SUPREME COURT OF QUEENSLAND

CITATION:	*Kingston Futures Pty Ltd v Waterhouse* [2012] QSC 212
PARTIES:	**KINGSTON FUTURES PTY LTD** (plaintiff) **v** **ROBERT WILLIAM WATERHOUSE** (defendant)
FILE NO:	2611 of 2012
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	17 August 2012
DELIVERED AT:	Brisbane
HEARING DATE:	27 July 2012
JUDGE:	Applegarth J
ORDER:	**The application filed on 3 July 2012 is dismissed.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – JURISDICTION AND GENERALLY – Generally – Striking out proceedings as an abuse of process – where plaintiff company is incorporated in the British Virgin Islands ("BVI") – where plaintiff company was struck off the BVI Register of Companies – where proceedings commenced in the plaintiff's name while struck off the Register – where plaintiff later restored to the Register – where s 217(3) BVI *Business Companies Act, 2004* states that upon restoration to the Register of Companies a company is "deemed never to have been struck off the Register" – whether the proceedings are a nullity and should be struck out as an abuse of process *Adsteam Building Industries Pty Ltd v The Queensland Cement and Lime Co Ltd (No 4)* [1985] 1 Qd R 127, cited *Chaff and Hay Acquisition Committee v J A Hemphill & Sons Pty Ltd* (1947) 74 CLR 375, cited *Godfrey v Torpy & Ors* [2007] EWHC 919 (Ch), cited *Jekos Holdings Pty Ltd v Australian Horticultural Finance Pty Ltd (No 2)* [1995] 1 Qd R 612, cited *Lazard Brothers & Co v Midland Bank Ltd* [1933] AC 289, cited *Pollnow v Ash Street Properties Pty Ltd* (1996) 130 FLR 235, cited *McIntyre v Eastern Prosperity Investments Pte Ltd (No 6)* (2005) 218 ALR 401, cited

R v Heilbronn (1999) 150 FLR 43, cited
Stergiou & Anor v Citibank Savings Ltd [2005] ACTCA 15, considered
Video Excellence Pty Ltd v Cincotta (1998) 44 NSWLR 742, cited

COUNSEL: J C Ashcroft for the applicant/defendant
I A Erskine for the respondent/plaintiff

SOLICITORS: JBT Lawyers for the applicant/defendant
Carl Blumen for the respondent/plaintiff

[1] The respondent to this application ("Kingston") was incorporated in the British Virgin Islands ("BVI") on 12 July 1993. It was struck off the BVI Register of Companies on 1 May 2007 for non-payment of fees. Despite this, proceedings were instituted in this Court on 12 March 2012 in Kingston's name against the applicant/defendant ("Waterhouse"). Waterhouse contends that because Kingston had been struck off it could not commence these proceedings, and that they are a nullity.

[2] On 3 July 2012 Waterhouse filed an application seeking an order that the Court, in the exercise of its inherent jurisdiction, dismiss the proceedings, or alternatively, that the originating process be set aside and the proceedings be struck out as an abuse of process. The application also sought an order that certain orders made on 12 June 2012 be set aside, and sought orders for costs of the application and of the proceedings. The application was returnable on 11 July 2012.

[3] On that day Kingston successfully applied for an adjournment to permit it "the opportunity of verifying the status of the Register". Its director, Dr Mulherin, swore that if the Court dismissed the proceedings, without first permitting Kingston the opportunity of verifying the status of the Register, it would suffer irreparable damage in that the company would be statute-barred from commencing a new action. Margaret Wilson J adjourned the application to 27 July 2012, reserved costs and vacated a direction made by Douglas J on 12 June 2012, which had directed that the matter be transferred to the District Court at Brisbane. The proceedings relate to a sum of $160,000 that Kingston is alleged to have advanced to Waterhouse on 31 March 2006. They should have been commenced in the District Court. However, the proceedings have remained in this Court to enable Waterhouse's application to be determined.

[4] Kingston did more than use the period of the adjournment to simply verify the status of the Register, something Waterhouse's solicitor had done on 28 June 2012. An application was made in the BVI to restore the company to the Register. Kingston was restored to the Register on 13 July 2012.

[5] Kingston resists Waterhouse's application on the basis that its recent restoration means that it "is deemed never to have been struck off the Register". This is what s 217(3) of the BVI *Business Companies Act, 2004* states, and Kingston relies on evidence of an attorney-at-law who is admitted to the BVI Bar to prove this law.

[6] Waterhouse submits that the legal opinion is inadmissible, is of no consequence and does not cure the problem that arises from the uncontradicted fact that the proceedings were commenced at a time when Kingston had been struck off. The

restoration of Kingston to the Register and s 217 of the BVI *Business Companies Act* is said not to cure the problem that Kingston had "no standing to bring these proceedings at the date of filing the Claim". The consequence of being struck off was that it could not commence these proceedings on 20 March 2012. According to Waterhouse, the proceedings were and are a nullity from the outset and remain an abuse of process.

[7] Kingston's position is that the application should be treated as, in effect, one for summary judgment and that, having been restored to the Register, it is at least arguable that the proceedings are not a nullity.

[8] The application is not one for summary judgment by a defendant. It is an application to dismiss the proceedings in the exercise of the Court's inherent jurisdiction, or to set aside the originating process and to strike out the proceedings as an abuse of process. Still, orders of this kind which have the effect of dismissing the proceedings should not be made if issues of fact need to be tried or if the questions of law to be resolved require more extensive argument than was possible in the Applications List. However, the facts are not in dispute, and the issue of whether the proceedings are a nullity was fully argued. It is appropriate that I determine that issue.

Foreign law

[9] The existence of Kingston as a legal entity derives from its incorporation under the law of the BVI.[1] The law of the BVI is a matter of fact for expert evidence.[2] The text of relevant provisions of the BVI *Business Companies Act, 2004* was placed in evidence. It is not for me to construe that law and to arrive at a conclusion about its meaning or effect based upon an independent consideration of its text. I am not bound to accept a foreign expert's evidence about foreign law, but should be reluctant to reject it if it is uncontradicted.[3] I have regard to the text of the BVI *Business Companies Act* in order to understand the opinion upon which I am invited by Kingston to rely.

The evidence of Wilson G McDonald II

[10] Mr McDonald is a highly qualified lawyer. He holds degrees, including post-graduate degrees, from universities in London, the United States and Canada. He is an attorney-at-law based in the Cayman Islands with extensive commercial experience. He was admitted to the BVI Bar in April 2004. His admission to practice at that Bar, his academic qualifications and his experience qualify him to express an opinion about the law of the BVI.

[11] Kingston's solicitors sought and obtained an opinion from Mr McDonald in respect of the BVI *Business Companies Act*. For the purposes of giving his opinion he was given a copy of Kingston's Certificate of Incorporation and a copy of the Certification of Restoration to the Register issued by the BVI Registrar of Companies on 13 July 2012. It is unclear what other facts Mr McDonald was told about and relied upon in reaching his opinion. Waterhouse submits that there is no

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1 *Lazard Brothers & Co v Midland Bank Ltd* [1933] AC 289 at 302; *McIntyre v Eastern Prosperity Investments Pte Ltd (No 6)* (2005) 218 ALR 401 at [25].

2 *Adsteam Building Industries Pty Ltd v The Queensland Cement and Lime Co Ltd (No 4)* [1985] 1 Qd R 127 at 141; *Lazard* (supra) at 298.

3 *Adsteam* (supra) at 141.

indication that Mr McDonald had regard to the date of the striking off or the fact that Kingston had instituted proceedings while struck off, being a matter which is specifically addressed by s 215(1)(a) of the Act. The contents of his briefing or letter of instruction are not before the Court. I do not regard these matters as rendering his opinion inadmissible.[4] The company having been restored to the Register on 13 July 2012, it would have been apparent to Mr McDonald, or easily assumed by him if not expressly told, that it had commenced the subject proceedings whilst struck off. I disallow the objection to the admissibility of his opinion.

[12] Mr McDonald's opinion is as follows:

> "The Company is incorporated in the BVI and it is a company currently registered and validly existing under the laws of the BVI.
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> According to Section 215(3) of the Act, 'the fact that a company is struck off the Register does not prevent (a) the company from incurring liabilities; or (b) any creditor from making a claim against the company and pursuing the claim through to judgment or execution'. Note further that Section 217(6) of the Act states that 'where a company is restored to the Register under this section, the company is deemed never to have been struck off the Register.'
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> It is our understanding that the Company is involved in a legal matter in the Supreme Court of the State of Queensland, Australia. Based on the Documents and reviewing the Act, we are of the opinion that the Company has been properly restored to the BVI register and is in good standing. Furthermore, according to the Act, the law of the BVI is that, the fact that the Company may have been struck off is of no consequence and cannot in and of itself constitute a bar to any legal proceedings which the Company is a party to, or which may have commenced whilst struck off, since the Act makes clear that once restored to the BVI register, the Company is deemed never to have been dissolved or struck off the BVI register. This is the case notwithstanding the provisions of s 215(1)(a). Under BVI law the Company is free once restored to continue any proceeding commenced whilst struck off. The striking off in this case was for non-payment of fees which is a mere administrative matter. Often, it is the case that the Registrar will not inform a company that it has been struck off. Additionally, the Act provides that the Company whilst struck off (unless dissolved after a 10 year and 90 day period), still retains all assets, retains its status as a company, the directors and secretaries retain their positions, and there is under the Act no limitation which limits the Company's rights regained once reinstated to the Register."

[13] To better understand this opinion, I set out the text of relevant provisions of the BVI *Business Companies Act, 2004*:

> "215. (1) **Where a company has been struck off the Register, the company** and the directors, members and any liquidator or receiver thereof, **may not**

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4 cf *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at [85].

(a) commence legal proceedings, carry on any business or in any way deal with the assets of the company;

(b) defend any legal proceedings, make any claim or claim any right for, or in the name of, the company; or

(c) act in any way with respect to the affairs of the company.

(2) **Notwithstanding subsection (1), where a company has been struck off the Register, the company**, or a director, member, liquidator or receiver thereof, **may**

(a) make application for restoration of the company to the Registrar;

(b) continue to defend proceedings that were commenced against the company prior to the date of the striking-off; and

(c) **continue to carry on legal proceedings that were instituted on behalf of the company prior to the date of striking-off**.

(3) The fact that a company is struck off the Register does not prevent

(a) the company from incurring liabilities; or

(b) any creditor from making a claim against the company and pursuing the claim through to judgment or execution; and does not affect the liability of any of its members, directors, officers or agents.

(4) In this section and section 217, 'liquidator' means a voluntary liquidator and an Insolvency Act liquidator.

216. **Where a company that has been struck off the Register under section 213 remains struck off continuously for a period of ten years, it is dissolved with effect from the last day of that period**.

217. (1) Where a company has been struck off the Register, but not dissolved, the Registrar may, upon receipt of an application in the approved form and upon payment of the restoration fee and all outstanding fees and penalties, restore the company to the Register and issue a certificate of restoration to the Register.

...

(6) Where a company is restored to the Register under this section, the company is deemed never to have been struck off the Register." (emphasis added)

[14] The critical sentence in the opinion is:

> "Under BVI law the Company is free once restored to continue any proceeding commenced whilst struck off."

This sentence tends to confirm, especially when reference is made to s 215(1)(a) and s 215(2)(c), that the opinion was given on the assumption that Kingston commenced proceedings whilst struck off. This assumption was correct. The opinion certainly does not assume that Kingston was struck off after the proceedings were commenced.

[15] The critical sentence which I have quoted might be thought to be restricted to describing the freedom of a company, once restored, to continue proceedings in the jurisdiction about whose laws the writer is an expert, namely proceedings in the BVI. I do not interpret the opinion in this way. Instead, it ventures an opinion about the operation of BVI law in respect of the powers of a company which is restored to the Register to continue proceedings. The expert opinion that is in evidence cannot purport to say what the effect of being struck off the Register and being restored to the Register is under Australian law in respect of Australian proceedings. I do not interpret it as doing so. Instead, the opinion is a statement of the law of the BVI and proves facts that are relevant in deciding whether proceedings that were commenced while struck off are a nullity, and in deciding whether restoration to the Register permits the proceedings to continue.

Discussion

[16] The issue for my determination does not concern the existence of a company.[5] The issue for determination is the effect of striking off and restoration to the Register.

[17] Waterhouse's submissions liken the striking off of Kingston from the Register in the BVI to "deregistration of the company" and rely upon *Stergiou & Anor v Citibank Savings Ltd*[6] for the proposition that a company that has been deregistered prior to the institution of proceedings has no standing to bring them, and that such proceedings are a nullity. *Stergiou* was concerned with the deregistration of a company in 1996 and the purported commencement of legal proceedings in its name almost nine years after the company had been deregistered. The case was concerned with the operation of Australian legislation and an application to the Court of Appeal of the Australian Capital Territory to reinstate the company. It was not concerned with the legislation that applies in this case and which contains different provisions concerning the assets, status and directorship of the company during the time that it is struck off. *Stergiou* turned on its own facts, and was not concerned with the consequences of reinstatement (whether by the Australian Securities and Investment Commission or by a court order) whereby a company "is taken to have continued in existence as if it had not been deregistered."[7]

[18] Crispin P, sitting as a single judge of the Court of Appeal of the Australian Capital Territory, observed that all proceedings "for or against a deregistered company are a nullity",[8] and cited by way of example *International Bulk Shipping and Services Ltd*

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5 cf *Lazard Brothers* (supra) and *McIntyre* (supra).

6 [2005] ACTCA 15.

7 *Corporations Act* 2001 (Cth), s 601AH(5).

8 [2005] ACTCA 15 at [20].

v Minerals and Metals Trading Corporation of India.[9] That decision related to companies that were dissolved in 1985 and 1986 respectively, and later proceedings issued in their names in 1988 to enforce arbitral awards. Evans LJ, with whom Peter Gibson LJ and Sir Iain Glidewell agreed, stated the general rule "that an action commenced in the name of a non-existent person, or company, is a nullity".[10] The companies in question had been dissolved for failing to render accounts, and the statutory period for reviving them under the laws of The Bahamas had expired. Accordingly, the Court of Appeal was not concerned with the operation of a law which states that upon reinstatement to the Register the company is taken to have continued in existence as if it had not been deregistered. The court was concerned with the dissolution of a company, not deregistration under a statutory regime that makes specific provision about the status of a company that is struck off the Register, but not dissolved.

[19] The issue for determination in these proceedings relates to the application of the law of the BVI in respect of a company that was struck off the Register of the BVI, but not dissolved, and which was subsequently restored to the Register. *Stergiou* was concerned with the consequences of deregistration of a company under Australian law. The decision of Crispin P and the subsequent decision of the Court of Appeal constituted by Crispin P, Gray and Tamberlin JJ stand for the proposition that a company that was deregistered under applicable Australian legislation could not institute proceedings and that proceedings purportedly instituted by it were a nullity.[11]

[20] Waterhouse submits that if I accept the authority of *Stergiou*, then it follows that these proceedings and the order of Douglas J made on 12 June 2009 in these proceedings are a nullity. The issue, however, is not one involving the acceptance or rejection of the authority of *Stergiou*. *Stergiou* concerned different legislation and different facts. The defect in the present proceedings which is alleged to render the proceedings a nullity involves the operation of the BVI law. The defect that was pleaded in the defence filed by leave before Margaret Wilson J on 11 July 2012 was that Kingston had been struck off the Register in the BVI and that by virtue of s 215 of the BVI *Business Companies Act, 2004* Kingston, its directors, members and any liquidator or receiver could not commence legal proceedings. The defect raised by Waterhouse's defence was a limitation on the capacity of the company and others to commence legal proceedings.

[21] If BVI law is the source of the defect, then BVI law also may be the source of the cure. It is hard to see why in principle it would be appropriate to apply BVI law in identifying a defect in the proceedings, but not apply BVI law in determining whether the defect has been cured.

[22] In the context of deciding whether a Russian Bank had ceased to exist before proceedings were commenced in England, Lord Wright in *Lazard Brothers*[12] applied the principle that the recognition of corporations established by foreign law is by virtue of the fact of their creation and continuance under and by that law. Such recognition was said to be by the comity of nations:

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9 [1996] 1 All ER 1017.

10 Ibid at 1023.

11 [2005] ACTCA 15 AT [20], [27]-[31]; *Stergiou & Anor v Citibank Savings Ltd* [2005] ACTCA 19 at [1]; *Apostolou (as Trustee of the Vasiliou Family Trust) v Marchesi* [2009] FCA 66 at [13].

12 Supra at 297.

> "But as the creation depends on the act of the foreign state which created them, the annulment of the act of creation by the same power will involve the dissolution and non-existence of the corporation in the eyes of English law. The will of the sovereign authority which created it can also destroy it. English law will equally recognise the one, as the other, fact."[13]

The same principle has been applied in Australian courts to the recognition of bodies created by foreign law.[14] *Lazard Brothers* applies the principle that the law of the foreign state that creates the juristic person is equally capable of rendering it non-existent.

[23] In a local context it has been said:

> "The law that acted to extinguish the corporation, is, however, equally capable of resurrecting it."[15]

This was said by the Court of Appeal to be the effect of s 574 of the *Corporations Law* as it then stood which relevantly provided that once an order for reinstatement was made and lodged the company "shall be deemed to have continued in existence as if its registration had not been cancelled".

[24] Adopting a similar approach, the law of the BVI which acted to deprive Kingston of the power to commence proceedings is equally capable of restoring that power. Two facts are involved. The first is the striking off, the second is restoration to the Register. Australian law will equally recognise the one, as the other, fact.

[25] Resolution of the present issue is not greatly assisted by an excursion into Australian authorities which discuss Australian statutory provisions. Kingston cites authorities relating to provisions of the *Corporations Law* concerning reinstatement of a deregistered company. These include *Jekos Holdings Pty Ltd v Australian Horticultural Finance Pty Ltd (No 2)*[16] in which a company was dissolved. Thereafter interlocutory orders were obtained and an application was made to have the orders set aside on the ground of the company's dissolution. However, prior to the hearing and determination of that application the company was reinstated to the Register by the then Australian Securities Commission. The company relied upon s 574(2) of the *Corporations Law* as it then stood which provided that upon the reinstatement of its registration "the company shall be deemed to have continued in existence as if its registration had not been cancelled". Because the restoration to the Register occurred before the proceedings to set aside the orders had been heard and determined, the restoration was found to be effective to cure any defect in the interlocutory proceedings. Other authorities are to like effect.[17] The decision in *Tymans Ltd v Craven*[18] is frequently cited in this context. These authorities are cited by Kingston, along with the discussion of the topic of reinstatement in *McPherson's Law of Company Liquidation*, as showing that there are authorities under Australian law to similar effect to the BVI law addressed by Mr McDonald.

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13 Ibid.

14 *Chaff and Hay Acquisition Committee v J A Hemphill & Sons Pty Ltd* (1947) 74 CLR 375; *McIntyre* (supra) at [25]-[26].

15 *R v Heilbronn* (1999) 150 FLR 43 at 50-51 [20]-[23]; [1999] QCA 095 at [20]-[23].

16 [1995] 1 Qd R 612.

17 *Pollnow v Ash Street Properties Pty Ltd* (1996) 130 FLR 235; *Video Excellence Pty Ltd v Cincotta* (1998) 44 NSWLR 742.

18 [1952] 2 QB 100.

The essential point of reference, however, is not Australian law governing the deregistration and reinstatement of companies, which deal with situations that are similar to the present case. The point of reference is the law of the BVI, as proven by Mr McDonald's opinion.

[26] The current status of these proceedings is determined by reference to the fact of striking off and the fact of restoration of Kingston to the BVI Register, and the consequence of those facts by operation of BVI law. The simple position is that following upon its restoration to the Register Kingston is deemed never to have been struck off the Register. Accordingly, the proceedings are not a nullity.

[27] It is strictly unnecessary in the present circumstances to determine the status of the proceedings prior to Kingston's restoration. As noted, Waterhouse places reliance upon *Stergiou* as authority for the proposition that a deregistered company could not be a party to any proceedings and that any purported proceedings would be a nullity. The proposition contended for emerges from a consideration of Australian law about the consequences of deregistration, not the consequence of striking off the Register in the BVI. Still, to the extent that *Stergiou* supports the proposition that a company that is struck off the BVI Register could not be a party to any proceedings and that any such purported proceedings would be a nullity,[19] *Stergiou* does not establish the proposition that such proceedings would be "incurably a nullity". In *Stergiou* the plaintiff was deregistered prior to the institution of proceedings and had not been reinstated by the time the status of the proceedings came to be determined. The decision did not address the situation that arises in the present proceedings where the registration of the company is reinstated before the Court determines the application to declare the proceedings a nullity.

[28] In different contexts courts have considered whether defective proceedings could not be described as a nullity if the court had power to cure the defect.[20] In those and other contexts a distinction is made between proceedings that are "incurably a nullity"[21] and proceedings that are defective but capable of having the defect cured.

[29] If it be assumed for present purposes that the current proceedings were a nullity at the time they were commenced and prior to the restoration of Kingston to the Register on 13 July 2012, they ceased to be a nullity upon restoration because the BVI law provides that Kingston "is deemed never to have been struck off the Register".

[30] Waterhouse cited *Godfrey v Torpy & Ors*[22] in which Mr Leaver QC, sitting as a Deputy Judge of the High Court in the High Court of Justice Chancery Division, said of a corporation that had been struck off the companies register in the BVI for non-payment of license fees:

> "15. The Third Defendant, Strasbourg Capital limited ('Strasbourg'), was incorporated in the British Virgin Island on the 29th April 1996. It was struck off the British Virgin Island Companies

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19 The opinion of Mr McDonald does not express in terms the proposition that a company that is struck off the BVI Register could not commence proceedings by virtue of the provisions of s 215(1)(a), but such a proposition seems implicit from his reference to the provisions of s 215(1)(a).

20 *Stone v Ace-IRM Insurance Broking Pty Ltd* [2004] 1 Qd R 173 and see the discussion of whether certain proceedings would have been "an incurable nullity" in *Hewitt v Gardner* [2009] NSWSC 705 at [32]-[72].

21 *Ingall v Moran* [1944] 1 All ER 97.

22 [2007] EWHC 919 (Ch).

> Register on the 2nd November 1999 for non-payment of its licence fee. Its address in England was given as '*c/o BBHW, Holly Road, Twickenham*'. The Claim Form was sent to that address, but was returned with the marking that the address had not been Strasbourg's address since 1998. Mr Godfrey's solicitors were then referred to a Mr Christopher Lovell, an English solicitor practising in Jersey. No response was received from Mr Lovell to Mr Godfrey's solicitors' attempts to serve Strasbourg.
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> 16. As Strasbourg **had been struck off the British Virgin Islands Companies Register by the date upon which these proceedings were commenced, and no application had been made to restore it to the Register, it follows that Strasbourg has never been a party to the proceedings.**" (emphasis added)

Kingston submits that this was merely a passing reference, and that no authority was relied upon for the propositions appearing in paragraph 16.

[31] The quoted observations in *Godfrey v Torpy & Ors* support the proposition that, had Kingston remained struck off the Register, it could not have commenced these proceedings and that any such purported proceedings would be a nullity. However, this is not the position. Unlike *Godfrey v Torpy & Ors*, where no application had been made to restore the company to the Register, an application has been made to restore Kingston to the Register and it has been granted.

[32] The fact of restoration makes all the difference. The restoration to the Register having occurred before the application to dismiss the proceedings was heard and determined, the restoration is effective to cure the defect in the proceedings.

[33] In the result, I decline to exercise the inherent power of the Court to dismiss the proceedings or to set aside the originating process. There is no suggestion that the proceedings were instituted by the managing director of Kingston, the solicitor who purported to institute the proceedings on its behalf or anyone else knowing that it had been struck off the Register. I decline to strike out the proceedings on the grounds that their commencement amounted to an abuse of process.

[34] Kingston applies for an order that the orders dated 12 June 2012 made by Douglas J be wholly set aside. On 12 June 2012 Douglas J heard an application by Waterhouse who sought a declaration that the proceedings had not, for want of jurisdiction, been properly started and other orders including alternative relief that the proceedings be stayed on the basis that the District Court of New South Wales or the Supreme Court of New South Wales was the appropriate forum for the proceedings. This application failed and orders were made setting aside a conditional notice of intention to defend. Directions were made for Waterhouse to file a notice of intention to defend and defence, and for the matter to be transferred to the District Court at Brisbane. Waterhouse was ordered to pay Kingston's costs of the application.

[35] Had Kingston not been restored and these proceedings had been found to be and remain a nullity, then the orders made on 12 June 2012 were liable to be set aside.[23] Kingston having been restored to the Register and the effect of its restoration being that it is deemed never to have been struck off the Register, I do not consider that it is appropriate to set aside the orders made by Douglas J. To do so would be to fail to accord recognition to the operation of s 217(6) of the BVI law which should be recognised as a matter of comity governing the status of Kingston and the extent of its power to commence proceedings. A legal entity that by reason of BVI law is recognised as having never been struck off the Register (and thereby not lacking the power to commence these proceedings) should be treated as having not been struck off the Register at the time Douglas J made orders on 12 June 2012.

[36] Further, the relief sought in paragraph 2 of the application is discretionary. The application was heard and determined by Douglas J on its merits, albeit at a time when neither party apparently appreciated that Kingston had been struck off the Register. If its status in that regard had been ascertained sooner then there is no reason to doubt that the defect would have been promptly cured and Waterhouse's challenge to the jurisdiction of this Court run and lost on its merits with the same orders, including orders as to costs, as the orders made on 12 June 2012. In the circumstances, I decline to relieve Waterhouse of the orders made that day.

Costs

[37] It is appropriate to consider the question of costs in respect of two periods. The first is the period up to and including the date of restoration of Kingston, namely 13 June 2012. The second is the period since then. As to the first period, the costs included the application determined by Douglas J and I decline to disturb the order for costs made. Another aspect relates to the costs of the present application and the hearing before Margaret Wilson J. The application was properly brought and if Margaret Wilson J had not granted an adjournment at Kingston's request, Waterhouse was likely to succeed. I consider that Waterhouse has a prima facie entitlement to the costs of and incidental to the application that was filed on 3 July 2012, including the costs of the hearing before Margaret Wilson J on 11 July 2012 and the costs thrown away by the adjournment up to and including 13 July 2012 (or, more precisely, the date when Waterhouse's legal representatives were informed of Kingston's restoration).

[38] The position in relation to costs incurred after the restoration of Kingston falls into a different category. The application was pressed after Kingston's restoration and has been unsuccessful. The costs that arise as a result of the application being pursued after Waterhouse was informed of the restoration should follow the event. In other words, Waterhouse should pay Kingston's costs of and incidental to the application after that date, which would include the costs of the hearing before me on 27 July 2012.

[39] Having two different assessments of costs should be avoided if possible. Rather than make one order for costs in favour of Waterhouse for certain costs incurred up to and including the date Waterhouse was informed of the restoration, and another order for costs in Kingston's favour for the costs incurred by it after that date, I will hear the parties as to an appropriate order which will avoid such a double

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[23] See *Cameron v Cole* (1944) 68 CLR 571 at 590-592 to the effect that an order of a superior court is valid unless and until it is set aside.

assessment. It may be that the appropriate order for costs is that there be no order as to the costs of the application. I will hear the parties as to costs.

[40] The only order which I will make at this stage is an order dismissing the application that was filed on 3 July 2012.