

**THE HIGH COURT**

[2021] IEHC 720  
[2019 No. 288 COS.]

**IN THE MATTER OF ALLENTON PROPERTIES LIMITED**

**AND**

**IN THE MATTER OF THE COMPANIES ACT, 2014**

**PROMONTORIA (OYSTER) DESIGNATED ACTIVITY COMPANY**

**APPLICANT**

**JUDGMENT of Ms. Justice Butler delivered on the 16th day of November, 2021**

**Introduction:**

1. This is ostensibly a straightforward application under s. 738 of the Companies Act, 2014 to have Allenton Properties Ltd (the company) restored to the register of companies so that the applicant may proceed to appoint a receiver and enforce a security over property being a site at 22A South Main Street, Naas, County Kildare (the property). However, the circumstances in which the application is made are anything but straightforward as the company asserts that the property which is the subject of the charge was sold some years ago. Subsequent to this application being issued, it transpired that the sale in question had never been properly closed. Despite this, the purchaser has entered into possession and has built a dwelling house on the property.
2. Consequently, the court has to determine whether the company should be restored to the register to enable a receiver to be appointed over property which now comprises the home of a third party who is not before the court. It was originally suggested that restoration of the company to the register was also necessary to allow the applicant pursue a guarantee provided personally by the notice party in respect of the company's indebtedness. This issue fell away during the course of the hearing in part because it was accepted that the service of demand on the company is not a pre-condition to the guarantor's liability and in part because the notice party indicated that he would not raise any issue arising from non-service on the company. Consequently, the only stated object of the restoration which is the subject of this application is the appointment of a receiver over the property. In order to understand how the issue arises, it is necessary to look at the factual history in some detail.

**Factual Background**

3. The applicant in this case purchased what I will loosely describe as the "loan book" of Ulster Bank in December, 2016. The transfer from Ulster Bank to the applicant included various facility letters, loans, mortgages and guarantees. Although the notice party, being the sole director of the company who has engaged with this application, did not admit the applicant's interest in its loan or the related security, the exhibited documents clearly identify the company's loan, the mortgage over the property and the director's guarantee as being part of the transferred assets. Nonetheless, it is potentially relevant to this application that the applicant was not a party to the loan and had no interest in the security at the times material to the events described below. No direct evidence has been provided by the Ulster Bank so the applicant's case is based on its construction of certain documents and exchanges between the Ulster Bank and the company and/or its solicitor.

4. The company was incorporated on 14th April, 1999 and dissolved on 7th May, 2014 for failure to file annual returns. The notice party states that the only fixed asset of the company was the property and this is not disputed by the applicant. At the time of its dissolution, the company had three directors. One of these is now resident in the USA and whilst initially issues arose concerning the adequacy of service on him, by the time this application was heard, the court was satisfied that he had been properly served. The other two directors, who are still resident in Ireland, were formerly a married couple and the husband is the notice party in this application.
5. At some time in 2000, a loan facility was put in place by the Ulster Bank in respect of the company's indebtedness. On 23rd October, 2000, a mortgage was created in favour of the Ulster Bank giving the bank security by way of first legal charge over the company's property at 22A South Main Street, Naas. As the title to this property is unregistered, this mortgage was registered in the Registry of Deeds on 11th January, 2001.
6. A decade later, the company's debt was still outstanding and the notice party actively took steps to deal with it. On 16th January, 2012, the solicitor for the notice party (who was also the solicitor for the company and references in this judgment to the solicitor for either is a reference to the one person) wrote to the Ulster Bank confirming that he had instructions from the notice party and his wife's solicitor in respect of the encashment of a New Ireland investment policy and the use of part of the proceeds to reduce the company's liabilities. This letter concludes by noting that the Ulster Bank had agreed a twelve-month moratorium on capital and interest to allow the notice party *"to sell the property in that intervening period"*. On 18th January, 2012, the Ulster Bank agreed to the proposal which included both releasing the notice party's wife from her guarantee and from all liability in respect of the company and allowing payment to her of 50% of the proceeds of the policy. On 23rd April, 2012, €52,295 was remitted by the notice party's solicitor to the Ulster Bank from the proceeds of the policy.
7. Very shortly after this, the Ulster Bank sent a letter to the solicitor on 10th May, 2012 which stated, *"The bank has agreed to accept the offer of €27K for the site at Naas"*. The site is described in the following paragraph as being at New Row, Naas, but the notice party has sworn that this was simply an error and that both parties were aware that it referred to the property. I agree with the notice party that subsequent correspondence between the Ulster Bank and the company's solicitor suggests that the address of the property was simply misdescribed at this point. In any event, I note that there is no evidence from the Ulster Bank, being the other party to this chain of correspondence, to dispute the notice party's averment. The letter of 10th May, 2012 goes on to ask the company's solicitor to arrange with the notice party to confirm acceptance of the offer with the estate agent and asks for formal written authority to release the title deeds for the purpose of the sale.
8. Matters seem to have slowed down at this point as it was not until 4th July, 2013 that the Ulster Bank formally released the title deeds to the property to the company's solicitor. The letter accompanying the title deeds made it a precondition that the company's

solicitor provide certain undertakings. The most significant of these are at paras. 1 and 2 of the letter as follows:-

- "1. *hold the documentation to our order and return it to us on demand in the same condition in which it is now pending completion of the transaction;*
2. *assist in the redemption of our security and to ensure that all legal requirements relating thereto have been complied with and that the documentation is not released unless you are in a position to pay us the monies secured by this property as advised to you in any redemption statement for the relevant redemption date;"*

9. On 7th August, 2013, the company entered into a contract for the sale of the property to a third party whom I shall refer to as the purchaser. Although this contract is dated over a year after the letter of 10th May, 2012 in which the Ulster Bank confirmed acceptance of the proposed offer, the purchase price in the contract for sale is the same as that in the letter and I accept the evidence of the notice party and his solicitor that the same sale referred to is in both documents. The applicant raises a separate issue which I will deal with below as to whether in circumstances where the sale was not properly completed, that consent continues to exist.
10. At this point, the transaction entered the twilight zone. The contract of sale had stipulated a closing date four weeks from 7th August, 2013 which would have been 4th September, 2013. The evidence as to what actually occurred is hazy. It seems the purchaser paid the purchase price to her solicitor and, on the assumption that the sale had completed, entered into possession of the property. She proceeded to build a dwelling house on the site, presumably having obtained planning permission to do so. However, at a legal level, none of the expected formalities were attended to. The purchaser's solicitor did not forward the purchase money to the vendor's solicitor (i.e. the company's solicitor). This appears to have been entirely inadvertent. The company's solicitor did not notice this omission and closed his file without having received the purchase monies, without sending the title deeds to the purchaser's solicitor and without remitting the purchase monies to the Ulster Bank. The notice party suggests this error may have occurred because the solicitor mistakenly believed he had received the proceeds of sale and remitted them to the Ulster Bank partly because payment of the proceeds of the investment policy had been made to the bank around the same time. Although the solicitor in question has sworn two affidavits, he does not himself proffer this or, indeed, any explanation for his error. In any event, I notice that the investment policy monies had been remitted to the Ulster Bank in April, 2012, nearly sixteen months before the contract for the sale of the property was signed, which is hardly sufficiently proximate to have caused that particular confusion.
11. Finally, despite the Ulster Bank having provided the vendor's solicitor with the title deeds on foot of an express condition that the title deeds would not be released until the vendor's solicitor was in a position to pay the money secured by the charge (i.e. to pay the purchase funds to the Ulster Bank), it made no enquiry either as to the whereabouts of the expected payment or to seek the return of the title deeds. Instead, a formal

demand was made of the notice party on foot of his personal guarantee a year later on 12th September, 2014. That demand did not refer to the security over the property or the sale for which the Ulster Bank had provided the title deeds the previous year.

12. It is a feature of professional life that errors and oversights can and do occur. In a situation like this, it would be normal to expect that an error or oversight on the part of any one of the three sets of lawyers involved in the transaction would have been picked up by the others and that a straightforward reminder from one to the other would have set the transaction back on course. What is extraordinary about this case is the mutual oversight on the part of all three that seemingly left all of the parties believing that the transaction had concluded when, in fact, it had not. The vendor's solicitor never requested the purchaser's solicitor to forward the purchase monies and, likewise, the purchaser's solicitor never requested the title deeds from the vendor's solicitor. Ulster Bank and its legal advisors never noticed that, having provided the vendor's solicitor with the original title deeds, it had not received either the expected payment or the return of the title deeds. A simple request for either would have immediately alerted the vendor's solicitor to his error. Instead, the company's indebtedness to the Ulster Bank continued to accumulate without any reduction in capital or interest arising from the sale of the property as the sale proceeds had never been remitted to the Ulster Bank.
13. That indebtedness was, of course, acquired by the applicant in December, 2016 and the earlier errors and oversights came to light when the applicant issued its motion seeking to restore the company to the register for the purposes of appointing a receiver and enforcing its security on 23rd July, 2019. The extent to which the parties to the 2013 sale mistakenly believed that the property had in fact been sold is evident from the notice party's first affidavit sworn on 15th October, 2019 in which he states that the property:-

*"was sold by agreement with the bank in August 2013 and the net agreed proceeds remitted to the bank in settlement. Moreover the said purchaser of the site has built a house on the site in question and is the owner of same all having been sold at arm's length."*

The notice party went on to state that his solicitors were still awaiting a formal partial discharge of the charge.

14. It transpired that the first part of this statement was incorrect. Correspondence ensued between the solicitors for the applicant and for the notice party, respectively, from October, 2019 through to March, 2020. On 5th December, 2019, having received and checked his file, the solicitor for the notice party sent an email to the solicitor for the applicant confirming the correct position, namely that the sale of the site had not actually closed; that the original title deeds remained on his file and that the purchase price had not been paid to him. He also indicated that he had now received the funds from the purchaser's solicitor and was in a position to remit them. The outstanding issue of concern to him was whether the purchase funds should be remitted to the Ulster Bank or to the applicant.

15. In a reply dated 13th December, 2019, the solicitors for the applicant noted the contents of this email with surprise. The letter continued:-

*"From the outset please note that our client does not consent in any manner whatsoever to the purported sale of the property. As you are aware, the entire basis of the within proceedings are to seek an order directing the restoration of the company in order to allow our client to appoint a receiver over the property. Our client has no information to suggest that the property was subject to contract at the time our client acquired the interest in the loans and associated security. Our instructions are to proceed with our client's application for the restoration of the company."*

16. The respective position of the parties has changed very little since then save that at some point after receiving the purchase funds, the notice party's solicitor released the title deeds to the purchaser's solicitor. The applicant takes issue with this on the basis that it did not consent to the sale; the title deeds were held by the notice party's solicitor on accountable receipt and should not have been released until the purchase funds had been remitted. The notice party maintains, firstly, that the Ulster Bank had consented to the sale; secondly, that the contract for the sale of the property was valid and enforceable by the purchaser against the company and, thirdly, that regardless of the dissolution of the company, the notice party's solicitor is obliged to and will remit the purchase funds as soon as he receives clarification as to whether the payment should be made to the Ulster Bank or to the applicant.

#### **Applicable Law**

17. Section 738 of the Companies Act, 2014 provides that an application may be made to the court for the restoration of a company to the register. Section 738(1) provides as follows:-

*"738. (1)On an application in accordance with section 739 by a person specified in subsection (2), the court may order that a company that has been struck off the register be restored to the register if—*

- (a) the striking off of the company has disadvantaged the applicant,*
- (b) the application is made within the period of 20 years after the date of dissolution of the company; and*
- (c) it is just and equitable to do so."*

The persons entitled to make an application under subs. (1) include, at subs. (2)(b) a creditor of the company. Whilst the notice party did not admit the applicant's interest in the company's loans, I have indicated above that the evidence before the court is sufficient to establish that the applicant is in fact a creditor of the company and, thus, entitled to make this application.

18. Under s. 739, an application under s. 738 is to be made on notice to the registrar of companies, the Minister (being now the Minister for Public Expenditure and Reform) and the Revenue Commissioners. All of these entities have been put on notice of the application and all are consenting to it, albeit that the consent of the Revenue Commissioners is conditional on the court making orders under s. 742 of the 2014 Act. If making an order under s. 738, the court is required to make certain consequential orders under s. 740 unless the court is satisfied that there is reason not to make such orders. The consequential orders under s. 740(2) require, inter alia, that the Company file outstanding annual returns in the CRO and outstanding tax returns to the Revenue Commissioners. The orders sought by the Revenue Commissioners under s. 742 would require the directors, as officers of the company, to fulfil certain of these obligations as regards the filing of tax returns for periods between 2011 and 2018. The Revenue Commissioners have also reserved their position as regards a potential further application to make the directors personally liable for all revenue liabilities arising during the period of dissolution. This is not, however, central to this application.
19. The area of dispute between the parties is whether the applicant has established both that the striking of the company has disadvantaged it and that it would be just and equitable to make an order restoring the company to the register. These two issues are, in this case, interlinked as the extent to which the applicant is disadvantaged by the fact the company has been struck off depends in turn on the extent to which it would be just and equitable to restore the company to the register to allow the applicant to appoint a receiver over property now in the possession a third party in order to enforce the security for a debt owed by the company.

**Arguments of the Parties:**

20. The applicant, in my view correctly, states that certain facts are either agreed or cannot be disputed. Firstly, monies were lent by the Ulster Bank to the company which have not been fully repaid. Secondly, the Ulster Bank had a mortgage over the property and, as I have noted above, I have accepted that that mortgage, together with its underlying loan, were transferred to the applicant. Thirdly, as the applicant puts it, the mortgage remains registered on the property and the property is registered in the company's name. Subject to the proviso that this is not registered land and that the registration referred to is the registration of deeds in the Registry of Deeds, this is also correct. Consequently, the applicant defines the dispute as being essentially whether the property has been sold. The applicant argues that it has shown the existence of a bona fide claim against the company in this regard, being a claim which might succeed and which is not frivolous or vexatious.
21. This is the threshold identified by Keane C.J. in *In Re Deauville Communications Worldwide Ltd* [2002] 2 IR 32. That case considered the precursor provisions to s. 738 of the 2014 Act, namely s.311(8) of the Companies Act 1963 and s. 12B(3) of the Companies (Amendment) Act, 1982 as substituted in 1999, which provided that the court could restore a company to the register if satisfied that it was "just" to do so rather than "just and equitable" which is the phrase used in the 2014 Act. Counsel for the applicant argues that the addition of equitable is not a change of substance since in order for

something to be just, it must also be equitable and vice versa. In a subsequent case, *Re Nalto Construction Ltd* [2011] IEHC 251, Laffoy J. emphasised the extent to which a private petitioner, as distinct from a public authority, must satisfy the court that it is pursuing a claim against the company *bona fide*. By identifying potential differences between the way a court might address the threshold to be met depending on whether the applicant is a private entity and a public authority, Laffoy J. was perhaps re-iterating the extent to which each case will turn on its particular facts.

22. The applicant downplays the position and interests of the third party purchaser who was not put on notice of the application, notwithstanding that the stated objective of the applicant is the appointment of a receiver over the property on which she has built a dwelling house. The applicant argues that while the contract of sale may bind the vendor and the purchaser, it does not bind either the Ulster Bank or the applicant in the absence of the redemption of the mortgage. Consequently, the applicant argues that the court cannot make any determination in this application either as to the appropriateness of appointing a receiver or as to any potential rights a third party might have. In the applicant's submission, the company should be restored to the register to allow these matters to be fully ventilated.
23. Whilst the applicant does not take issue with the notice party's right to be heard on this application (and, indeed, could not do so in circumstances where the Revenue Commissioners are seeking consequential orders against the directors of the company) it does suggest that there is no need for the purchaser to be heard notwithstanding the potential consequences for her if the application is successful. In this regard, the applicant relies on the statement by Murphy J. in the Supreme Court in *Goode v. Philips Electrical (Ireland) Ltd* [2002] 2 IR 613 to the effect that restoration is primarily a matter between the petitioner and the regulatory authority (i.e. the CRO) which has the duty to ensure compliance with the Companies Acts and the Minister in whom the assets of the company would vest as the *bona vacantia*.
24. Counsel for the notice party points out that all of the authorities opened to the court dealt with the previous statutory regime. That regime, originally under s. 311(8) of the Companies Act, 1963 was amended in 1999 to reflect changes consequential on the expansion of the registrar's power to strike companies off for failure to make returns. The position between 2002 and 2014 when *Re Deauville Communications Worldwide Ltd*, *Re Nalto Construction Ltd* and *Goode v. Philips Electrical* were decided allowed an aggrieved creditor to make an application to restore a company on notice to the registrar, the Minister and the Revenue Commissioners and allowed the court to make an order if satisfied that it was just that the company be restored to the register. (In the context of this discussion, I will consider only a creditor seeking restoration as that is the position in which this applicant comes before the court). Counsel argues that the changes introduced by 2014 Act amount to more than a simple addition of a requirement that restoration be equitable as well as just, although he still characterises this as a substantive addition. The previous requirement that a creditor must "*feel aggrieved*" has been replaced by the stronger and more prescriptive requirement that the creditor be disadvantaged. As well as

being a more prescriptive requirement, it is one which is expressed in objective rather than subjective terms.

25. As a result of these changes, counsel argues that the test identified in the case law for succeeding in an application to restore a company to the register under the old legislation is not reflective of the threshold under the 2014 Act. He urges the court to enquire into the strength of the action proposed on foot of restoration should it take place. Without going so far as to contend that the applicant must show that it has a strong case likely to succeed at trial as would be required for a mandatory interlocutory injunction (per *Maha Lingam v. HSE* [2006] 17 ELR 137), he contends that the applicant must at least meet the fair question to be tried test that would apply to a prohibitory interlocutory injunction. However, and probably crucially in terms of his argument, meeting that threshold should not automatically result in an order of restoration being made. The introduction of a requirement that the making of an order be equitable imports a balance of justice type of analysis into the statutory criteria.
26. On the facts, counsel for the notice party argues that, although the 2013 transaction was irregular, there is no evidence of impropriety on anyone's part. The purchaser entered into a contract for the purchase of the site which was entirely above board and for value. The bank consented to the sale. Consequently, notwithstanding the fact that technically the transaction has not closed, there is a valid and enforceable contract for the sale of the property. Counsel argues that any proposed action on the part of the applicant has to be viewed in the context of these facts. He says there is no likelihood that a court would sanction any action by a receiver which could result in the purchaser being deprived of the property of which she is currently in de facto possession. Equally, he states that the property could not be recovered by the applicant without instituting proceedings against the purchaser and that any such proceedings would be doomed to fail. He notes that the applicant has not put the purchaser on notice of this application despite the fact that her interests are undoubtedly affected.
27. Counsel also argues that there is no evidence of disadvantage to the applicant by virtue of the transaction being allowed to proceed. The purchase monies are available to either the Ulster Bank or to the applicant once confirmation has been received as to who is entitled to them. The applicant has not placed any evidence before the court to suggest that the value of the property is materially greater now than it was in 2013 (although counsel for the applicant argues that it is). In addition, the appointment of a receiver would necessarily add to the costs of realising the property, leaving less funds available to discharge the company's liability to the disadvantage of both the applicant and the company.

### **Analysis**

28. The central issue in this case is the meaning of the phrase "*just and equitable*" in s. 738(1)(c) of the 2014 Act and whether that alters the threshold to be met by a creditor applicant in seeking to have a company restored to the register. The applicant argues that "*equitable*" adds nothing to "*just*", the two words being synonyms. The notice party argues that the inclusion of the word equitable in 2014, together with other changes



made to the provision, marks a significant shift from the pre-existing position. The starting point for the court is that where a legislative amendment alters a pre-existing statutory provision, it must be assumed that the Oireachtas intended that the newly worded provision would have a different meaning, even if only slightly different, to that which preceded it.

29. There is obviously a significant overlap between the meanings of the words "*just*" and "*equitable*" and, in certain contexts, a complete convergence. The common law often uses pairs of words with similar meanings (will and testament, devise and bequeath), one with an Anglo-Saxon origin and the other with a Norman French origin as early common lawyers were dealing with a population in which both old English and old French were spoken by different sectors of society. However, this is not the case with just and equitable, both of which words came into English from French, albeit at different times. Instead, from a legal perspective, the word equity came to refer to the discretionary jurisdiction exercised by the Lord Chancellor's courts in circumstances where the traditional rules of the common law were often too rigid or inflexible to ensure that a remedy would be available in all circumstances where a wrong had been done.
30. The historical distinction between courts of law and courts of equity ceased to be relevant in Ireland when the two systems were fused by the Judicature (Ireland) Act, 1877, although, of course, equity continued to exist as an integral part of the civil law. In particular, equity refers to the body of principles and remedies which have been developed by courts and judges as distinct from those created by statute. Thus, when a statutory provision requires that a court be satisfied that something is equitable, it suggests that the court must do more than merely carry out a box-checking exercise to ascertain whether certain criteria are met. The court must look at the situation before it holistically to ensure that any order to be made by it reflects a fair and proportionate outcome for all of those with an interest in the subject matter of the dispute. Thus, whilst it is possible to argue in strict dictionary terms that the introduction of an "*equitable*" requirement in the 2014 Act did not materially alter the threshold to be met by an applicant under s. 738, in legal terms I think the threshold has, in fact, been altered. The alteration may be subtle and of no practical effect in many cases, but it is significant in the context of this case.
31. I think that the applicant's reliance on the English authority of *In Re Blue Note Enterprises Ltd* [2001] 2 BCLC 427 has to be viewed in the context of this legislative amendment. On the basis of this authority the applicant argues that once it has satisfied the criteria in s. 738(1), then the onus falls on the notice party, as an objector to the application, to persuade the court that its discretion should be exercised against restoration. The court in *Re Blue Note* acknowledged a line of authority which established that once the statutory criteria had been satisfied, then exercising the discretion against restoration should be the exception and not the rule. Further, it was accepted by the court, again on the basis of authority, that it is a legitimate collateral purpose for seeking registration that the restored company be able to pursue some legal right or redress to which it would, but for its striking off, be entitled. By analogy, it can be argued that it is equally legitimate to

seek to restore a company to the register so that the party seeking restoration can pursue a legal right or remedy against the company. The judgment then identified a series of factors which were relevant to the circumstances of that case including a balancing exercise between the potential prejudice to the company if it is not restored to the register and the potential prejudice to the entity it wished to sue, if it were.

32. The UK statutory provisions under consideration in *Re Blue Note* mirrored the legislative position in Ireland prior to 2014. The applicable threshold included a requirement that it be "*just*" that restoration be ordered rather than "*just and equitable*". Whilst the judgment is undoubtedly of interest, I do not regard it as determinative of the issues in this case. Firstly, the statutory criterion of "*just and equitable*" is, for the reasons outlined above, materially different to a criterion of "*just*" alone. In practical terms it means that at least part, if not all, of the balancing exercise carried out in *Re Blue Note* in the exercise of the court's discretion subsequent to the statutory criteria being satisfied, must now be addressed as part of the threshold requirements set by statute. This has a consequent impact on who bears the burden of establishing the equity of the situation.
33. Further, I think there is a material difference between the position of an entity which a company might wish to sue if restored to the register (and which, absent restoration, would fortuitously escape potential liability in such suit) and the position of the purchaser here. There is no dispute between the company and the purchaser. Both of their solicitors acknowledge oversights which resulted in the contract between them not being fully completed. Both of the parties to the 2013 sale and/or their respective solicitors are now anxious to formally complete the contract so that the legal position reflects the *de facto* position as it has pertained for some eight years. The applicant on the other hand seeks restoration of the company so that it can take steps which will result in the purchaser's title to the property being put in jeopardy. Thus, apart altogether from its timing, the balancing exercise carried out by the court in *Re Blue Note* is necessarily very different to that which must be carried out here.
34. I accept that the applicant has established a stateable case which is neither frivolous nor vexatious as regards the security which it ostensibly holds over the property having purchased the company's loan from the Ulster Bank in 2016. I do not accept that there is any real issue as to the fact that Ulster Bank had consented to the sale of the property to the purchaser in 2013. Although the applicant disputes whether the exhibited correspondence demonstrates a consent, it is difficult if not impossible to read a chain of correspondence in which a financial institution asks the vendor's solicitor to confirm acceptance of a specific offer with an estate agent and then provides the vendor's solicitor with the title deeds to the property to effect the agreed sale as anything other than a consent. Moreover, the applicant, who bears the onus of proof, has not adduced any evidence from the Ulster Bank to suggest that the only inference which can be readily drawn from this correspondence was not in fact the true position.
35. Separately, the applicant argues that even if the Ulster Bank had consented to the sale in 2013, that consent could not be of indefinite duration and, thus, was no longer in place or

perhaps had been withdrawn by the applicant by the time the parties sought to close the sale in 2013. This is a more complex issue which obviously cannot be determined in the context of this application. However, in my view, it is an issue which cannot be separated from that raised by the notice party to the effect that a valid and enforceable contract for sale exists of which the purchaser could seek specific performance which would, in all of the circumstances, almost inevitably be ordered against the vendor. Leaving aside the question of whether the company would be required to be restored to the register to complete the sale in circumstances where the vendor's solicitor maintains that he is both willing to and in a position to complete the sale on the basis of his original instructions, I do not accept the applicant's contention that the partly-executed contract of sale to which the Ulster Bank had consented is somehow a matter of no concern to it.

36. I also have considerable difficulty accepting the applicant's characterisation of the purchaser's position. The applicant says the purchaser will not be affected by the restoration of the company to the register as the restoration will not confer any additional rights on the applicant. Equally, the applicant says that the purchaser will not lose anything because, at present, she does not have paper title to the property and any action for specific performance would require the company to be restored to the Register for the purposes of instituting proceedings. However, that is to completely ignore the *de facto* position in which the third party is a *bona fide* purchaser for value who provided the purchase funds to her solicitor and entered into possession of the property in the entirely reasonable, *albeit* incorrect, assumption that having discharged her liability under the contract, the sale had duly closed. It also ignores the fact that the purchaser purchased a site which she has since developed, presumably at a significant additional cost to herself. It is very difficult for the court to understand how it could ever be equitable to make an order, the ultimate purpose of which is for the applicant to appoint a receiver, over what is *de facto* the third party's property without notice to the third party.
37. The applicant bears the onus under s.738 of satisfying the court that it would be just and equitable to make an order restoring the company to the register. I acknowledge the line of authority referred to in *Re Blue Note* to the effect that once the statutory criteria have been satisfied, the court should normally make an order restoring the company to the register and that onus then shifts to the objector to show why the court should exercise its discretion not to make an order. However, the introduction of a requirement to show that it is "equitable" that such an order be made, in my view, has a material effect on the point at which that onus shifts to an objector. The threshold to be met by the applicant is now more onerous than was previously the case and there is a positive obligation on an applicant to satisfy the court that the order it seeks is fair and proportionate to all whose rights and interests may be affected by the restoration. In many cases this will not make a practical difference but in some cases, such as this one, it is crucial. In this case the purchaser is the person who stands to be most directly affected by the consequences of restoration and affected in a profoundly prejudicial way. By failing to involve the purchaser in the process the applicant has left an evidential gap as a result of which the court cannot be and is not satisfied that it would be just and equitable to make the order requested. Whilst I am satisfied that the applicant has not met the "just and equitable"

threshold, it strikes me that even if the threshold had remained unchanged so that all the applicant had to establish was that it was “just” that the company be restored, the applicant could well still have had difficulty in meeting that threshold or, at very least, at the subsequent stage (per *Re Blue Note*) when the court would come to conduct a balancing exercise for the purposes of exercising its discretion.

38. This is not to say that the applicant’s position is entirely without merit. The applicant purchased a loan and its related security over the property apparently without any “*information to suggest that the property was subject to contract at the time*” (per the applicant’s solicitor’s letter of 13th December, 2019 to the notice party’s solicitor). However, it does not follow from the fact that the applicant was unaware of the contract, that the contract did not exist or is not enforceable. As previously noted, there was an extraordinary absence of attention paid to this transaction not only by the vendor’s solicitor and the purchaser’s solicitor but also by the Ulster Bank which had consented to the sale and provided the title deeds to the vendor’s solicitor to facilitate it. The situation which currently arises is at least partly due to the bank’s failure to notice that it had neither the purchase monies remitted to it nor the title deeds returned before selling the loan to the applicant without advising the applicant of the existence of the contract.
39. In circumstances where the applicant’s real grievance is with the company whose debt it has purchased or with the Ulster Bank from whom the debt was purchased, the court is not persuaded that it would be equitable to make an order the purpose of which would be to facilitate the applicant in taking steps which would be extremely prejudicial to the purchaser. I tend to agree with the notice party’s assessment that no court would be likely to support the applicant in any steps taken by it to enforce the security over the property to the detriment of the purchaser. Nonetheless, restoring the company to the register for the purposes of facilitating litigation in respect of the property would likely embroil the purchaser in that litigation at considerable cost to her, both financial and emotional. I do not have to go quite so far as to agree with the notice party’s suggestion that any such litigation would not be pursued *bona fide* by the applicant in order to definitively conclude that a restoration of the company to the register for the purposes of allowing steps to be taken by the applicant in relation to the property would not be equitable, particularly as the purchaser has not been put on notice of this application or of the fact that her rights and interests are potentially threatened by it.
40. In light of these conclusions, I will refuse the application. In the circumstances, it is unnecessary to decide all of the other arguments and issues which have been raised. However, for completeness, I will briefly address a few of them. Firstly, I would not have refused this application on the basis of the practical problems which the directors might face in filing returns for the years during which the company was struck off. Section 738(1)(b) envisages that applications of this nature may be made at any time within 20 years from the date a company is dissolved. This application was made in July, 2019, some five years after the company had been struck off and, thus, comfortably within the earlier part of that timeframe. Even though one director is now resident in the USA, no evidence has been adduced by the notice party of any special circumstances that would

render an obligation to make returns unduly onerous and the interval is not such that the difficulties created by the efflux of time alone could be regarded as insurmountable.

41. Secondly, the applicant argues that although the purchase monies are now in the possession of the notice party's solicitor, the applicant has no entitlement to sue the solicitor to recover the funds. Whilst this is technically correct, the solicitor, who is an officer of the court, has sworn an affidavit stating not only that he is in possession of the funds but that he is willing and able to remit the funds to the appropriate party, once it has been confirmed who the correct party is. Indeed, he has undertaken to remit the monies to the appropriate party. The court has no reason to suppose that undertaking will not be honoured. It is a matter between the Ulster Bank and the applicant to sort out which of them is the appropriate party to whom the monies should be paid but it does not seem to me that the lack of a cause of action vested in the applicant against the solicitor is a material concern.