (Striking Off) Regulations 2015, the ground that must be satisfied before the Registrar can strike off the defendant is that it never carried on a business, or it had ceased to carry on a business. That being the case, it would *prima facie* be consistent with achieving the purpose contemplated by s 344G(1) if a direction is made that the directors were put in the position they were in prior to the striking off. But, as to whether it would be *just* for the court to make such a direction, the court can and will consider the particular circumstances of the case, and not limit itself to any particular set of factors. In this regard, I did not accept the plaintiff's submission that his conduct vis-à-vis the three struck off companies in the lead-up to his disqualification is not relevant.

61 I first considered the alleged deficiencies in the plaintiff's conduct in relation to Spartan Trading and Mango Games. While the plaintiff's application under s 344G(3) was in relation to the *defendant's* restoration, the striking-off of Spartan Trading and Mango Games were also relevant in that they provided a better understanding of the limitations faced by the plaintiff as a nominee director and to show whether the plaintiff was likely to be a recalcitrant in terms

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of compliance with statutory requirements if he was permitted to continue being appointed as a director in companies.

62 The plaintiff was not involved in the daily operations of Spartan Trading and Mango Games and his functions in the company were largely dependent on instructions from Camford's clients. When this was not forthcoming, both Camford and the plaintiff took steps to try to obtain the relevant financial information from Sand Hill and to get the directors to take action to remedy the regulatory lapses (see [16] to [18] above). In the absence of a substantive response, there was really little more the plaintiff could have done. As I already noted, he did not have sufficient information about the financial position of the companies to be able to file the annual returns.

63 The intervener noted that the plaintiff had not produced evidence that similar steps were taken in respect of the defendant.[40] The plaintiff's explanation for this, which I accepted, was that communications between Camford and the defendant's directors are subject to solicitor-client privilege, and that it was not within his means to produce such documents.[41] Nonetheless, I have the plaintiff's statements on affidavit that the defendant's directors and members had gone incommunicado and he himself was not able to get in touch with them. These were not disputed by the intervener.

64 I was not persuaded by the intervener's submissions on the preventative measures which could have been taken by the plaintiff when he took on the role as resident nominee director in 2010. They do not reflect the reality of corporate

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40 AGS, paras 144 and 153.

41 Minute sheet, 2 April 2019, p 8.

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legal practice. For example, I am sure that any client would baulk at the suggestion that a resident nominee director be given some shares so that he might, if the need arises, wind up the company on his own. The client might also find it surprising, to say the least, if its prospective resident nominee director insists, as a condition of his appointment, on *another* resident director being appointed. Also, to argue that a director might exercise his contractual (if any) or statutory right to apply to court for an order that the documents and accounts of the company are to be provided to him may be quite meaningless, if the other directors, who have such information, are uncontactable or outside of Singapore, as in the case here. Counsel for the intervener himself admitted, in the course of oral arguments, that this last suggestion was more a theoretical solution than a realistic one.

65 Having considered all the evidence, there was nothing to suggest to me that the plaintiff could have foreseen at the time he took on the appointment as resident nominee director that the defendant's other directors would become uncontactable. Effective communication may also have been impeded by the fact that the plaintiff was not the one in direct communication with the directors, since this was the task of Mr Natarajan as the client relationship partner. This problem was exacerbated after the plaintiff's resignation from Camford. He had to mostly depend on Mr Natarajan to follow up on his behalf. It was also not possible for the plaintiff to extricate himself from the situation by resigning or having the defendant voluntarily struck off.[42]

66 All in all, after examining the totality of the plaintiff's conduct, I was not convinced that his conduct was such that it should inhibit the exercise of the

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42 PWS, paras 85(b) and 85(c).

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court's discretion in his favour. I was not convinced that he will be a recalcitrant defaulter in terms of compliance with statutory filing requirements. The plaintiff took on the position as a director of the defendant in 2010, well before the new and draconian basis of disqualification under s 155A was even introduced via the Amendment Bill. Likewise, he had accepted the appointments for Mango Games and Spartan Trading in 2011 and 2012 respectively. There was no doubt in my mind that, after the coming into force of s 155A, many would be more cautious about taking on resident nominee director appointments in cases where they did not have a pre-existing relationship with the shareholders or know them well. In this case, given the plaintiff's appointment as director for all the three companies pre-dated the enactment of s 155A, I was of the view that the plaintiff's conduct in relation to the three companies had to be viewed a bit more understanding of the proper context, and less with the benefit of hindsight.

67 I also accepted that the plaintiff's continued disqualification for five years would impose significant hardship, particularly in respect of him being unable to act as a director of his own law practice, Oxon. On the other hand, there was no third party prejudice in granting the plaintiff relief. None of the companies for which he had sought leave to act had expressed objections to the plaintiff's application.

68 The intervener argued that the need for protection extended beyond these considerations. It cited *Ong Chow Hong (alias Ong Chaw Ping) v Public Prosecutor and another appeal* [2011] 3 SLR 1093 ("*Ong Chow Hong*") for the proposition that that the disqualification regime under the Act is "essentially protective in nature" (at [21]).

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69 The Court in *Ong Chow Hong* identified two sides to this shield of protection. On one side is specific protection, which is the need to protect the public from a specific director and the harm he may cause (at [22]). This is referred to as the "thin definition" of protection. There is also the more general need to "protect the public from all errant directors by an uncompromising reaffirmation of the expected exemplary standards of corporate governance" (at [23]). This is the "thick definition" of protection. Although *Ong Chow Hong* was decided prior to the present s 155A's enactment, the intervener submitted that the Court's reasoning also applied to a s 155A disqualification. The objective of a s 155A disqualification is to *generally* deter directors from adopting a complacent approach in complying with statutory requirements.[43] Even if there was little need to protect the public from the plaintiff's specific actions, his disqualification should stand so as to "deter similar irresponsible conduct" (*Ong Chow Hong* at [35]).

70 The Court in *Ong Chow Hong* considered that the "thick" form of protection was to deter "serious lapses in corporate behaviour" (at [24]), particularly involving listed companies (at [23]). For the reasons above, I did not consider the plaintiff's conduct as meeting this description. I found it doubtful that the plaintiff's disqualification would serve the purpose of general deterrence given that that his situation was rather unique, in that he found himself stuck in his position as a resident nominee director and unable to resign at the time the s 155A disqualification regime was introduced into law. Also, *Ong Chow Hong* concerned an appeal against a disqualification under s 154(2)(*b*) of the Act, because the director had been convicted of an offence under s 157 of the Act. This is quite different from the present circumstances.

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[43] AGS, para 87.

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I therefore rejected the applicability of the thick definition of protection in this case.

71 I also rejected the intervener's argument that the legislative purpose(s) of s 155A should solely dictate the exercise of the court's discretion under s 344G(3). The intervener submitted that, by setting aside an errant director's disqualification, the effect of a s 155A disqualification would be reduced from an effective deterrent to a mere procedural inconvenience.[44] It would also overlook the purposes of disqualification under s 155A which were threefold:[45]

> (a) to encourage directors to wind up or voluntarily strike off their inactive companies and deter them from leaving it to ACRA to strike them off;
>
> (b) to improve the rate of filing of annual returns; and
>
> (c) to discourage persons from taking up directorships without exercising any supervision over the affairs of their companies.

The intervener relied on the unreported decisions of *Re Tay Yew Beng Peter* (Originating Summons No 66 of 2018) and *Re Thomas Haeusler* (Originating Summons No 1028 of 2018) where the High Court broadly accepted these three purposes as the ones underlying the disqualification regime under s 155A(1). Those cases dealt with applications for relief under s 155(A)(3).

72 As I have already explained (at [52] to [53]) , I found that nothing in the language of s 344G fetters the court's discretion in the manner suggested by the intervener. The court's decision whether to permit an affected director to be relieved of his disqualification turns on the individual facts and justice of the

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44 AGS, para 61.

45 AGS, paras 12(a) and 43.

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case. Arguments which focused just on s 155A were not entirely helpful and detracted from the primary objective of achieving the "as-you-were" position that is envisaged by ss 344G(1) and (3). For this reason, I also found that the other unreported decisions cited by the intervener were of little assistance.

73 I was satisfied that, on an assessment of the facts, the plaintiff's application should be allowed. It seemed just to me that a direction be made that the plaintiff be put in the position as director of the defendant as if the company had never been struck off the register.

74 I also made the consequential declaration that the plaintiff is not disqualified under s 155A of the Act. This placed the plaintiff, as envisaged by the language of s 344G(3), in the position he was in prior to the defendant being struck off.

The alternative relief under s 155A(3)

75 Having exercised my discretion under s 344G(3) in the plaintiff's favour, there was no need for me to deal with the plaintiff's alternative prayer for relief under s 155A(3) and I did not do so.

Conclusion

76 For the reasons set out in this judgment, I found that it was just to exercise my discretion pursuant to s 344G(3) to grant the plaintiff relief to act as a director. Accordingly, I made an order in terms of prayers one and two of the originating summons and declared that the defendant is not disqualified under s 155A(1).

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Ang Cheng Hock
Judge

Gregory Vijayendran Ganesmoorthy SC and Leow Jiamin (Rajah & Tann Singapore LLP) for the plaintiff;
The defendant absent and unrepresented;
Lim Wei Wen, Gordon and Lee Yi Zan, David (Attorney-General's Chambers) for the intervener.

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