Background

This case concerned the effect of administrative restoration under s.1028 of the Companies Act 2006 ***("2006 Act")***. The issue arose on an appeal pursuant to s. 69 of the Arbitration Act 1996 against an award following an arbitration between the Claimant ***("BB2")*** and the Defendant ***("BAE")***.

By an agreement dated 20 December 2012 ***("Agreement")***, BAE agreed to procure the sale of two properties to BB2 (which had been incorporated specifically for this purpose). Clause 20 of the Agreement provided that BAE could terminate the Agreement by written notice if BB2 suffered an Event of Default. Sub-clause 20.2(g) defined an Event of Default as including BB2 "*being struck off the Register of Companies or being dissolved or ceasing for any reason to retain its corporate existence*".

BB2 was dissolved and struck off the register pursuant to s.1000 of the Companies Act ***("2006 Act")*** on 31 May 2016. As a result, BAE reserved a notice of termination pursuant to Clause 20 of the Agreement on 2 June 2016. Subsequently, on 24 June 2016, an application was made to the registrar for the restoration of BB2 pursuant to s.1024 of the 2006 Act. That application succeeded and BB2 was restored to the register on 28 July 2016.

Two issues arose on appeal:

(1) What was the effect of BB2's restoration to the register on the termination of the Agreement?

(2) Whether an Event in Default under Clause 20.2(g) occurred on strike off, or a reasonable time thereafter.

Cockerill J approached the issues as if *de novo* because the appeal was brought with agreement of both parties and on issues that had not been the subject of much attention in the arbitration hearing.

(1) The effect of s.1028

The effect of restoration to the register is governed by s.1028 of the 2006 Act, which provides that: "*The general effect of administrative restoration to the register is that the company is deemed to have continued in existence as if it had not been dissolved or struck off the register*".

BB2 relied on a number of authorities, all of which emphasised the breadth of the deeming provision in s.1028. It argued that there was a clear line of authorities showing that the deeming provision has an unlimited ambit and reverses all consequences of strike off. Cockerill J rejected this argument.

In her view, it was "*clear that the deeming provision is of very wide effect*", but none of the authorities dealt directly with the issue of contractual termination clauses. In her detailed analysis of the authorities, Cockerill J noted the following:

- Most of the cases that BB2 relied upon involved s.1028 validating acts taken by dissolved companies prior to restoration, rather than undoing those actually taken by third parties (e.g. Tyman's Ltd v Craven [1952] 2 Q.B. 100).
- The courts in Orchidway Properties v Fairlight Commercial [2002] EWHC 1716 and Contract Facilities v Rees [2002] EWHC 2939 called for caution beyond this.
- The decisions dealing with the effect of s.1028 on terminated contracts were cases involving discharge by frustration (Orchidway Properties) and repudiatory breach (Contract Facilities).

Cockerill J concluded, primarily based on the authorities, that s.1028 draws a distinction between direct consequences and secondary/indirect consequences. Accordingly, the deeming provision will undo the automatic consequences of a removal from the register or dissolution (and will have a wide effect in doing so). But it will not affect indirect matters which are consequent on or independent of dissolution. For example, if strike off amounts to a repudiatory breach of a contract, it does not by itself terminate that contract. That itself only occurs where the innocent party elects to accept that breach (e.g. Contract Facilities).

Further, Cockerill J considered that her conclusion was consistent with: (i) the wording of s.1028 (particularly subsection (3) thereof); (ii) *Bennion on Statutory Interpretation*, which indicated that deeming provisions are to be interpreted restrictively. She also considered that it was supported by the factual consequences of BB2's proposed interpretation. In relation to the latter, Cockerill J noted that it would deprive clauses such as Clause 20 of having any effect, and a party exercising such a would risk being in repudiatory breach of contract if the company was later restored to the register.

However, Cockerill J rejected BAE's argument, in support of this interpretation, that the policy behind s.1028 was the protection of third parties for two reasons: (i) the purpose of s. 1028 "*was to provide an administrative route through restoration where it was highly unlikely that a third party would be impacted*"; and (ii) s.1028 is identical to (and was adopted from) provisions in previous legislation dealing with restoration by the courts.

Cockerill J went on to consider the alternative hypothesis of, if she were wrong on the effect of s.1028, whether the parties would have been able to 'contract out' of those effects:

- The parties would not be able to contract out of s.1028. It was common ground that s.1028 had a public policy element. A party cannot renounce a private remedy conferred by statute where any element of public policy existed: Johnson v Moreton [1980] AC 37.
- However, if it were possible to contract out of s.1028, clause 20 would have been effective in doing so. Although there is no express reference to that provision, the clause would not serve any sensible commercial purpose otherwise.

(2) Event of Default

The second question was whether the Event of Default took place on 31 May 2016 (when BB2 was struck off the register) or at a reasonable time thereafter. This was purely a matter of contractual interpretation.

BB2 argued that the only sensible interpretation was that an Event of Default only occurs after a reasonable period of time has elapsed without an application for restoration having been made. It argued that the parties cannot have intended that BAE would become entitled to terminate immediately on BB2 being struck off where, if BB2 were restored to the register within a reasonable time, it would cause no prejudice to BAE.

Cockerill J rejected this argument on the basis that the wording of Clause 20 "*could hardly be clearer*". She considered that the leading authorities on contractual interpretation (such as Arnold v Britton [2015] UKSC 36) made BB2's argument *"practically impossible*". In any event, she noted that the fact that certain other events of default in the Agreement do not entitle BAE to terminate unless specified in a remedied period militate against BB2's proposed interpretation. Further, she did not consider the result draconian in light of: (i) the steps the

registrar must go through before striking off a company under s.1000 of the 2006 Act; and (ii) the state of disarray a company must be in if it fails to comply with its statutory obligations.