THE HIGH COURT

[2022] IEHC 709

[Record No. 2021/83COS]

IN THE MATTER OF DERBAR DEVELOPMENTS (WESTPORT) LIMITED

AND

IN THE MATTER OF SECTION 738 OF THE COMPANIES ACT 2014

AND

IN THE MATTER OF AN APPLICATION BY EVERYDAY FINANCE DESIGNATED ACTIVITY COMPANY TO RESTORE DERBAR DEVELOPMENTS (WESTPORT) LIMITED TO THE REGISTER OF COMPANIES

JUDGMENT of Mr Justice Mark Sanfey delivered on the 19th day of December 2022

Introduction

1. This judgment concerns an application to restore Derbar Developments (Westport) Limited ('the company') to the Register of Companies pursuant to s.738 of the Companies Act 2014 (as amended) ('the Act'). The applicant also seeks a number of orders pursuant to s.740 of the Act requiring the directors of the company to attend to certain matters relevant to the proposed restoration.

2. The application is opposed by Derek Lavelle, one of the directors of the company. The company was struck off the Register on 21st January 2015; Mr Lavelle's primary contention is that the applicant Everyday Finance DAC

('Everyday') must establish that it was "a *bona fide* and established creditor before this date" [affidavit of Derek Lavelle sworn 30th June 2021, para. 4], and is not in a position to do so.

3. The applicant was represented by Anthony Thuillier BL, and Mr Lavelle was represented by Brian Walker BL. Both counsel proffered lengthy written submissions – and indeed supplemental submissions – and made helpful and detailed submissions at the hearing of the application.

Background

4. The relevant background and basis for the application is set out in the affidavit grounding the application sworn by Paul Murphy on 19 March 2021. Mr Murphy is an asset manager employed by Link ASI Limited ('the servicer') which provides loan administration and asset management services to Everyday in respect of the company's loans.

5. Mr Murphy avers that the application is brought on behalf of Everyday, which he contends is a creditor of the company by virtue of a deed of transfer dated 2 August 2018 and an amendment and restatement deed dated 22 October 2018 between Allied Irish Banks plc ('the bank') and Everyday by which it is contended that Everyday acquired the right, title and interest of the bank in the facility letters, mortgages and guarantees on which the alleged debt of the company to Everyday is based.

6. Mr Murphy avers that the company was incorporated on 2nd April 2004 as a single member private company limited by shares. The registered office of the company prior to its dissolution was located at Slogger, Carrtowick, Westport, County Mayo, and the objects for which the company was established included, *inter alia*, "to carry on the business or businesses of buying, owning, developing and selling

commercial and private property, and/or to lease and maintain same" as set out in the memorandum and articles of association of the company.

7. It appears that the company last filed an annual return on 2 October 2012 in respect of the period ending on that date. The company was involuntarily struck off the Register of Companies pursuant to the provisions of the Act on 21 January 2015. Mr Murphy avers that, at the date of its dissolution, Barry Dobbin and Mr Lavelle were the directors of the company. Mr Dobbin was served with the present application but did not respond to it.

8. The company was provided with loan facilities by the bank pursuant to the terms of a facility letter of 21 January 2008 and a further facility letter of 19 June 2008. The company granted certain security over its assets to the bank, which security included mortgage debentures of 16 September 2004, 14 September 2005 and 18 May 2006, each securing various lands in County Mayo in favour of the bank. In addition to the mortgages, two guarantees were provided in accordance with the facility letters to the bank in respect of the company's liabilities: a guarantee of 4 March 2008 from Derbar Developments Limited and Westport Coursing Club Limited up to the sum of €1,338,000; and a further guarantee of 24 June 2008 from Mr Lavelle to the bank up to the sum of €1,338,000.

9. Mr Murphy avers that the company is in breach of the terms of the facility letters in that it has failed to make repayments in respect of the loan facilities, and that a sum of €1,565,559.05 is due and owing by the company to the applicant as of 6 January 2021.

10. Everyday now wishes to enforce the mortgages against the company with a view to realising the assets secured by the mortgages, and in particular, intends to appoint a receiver to the assets. In order to ensure that a receiver can be validly

appointed pursuant to the mortgages, Everyday wishes to ensure that a notice of demand is validly served on the company in respect of its liabilities under the facility letters. Mr Murphy avers that the applicant may also wish to enforce the guarantees against the relevant guarantors, which would also require a notice of demand to be served on the company. Everyday considers that, in order for a demand to be validly served on the company in accordance with the terms of the facility letters and mortgages, it is necessary for the company to be restored to the Register of Companies.

11. Everyday considers that it is a "creditor" of the company within the meaning of s.738 of the 2014 Act, and Mr Murphy avers that the applicant is not aware of the State having intermeddled with any of the company's assets since it was struck off and dissolved, nor is Everyday aware of any claim against the assets being made by or on behalf of any other party. Mr Murphy also avers that Everyday "knows of no person or persons who would be prejudiced by the restoration of the company [to the Register]…" [para. 21].

12. I should say that the facility letters, a redacted copy of the deed of transfer and amendment and restatement deed, the last annual return, the mortgages and the guarantees are all exhibited to Mr Murphy's affidavit.

Mr Lavelle's affidavit

13. Mr Lavelle swore an affidavit in response to the application on 30 June 2021. He nails his colours firmly to the mast at para. 3 of the affidavit, in which he avers that he does not accept that Everyday "…is entitled or has *locus standi* to make this application in their alleged capacity as a creditor of the company in circumstances that they have put no evidence before this honourable Court to prove that they were a creditor of the company when it was struck off the Register on 21 January 2015". He

goes on to aver at para. 4 that he is advised "…that an applicant seeking relief pursuant to section 738 of the Companies Act 2014 on the basis that an applicant has been disadvantaged by the striking off of the company on 21 January 2015 must in fact be…a *bona fide* and established creditor before this date. Everyday Finance Designated Activity Company was not such a creditor under any circumstances". Mr Lavelle avers that he has called on the applicant to produce "the relevant security documentation establishing their alleged legal interest in the property mentioned here", and that his solicitors were awaiting a response. He noted as regards the guarantee of 1 March 2008 that Derbar Developments Limited "is in liquidation and has been dissolved from the Register and any application to restore Derbar Developments Limited to the Register will be statute barred after 30 September 2021…" [para. 6]. He also notes that Westport Coursing Club Limited "was struck off the Register on 25 February 2015".

14. Mr Lavelle avers that Derbar Developments Limited "…was the main company in the group which held Derbar Developments Westport Limited and Westport Coursing Club Limited. A liquidator was appointed to Derbar Developments Limited on 15 December 2009. After this date the liquidator took over responsibility for the assets of Derbar Developments Limited which included Derbar Developments Westport Limited and Westport Coursing Club Limited, therefore the company directors could no longer file annual returns. This led to both Derbar Developments Westport Limited and Westport Coursing Club Limited being struck off for not filing annual returns" [para. 9].

15. At para. 12 of his affidavit, Mr Lavelle avers that he disputes that Mr Murphy "has the necessary means of knowledge to make this application…". He goes on to aver at para. 13 that neither Mr Murphy, Link ASI Limited or Everyday wrote to him

or communicated with him seeking his consent or cooperation with regard to the application notwithstanding what he characterises as "numerous and frequent requests to communicate with Everyday Finance DAC for the purposes of clarifying and resolving any issues arising between us in a pragmatic and efficient manner…" [para. 13].

16. At para. 14 of his affidavit, Mr Lavelle takes issue with what he regards as the non-compliance of the applicant or their solicitors with s.14 of the Mediation Act 2017 "…which requires practising solicitors to advise the applicant to consider mediation as an alternative to court proceedings and to provide them with information on mediation services, including details of mediators, information about the advantages and benefits of mediation and information on confidentiality obligations and the enforceability of mediation settlements in circumstances that I already sought to engage with the applicant to no avail".

Other affidavits

17. The Revenue Commissioners, a notice party to the application, proffered an affidavit of Joseph Hughes, an official of the office of the Revenue solicitor, sworn on 2 June 2021. Mr Hughes averred that the Revenue Commissioners had written to the directors of the company, Mr Dobbyn and Mr Lavelle, on 11 May 2021, requesting that all outstanding tax returns be submitted prior to the hearing of the motion.

18. Mr Hughes went on to aver that the Revenue Commissioners were consenting to the application to restore the company "…conditional upon this Honourable Court granting an order requiring the director(s) to file all outstanding tax returns in relation to the company, as set out in the letter dated 11 May 2021".

19. Mr Hughes also averred that the Revenue Commissioners "…seek to reserve their right to make any further application that may be appropriate, including but not

limited to, an application under s.742 of the Companies Act, 2014, rendering the director(s) personally liable for all Revenue liabilities arising during the period of dissolution" [para. 4].

20. The applicant also proffered an affidavit of Edward Kane, a solicitor in the firm acting for Everyday, the purpose of which was to exhibit documents relevant to the application. Mr Kane referred to the notice of motion, grounding affidavit and the exhibits to that affidavit collectively as "the documents", and averred that he had sent copies of the documents to the Registrar of Companies, the Minister for Public Expenditure and Reform, the Revenue Solicitor, the National Companies Unit, the Chief State Solicitor's Office, the company and the directors of the company. In respect of the Registrar of Companies, the Minister for Public Expenditure and Reform and the Revenue Solicitor, replies were received which indicated that those parties had no objection to the application to restore the company to the Register.

21. In relation to the letter from the Companies Registration Office of 11 May 2021 exhibited to Mr Kane's affidavit, it is notable that Mr Michael Neville, a Higher Executive Officer replying on behalf of the Registrar of Companies, having stated unequivocally that the Registrar of Companies "has no objection to the application proceeding" commented as follows: -

> "Finally, in order to be a 'creditor' for the purposes of the Court restoration, the law states that the applicant must have been a creditor at the time the company was struck-off the Register".

22. Considerable emphasis was placed by the respondent Mr Lavelle in the course of the application on this comment by Mr Neville. An affidavit was sworn on Mr Lavelle's behalf by John W Carroll on 8 July 2021. Mr Carroll is a solicitor in the firm representing Mr Lavelle. He avers that, having received Mr Kane's affidavit, he

considered it "…necessary for me as the solicitor for Derek Lavelle to clarify matters with both the Registrar of Companies and the Chief State Solicitor's Office…". He avers that the letter of 11 May 2021 from the Registrar of Companies "…clearly set out the position of the Registrar with regard to the requirement that an applicant to a creditor company restoration application be required to be a creditor of the company at the time the company was struck off the register…", but notes that the solicitors for the Registrar of Companies and the Minister for Public Expenditure and Reform "were silent specifically on this issue".

23. Mr Carroll averred that the position "has now been clarified by the Registrar of Companies and by the Office of the Chief State Solicitor's Office" and exhibits two letters of 5 July 2021 sent to them by him and their email response received on Tuesday 6 July 2021.

24. In that regard, Ms Joan Murphy in her email on behalf of the Chief State Solicitor's Office noted that that office's previous letter of 18 May 2021 noted the position of the Registrar of Companies "…and refers to their letter dated 11 May 2021 which sets out in details [sic] their requirements. The consent letter was then sent t[o] Matheson who issued the motion in this matter…nothing further occurs and I note that Michael Neville from the Companies Office has advised you that this is now a matter for the Court to determine".

25. Mr Neville also replied to Mr Lavelle's solicitors on 6 July 2021. He replied *inter alia* as follows: -

> "The Registrar's position is as outlined in my letter of 11 May 2021 addressed to Matheson Solicitors.
>
> In the final paragraph of that letter I have pointed out that: 'Finally, in order to be a 'creditor' for the purposes of the court restoration, the law states that the

applicant must have been a creditor at the time the company was struck-off the register'.

It is a matter for the Court to rule on the application on that basis."

The statutory provisions under which relief is sought

26. The applicant seeks relief pursuant to ss. 738 and 740 of the Companies Act 2014 (as amended). Before considering the submissions of the parties, it is appropriate to set out the terms of those sections: -

"**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.

(2) The court may make the order on the application of—

(a) the company;

(b) a creditor of the company;

(c) a person who was a member or an officer of the company at its date of dissolution; or

(d) a person who, at the date of its dissolution, had an entitlement (disregarding any right of the directors to decline to register the person as such) to be registered as a member of the company by virtue of—

(i) the execution, in the person's favour, of an instrument of transfer of a share;

(ii) the transmission, by operation of law, to the person of a right to a share.

(3) Subject to a supplementary order made under section 742 (c), the company shall be deemed to have continued in existence as if it had not been struck off the register upon the Registrar receiving a certified copy of the order under subsection (1) within 28 days after the date of its perfection.

… **740**. (1) In making an order under section 738 on the application of a member or an officer of the company, the court shall, unless reason to the contrary is shown to the satisfaction of the court, make it a term of the order that the order shall not have effect unless, within a specified period, there is done each of the things (save where it has already been done) that are set out in subsection (2).

(2) Those things are—

(a) all outstanding annual returns in relation to the company are delivered, in accordance with Part 6 , to the Registrar;

(b) all outstanding statements as required by section 882 of the Taxes Consolidation Act 1997 in relation to the company are delivered to the Revenue Commissioners;

(c) the company appoints a director and delivers to the Registrar the notification and consent required by section 149 (8) and (10), respectively, and either that

(i) the person so appointed is resident in an EEA

(ii) unless a certificate under section 140 in relation to the company has been granted by the Registrar and is in force, the

company provides the Registrar with a bond in accordance with section 137.

(3) For the avoidance of doubt, subsection (1) requires, unless reason to the contrary there mentioned is shown, the order of the court to specify that a thing set out in subsection (2) is to be done (save where it has already been done) notwithstanding that the ground on which the company had been struck off the register did not relate to that thing.

(4) In making an order under section 738 on the application of a creditor of the company, the court shall direct that, within a specified period (save where the particular thing has already been done)—

(a) there is procured by one or more specified members or officers of the company the delivery by the company of all outstanding annual returns, in accordance with Part 6 , to the Registrar;

(b) there is delivered by such specified members or officers all outstanding statements as required by section 882 of the Taxes Consolidation Act 1997 in relation to the company to the Revenue Commissioners;

(c) such specified members or officers take all reasonable steps to ensure that the company appoints a director and delivers to the Registrar the notification and consent required by section 149 (8) and (10), respectively, and either that—

(i) the person so appointed is resident in an EEA state; or

(ii) unless a certificate under section 140 in relation to the company has been granted by the Registrar and is in force, the

company provides the Registrar with a bond in accordance with section 137.

(5) For the avoidance of doubt, subsection (4) requires the order of the court to specify that a thing set out in that subsection is to be done (save where it has already been done) notwithstanding that the ground on which the company had been struck off the register did not relate to that thing;

(6) In making an order under section 738 on the application of a creditor of the company, the court may award the applicant the costs of the application against the company."

Submissions of the respondent

27. It was agreed that the respondent Mr Lavelle should proffer written submissions setting out his objections to the reliefs sought, and that Everyday should reply in turn. Accordingly, both parties made comprehensive and helpful submissions on the legal issues involved.

28. The respondent's legal submissions are mainly concerned with the contention that the applicant does not have *locus standi* to bring the application pursuant to s.738 of the Act in circumstances where there is no evidence before the court that Everyday was a creditor of the company on or before the date on which it was struck off the Register of Creditors on 21st January 2015. The submissions place much emphasis on the statement by Mr Neville on behalf of the Registrar of Companies, quoted at para. 21 above, and also notes Mr Neville's further comment in his email of 6 July 2021 in response to Mr Lavelle's email of 5 July 2021, which response is quoted above at para. 25.

29. The respondent submits that, when the company was struck off the Register on 21 January 2015, it "ceased to have any legal existence whatsoever and its assets

automatically vested in the State pursuant to Section 28(2) of the State Property Act 1954…". It is asserted that Everyday could not become a creditor of the company after the date of dissolution as no transactions could be conducted by the company in circumstances where it had no legal existence. It was submitted that, pursuant to s.734(3)(b) of the Act, it is only for the purpose of making an application for restoration under ss. 737 or 738 that "a company shall be deemed not to have been dissolved under s.733".

30. In these circumstances, the respondent claims that Everyday "…knew or ought to have known that Derbar Developments Westport Limited was struck off the Register on 21 January 2015 by their solicitors or otherwise…carrying out a Company's Office search with the Registrar of Companies to ascertain the exact legal status of the company and accordingly they cannot now claim they have been disadvantaged".

31. The respondent refers extensively in his submissions to the decision of the Supreme Court in *Re Deauville Communications Worldwide Limited and the Companies Acts 1963-1999* [2002] 2 IR 32. In that case, the applicant sought the restoration of Deauville Communications Worldwide Limited ('Deauville') to the Register pursuant to s.12B(3) of the Companies (Amendment) Act 1982 as a creditor on the basis that it would be just for the court to make that order. It did so in circumstances where it was the plaintiff in proceedings pending against Deauville before the Supreme Court of Bermuda; as Deauville had been struck off the Register of Companies, the applicant brought an application for its restoration to the Register in order to prosecute those proceedings. In the High Court, the respondents resisted the application on a number of grounds, among which was the contention that the applicant was not a creditor of Deauville. The High Court ordered the restoration of

Deauville to the Register, and the respondents, who were the last known directors of Deauville, appealed to the Supreme Court.

32. In giving the judgment of the Supreme Court, Keane CJ expressed the view that, unless there were authority to the contrary, he would be inclined to the view that the word "creditor" in s.12B(3) "should be read as extending to contingent or prospective creditors". He referred to the decision of Megarry J in *Re Harvest Lane Motor Bodies Limited* [1969] 1 CH457, in which the court "declined to accept the more restrictive construction of the word 'creditor' in the corresponding English legislation contended for by the respondents in this case". The court noted that the wording of the English provision considered in the *Harvest Lane* case was identical to the wording of s.12B(3) of the 1982 Act. That section permitted the court to make a restoration order by a "member, officer or creditor of a company" who is "aggrieved by the fact of the companies having been struck off the Register", in circumstances where the court was "satisfied that it is just that the company be restored to the Register…".

33. The submissions make reference to a number of cases involving a range of circumstances, in which the court held that the applicant for restoration was not a creditor of the company. Particular reference was made to the decision in *Re New Timbiqui Gold Mines Limited* [1961] 1 Ch. 47 in that case, the petitioners applied pursuant to s.353(6) of the Companies Act 1948 to restore the company to the Register of Companies. At the date on which the company had been struck off the Register, the petitioners were neither members nor creditors of the company. The first petitioner subsequently acquired a number of bearer shares in the company, and debts due from the company were assigned to both petitioners.

34. Buckley J commented that it seemed to him to be

> "…clear that nobody could become a creditor of a company after the company had ceased to exist; one cannot become a creditor of a non-existent debtor. But that is not the position of the creditors here, as I understand it, because they claim to be creditors as assignees of debts which accrued before the company was struck off. The position in this respect seems to be that the original creditor, although he might be a person who was a creditor within the meaning of this section would still not in law be a creditor of the company when the company had become dissolved, and it is debatable whether he could assign the debt to anybody else."

35. Buckley J went on to state as follows: -

> "Although I think the point is a difficult one, I reach the conclusion that, in order to qualify to be a petitioner under this subsection, the petitioner must show that, at the date when the company was dissolved, he was a member or a creditor; and that anyone who, whether in ignorance of the dissolution of the company or otherwise, purports to become a member or creditor of the company afterwards is not a member or a creditor within the subsection".

36. Buckley J went on to refer to the argument put forward by the respondents in that case to the effect that one could not say that one was "aggrieved" – as required by the section under which the petitioner applied – by the company having been struck off the Register if the petitioner had subsequently acquired his shares or his debt with the knowledge that the company had been struck off the Register. Buckley J commented: -

> "It seems to me it would be impossible for such a person to say that he was aggrieved. He would, in fact, be an officious interloper who, with knowledge of the fact that the company had been struck off, chooses to buy his shares or

> acquire the debt in the hope that he can get something out of it. Such a person, in my judgment, could not genuinely be said to be aggrieved by the company having been struck off the Register".

37. The written submissions also make complaint in relation to what the respondent considers to be a failure on the part of Mr Murphy, Link ASI Limited or Everyday itself to communicate and engage with him. Mr Lavelle also complains of an alleged failure on the part of the applicant or their solicitors to comply with s.14 of the Mediation Act 2017 which requires practising solicitors to advise their clients – in this case, Everyday – of the possibility of considering mediation as an alternative to court proceedings.

Submissions of the applicant

38. In its submissions, Everyday characterises its application as "a very straightforward application". The point is made that all relevant parties required to be put on notice of the application either consent to it or have indicated that they have no objection to the application.

39. The applicant's position is that it is a creditor of the company as a result of the assignment to it of the debt owing by the company to the bank referred to at para.5 above. It is submitted that "…there is no requirement for the applicant to have been a creditor at the time of, or immediately before, Derbar's dissolution, in order for it to have the *locus standi* to make this restoration application; the only requirement in the legislation is that the applicant be a creditor of the company.

40. In this regard, the applicant makes the point that s.738(2)(b) provides that the court "may make the order on the application of…a creditor of the company"…whereas s.738(2)(c) allows the court to make an order on the application of "…a person who is a member or an officer of the company at its date of

dissolution…". The applicant submits that there is no qualification in s.738(2)(b) which requires the "creditor of the company" to be a creditor at the date of dissolution.

41. The applicant refers in its submissions to *Deauville*, stating that "…Keane CJ was satisfied that the broad interpretation of 'creditor' should be applied, and in the circumstances of that case he noted that the events which were claimed to give rise to the cause of action were alleged to have happened before the day on which *Deauville* was struck off".

42. The applicant emphasised that the present case involves an assignment, in which an assignor's right or interest is not extinguished, and "…after the assignment, the assignee can exercise, claim and enforce the right or interest to the extent that it has been transferred to him" [Guest on the Law of Assignment, YK Liew, 3rd Edition Sweet & Maxwell, 2018 at para. 1-01]. The applicant submits that, given that a party can become a creditor of another party by way of assignment to it of a debt, it is appropriate to apply the Supreme Court's broad approach in *Deauville* to the term "creditor" in this situation.

43. As regards the respondent's submissions in relation to the *Timbiqui* case, the applicant contends that this authority does not support the respondent's position, drawing attention to the fact that the court's reasoning is based on the language of the English statute, which requires that an application for restoration be "aggrieved" by the strike off. It is submitted that the court's position in *Timbiqui* "…does not…sit comfortably with the clearly articulated position of the Irish Supreme Court in *Deauville*, to the effect that a broad interpretation of "creditor" is preferable in restoration applications" [para. 26].

44. The applicant also contends that, if the approach of the court in *Timbiqui* were to be adopted in relation to s.738, it "…would encourage a court to read into the language of 'disadvantaged the applicant' a temporal element, which in effect would add to the legislation the words 'disadvantaged the applicant at the time of the strike off' [the underlined words are not actually present in statute]". While the applicant accepts that it is "possible to argue for this position", it is submitted that such an interpretation "…represents a strained, distorted reading of the plain language of the legislation…". It is also submitted that it goes against the third criterion which must be present for the making of an application under s.738, *i.e.* that contained in s.738(1)(c), that it is "just and equitable" to make the order.

Supplemental submissions

45. Shortly before the hearing of the application, supplementary legal submissions were delivered on behalf of Mr Lavelle. The purpose of those submissions was expressed to be to bring to the attention of the court the decision of Butler J which had just been delivered at that time: *Re Allenton Properties Limited* [2021] IEHC 720. The judgment was expressed in the submissions to be important in the context of the present application "…in that the court was asked to deal with the new threshold introduced on 1 June 2015 on the commencement into law of the section 738 of the Companies Act 2014 introduction a new requirement that '**it would be just and equitable**' to make an order restoring the company to the Register as opposed to the previous [s.12B(3)] of the Companies Amendment Act 1982, that provided "if satisfied that it is **just** that the company be restored to the Register". [Emphasis in original]

46. It was submitted by Mr Lavelle that the High Court had held in *Allenton* that the applicant "now bears the onus under Section 738 of satisfying the court that it

would be just and equitable to make an order restoring the company back to the Register, and that the court had held that the threshold was 'now more onerous than was previously the case'…there is a positive obligation on an applicant to satisfy the court that the order it seeks is fair and proportionate…" in relation to rights and interests which may be affected by the restoration.

47. The supplemental submissions took the opportunity to set out a range of matters which it was submitted should incline the court to refuse the reliefs sought. It was argued that the company was prejudiced by delay on the part of the petitioner, which Mr Lavelle characterised as "inordinate and inexcusable". While Mr Murphy's standing to swear the grounding affidavit was again challenged, the submissions stated as follows:

> "9. It is acknowledged that Allied Irish Bank plc [was] a creditor of the company when it was struck off on 21 January 2015 and more than 3 ½ years elapsed before AIB purported to assign the debt to the Applicant, Everyday Finance Designated Activity Company".

48. The applicant responded to Mr Lavelle's supplemental submissions with supplemental submissions of its own. The applicant acknowledged that *Allenton* "…is an important new authority in the context of restoration applications because it gives guidance as to what factors come into play when the court is weighing the "just and equitable" element of the jurisdiction…", but went on to contend that "…it is not an authority which deals in any way with the fundamental point advanced by Mr Lavelle in this matter, *i.e.* whether or not a party lacks standing to apply for restoration where it was not a creditor of the company *at the time of the strike off*" [paras. 2 to 3 of supplemental submissions; emphasis in original]. It was submitted that "…it was the

presence of [a] highly unusual set of facts that caused the Court to refuse the restoration application in *Allenton*…" [para. 10].

Analysis

49. For Everyday to succeed in its application, it must satisfy the criteria in s.738 relevant to its situation. It must establish that it is "a creditor of the company" [s.738(2)(b)]; the striking off of the company must have "disadvantaged" the applicant; and it must satisfy the court that it is "just and equitable" to restore the company to the Register.

50. In relation to the first of these requirements, *i.e.* that of *locus standi*, it would seem from the wording of the section itself that Everyday must simply satisfy the court that it is "a creditor of the company". The qualifying phrase "at the date of [the company's] dissolution", which is used at s.738(2)(c) and (d) in relation to certain persons who may be entitled to apply for restoration, is not used in s.738(2)(b) in relation to "a creditor of the company".

51. The respondent refers to the decisions of the Supreme Court in *Re Bloomberg Developments Limited and Companies Acts* [2002] 2 IR 613. That case involved an appeal by an applicant for restoration of the company to the Register against an award of costs to a notice party who had sought to oppose the application. The respondent draws attention to the following comments of Murphy J at p.616 of the judgment:

> "On principle, it is difficult to see what legal right the notice party had to intervene in the proceedings for the restoration of the company to the Register of Companies. Restoration is primarily a matter between the petitioner, on the one part, and the regulatory authority - who has the duty to ensure compliance with the relevant provisions of the Companies Acts - and the Minister for

Finance - in whom would vest the assets of the company as *bona vacantia* - of the other part."

52. Following on from these dicta, the respondent relies heavily on the view expressed on behalf of the Registrar of Companies that the applicant "…must have been a creditor at the time the company was struck off the Register…" and, as we have seen, suggests that the cases, and in particular the *Timbiqui* decision, support this position and that accordingly the applicant should be deemed not to have been a creditor at the time the company was struck off, and does not have the *locus standi* required by the Act.

53. There are a number of difficulties with this argument. First is the one to which I have referred above; that s.738(2)(b) itself does not appear to require that the applicant be a creditor at the date of the company's dissolution. Secondly, while Mr Neville expressed a view in relation to the applicant having to be a creditor at the time the company was struck off, he also stated that "…the Registrar has no objection to the restoration application made by Everyday Finance DAC as a creditor for [the company]…". In any event, as Mr Neville acknowledged, it is "a matter for the court" to rule on the application.

54. In *Deauville*, the respondents sought to argue that the applicant which sought restoration of the company was not a creditor. The applicant had issued proceedings against Deauville; the respondent argued that the applicant company "…was, at best, no more than a contingent or prospective creditor of Deauville and, accordingly had no *locus standi* to present the petition". Keane CJ stated that "…unless there was authority to the contrary, I would be inclined to the view that the word "creditor" in s.12B(3) should be read as extending to contingent or prospective creditors…", but that "…[H]appily, however, there is authority which supports that view…". The Chief

Justice in this regard referred to the decision of Megarry J in *Re Harvest Lane Motor Bodies Limited* [1969] 1 CH 457, in which the court stated as follows: -

> "In my judgment the section contains a sufficient indication that 'creditor' ought to be construed widely. It begins with the words: 'if a company or any member or creditor thereof feels aggrieved by the company having been struck off the Register...'. The subsection is thus concerned with a grievance on the part of some person, whether a company or a member or a creditor. Here we have the case of a petitioner who, at the time when the company was struck off, had an action in being against the company which was rendered ineffective by the disappearance of the company from the Register. Where one is concerned with those who might feel a legitimate grievance because a company has been struck off, it seems to me that one should look somewhat generously at the word 'creditor' which precedes the phrase 'feels aggrieved'. Put another way, I doubt very much whether in using the word 'creditor' *simpliciter* the legislature can have been intending thereby to differentiate between those creditors whose debts are fixed and ascertained and those whose debts are contingent or prospective, providing redress for the grievances of the former but ignoring the grievances of the latter. In short, I think it would be wrong to construe the word 'creditor' narrowly; and in refusing to do so I feel comforted by the approach indicated by so great a master of equity as James V.C. in In *Re Telegraph Construction Company* [1870] 10 LR EQ384. Accordingly, in my judgment the word 'creditor' is wide enough to embrace the petitioner in this case, and as it is plainly just to restore the company's name to the register the petition therefore succeeds".

55. Keane CJ noted that the wording of the English provision was "identical to the wording of s.12B(3) of the Act of 1982, with which we are concerned"…, and stated that he would have "no hesitation in adopting the reasoning of Megarry J in that judgment". The Chief Justice went on to refer to the judgment of the Court of Appeal in *City of Westminster Assurance Company Limited v Registrar of Companies (997) BCC 960,* which applied the same reasoning as in *Harvest Lane* "even though the proceedings were not in existence at the time the company was struck off". Keane J referred to the following dicta of Millett LJ in that case: -

> "…those who wish to enforce a liability of the company need to have means to restore the company to the Register so that they can enforce its liability. That does not, in my judgment, depend upon whether the applicant for restoration of the company had an existing cause of action when the company was struck off the Register. It depends upon whether the company was then subject to a liability, whether contingent or prospective, which a creditor might need to enforce. That is the present case, since at the date of striking off the company was subject to a contingent liability to the respondent".

56. In *Timbiqui*, the High Court of England and Wales had to determine whether the petitioner was a "member or creditor" of the company within the meaning of s.353(6) of the Companies Act 1948. The company was struck off the Register in August 1955; in September 1959, the first petitioner acquired 5,894 bearer shares and claimed to have acquired a further substantial holding of bearer shares. In 1960, the first and second petitioners acquired 380,000 pesos which had been admitted as debts in bankruptcy proceedings by the competent court in Columbia. Buckley J took the view that a party which became a creditor after the strike-off of the debtor company

could not be said to have been "aggrieved" as required by the section under which it applied for restoration: see paras. 34 to 36 above.

57. The respondent in the present case relies heavily upon this decision. It is necessary therefore to consider the extent to which its reasoning may be considered applicable to the circumstances in the present application.

58. The *locus standi* of the applicant is based on its contention that it is a creditor of the company by virtue of an assignment to it of the debts and securities of the company by the bank. Indeed, as we have seen at para. 47 above, the respondent acknowledges that the bank was a creditor of the company when it was struck off, and that AIB subsequently "purported to assign the debt to the applicant". Mr Murphy exhibits in his grounding affidavit the deeds by which the applicant acquired the right, title and interest of the bank in the facility letters, mortgages and guarantees and all other rights connected therewith. He exhibits the facility letters by which the bank provided the company with loan facilities, together with the three mortgage debentures by which certain assets of the company were mortgaged to the bank as security for the company's indebtedness. Mr Murphy also exhibits the guarantees of the company's liabilities from Derbar Developments Limited and Westport Coursing Club Limited to the bank up to the sum of €1,338,000, and a further guarantee of 24 June 2008 from Mr Lavelle to the bank for the same amount. Mr Murphy avers that, in breach of the terms of the facility letters, the company failed to make the required repayments, so that a sum of €1,565,559.05 is due and owing by the company to the applicant as of 6 January 2021. While the respondent does make complaint in his affidavit in relation to a lack of response to a request from his solicitors for "production of the relevant security documentation", and disputes that Mr Murphy "has the necessary means of knowledge to make the application", the respondent does

not at any stage put forward any basis for contending that the documentation is flawed, or that the assignment by the bank to the applicant is invalid. The applicant characterises the assignment in its written submissions, without complaint from the respondent, as "uncontroversial".

59. In truth, the only substantive issue of controversy between the parties in this application is whether or not an assignment by the bank of the company's debt to the applicant after the strike off is sufficient to constitute the applicant a creditor for the purposes of s.738. In circumstances where the respondent acknowledges that the company had an indebtedness to the bank as of the date of strike off, where there is no substantive challenge to the assignment by the bank to the applicant where it was necessary for the applicant to prove only that it was a creditor and not the amount of its debt, and where it was not suggested by Mr. Lavelle that the sum alleged by Mr Murphy to be due by the company was in not in fact due and owing, I do not consider that Mr Murphy was an inappropriate deponent in this regard. No arguments were in fact advanced by the respondent in support of this assertion.

60. In any event, the documents exhibited to Mr Murphy's affidavit seem to me to be records "in document form compiled in the ordinary course of business" which enjoy the presumption of admissibility in s.13 of the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020. In accordance with s.16 of that Act, I am of the view that there is no reason in the interests of justice why the documents ought not to be admitted. It is areasonable inference that the information which the documents convey is reliable; that the documents exhibited are authentic; and that their admission will not result in any unfairness to any of the parties to the application.

61. The statement by Buckley J quoted above at para. 34 that "…the position…seems to be that the original creditor…would still not in law be a creditor

of the company when the company had become dissolved…" seems to suggest that the court had a tentative view that a creditor of a company ceased to be such when the debtor company was struck off. The court suggested that it was "debateable whether [the creditor] could assign the debt to anybody else". The court does not appear to resolve this latter issue, but goes on to accept that a petitioner who is a creditor at the date of strike off can invoke the restoration jurisdiction, although anyone who subsequently becomes a creditor cannot.

62. Section 734(3) makes it clear that, for the purpose of an application under s.738, "…a company shall be deemed not to have been dissolved…". If the bank had not assigned the company's debt to Everyday, there can be no doubt that it would have been entitled to invoke s.738 as a creditor of the company. It is in my view equally clear that it would also have been regarded as "disadvantaged" within the meaning of the section, as its ability to enforce its securities or appoint a receiver would have been compromised by the company having brought about a situation where it was involuntarily struck off. Likewise, if the bank had assigned the company's debt to Everyday prior to the strike off, there could be no objection to Everyday invoking s.738 to seek to have the company restored for the same purpose.

63. If the bank had a right to invoke s.738 as a creditor of the company after it had been struck off the Register, is there any reason why a party who had acquired the debt after the strike off could not equally invoke s.738? In my view, there is not. I do not agree with the suggestion in the judgment of Buckley J in *Timbiqui* that a creditor ceases to be a creditor when the debtor company is struck off. The debt does not disappear in a puff of smoke. At very least, it remains live for the purpose of constituting an applicant pursuant to s.738 a "creditor" for the purpose of that section. The debt, with the concomitant right to invoke s.738 as a creditor, was in this case

assigned to Everyday. A "creditor" of the company existed prior to the strike off. All that has changed by virtue of the assignment is the identity of that creditor.

64. One could understand a court taking a different view if a new debt arose after the strike off. If a dissolved company continued to trade, and a debt arose from the post-strike off period, it might be that the court would take the view that a company that had ceased to have any legal existence could not generate a valid enforceable debt. That is not the situation here, where the debt existed prior to the strike off, and only the identity of the creditor changed, as the assignee creditor has succeeded to all the rights of the assignor.

65. I am fortified in my conclusion by the view taken by the Supreme Court in *Deauville* that the word "creditor" should be widely construed, and its explicit adoption of the dicta of Millet J in *City of Westminster Assurance Company* that "…those who wish to enforce a liability of the company need to have means to restore the company to the Register so they can enforce its liability…". It seems to me that Everyday has been "disadvantaged" in exactly the same way in which the bank would have been, had the debt not been assigned and the bank had invoked s.738.

66. It does appear that the view taken by Buckley J in *Timbiqui* may have been influenced by the necessity to consider whether the applicant creditor could be said to be "aggrieved". It is clear from the extract quoted at para. 36 above that the court took a strong view that a creditor who acquired the debt after the strike off could not be said to be "aggrieved". Whether this view is justified or not, it seems to me that the requirement for the creditor of being "disadvantaged" is a more objective, less emotive and possibly also less exacting requirement than "aggrieved", the word used in s.12B(3) of the Companies (Amendment) Act 1982.

67. The court does require however to be satisfied, in accordance with s.738(1)(c) that it is "just and equitable" for the court to make the order. If the court were to refuse the restoration, the company would, through its own neglect which led to the strike off, have brought about a situation whereby it was immune to enforcement against it of securities in respect of its assets. In my view, the justice and equity of the situation clearly lie in granting the order sought.

68. The *Allenton* decision involved circumstances which Butler J described as "anything but straightforward". The court refused the application for restoration; a purchaser who had entered into possession and built a dwelling house on property in respect of which the applicant wished to appoint a receiver if a restoration order had been granted would have been "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…" [para. 37]. While of considerable assistance generally as to what is meant by "just and equitable", the case is very much decided on its own facts, and the applicant is correct in asserting that the decision is not concerned with the central issue in the present case.

69. While Mr Lavelle makes complaint of an alleged failure by the applicant or its agents to communicate with him in relation to the application, it is not clear to me why it is said that there was any obligation on the applicant to do so. As the respondent acknowledges in his submissions, the restoration of a company is "primarily a matter between the petitioner on the one part and the regulatory authority…and the Minister for Finance…" [Murphy J in *Bloomberg Developments*]. Similarly, it does not seem to me that s.14 of the Mediation Act 2014 has any

relevance to the current application, which is simply an administrative application to restore a company to the Register. It does not involve the resolution of a dispute in proceedings, such as is envisaged in s.14(1)(a) of that Act. It may well be that there will be "disputes" between the applicant and the respondent in the future which would benefit from mediation; however, the question of mediation at this stage does not arise.

Conclusions and orders

70. In all the circumstances, I am satisfied that the applicant, for the purpose of the present application, has established that it is a creditor of the company; I am satisfied that the striking-off of the company has disadvantaged the applicant; and I am satisfied that it is just and equitable to make an order that the company be restored to the Register.

71. In the circumstances, I am satisfied that the reliefs sought at paras. 1 to 4 of the originating notice of motion in the present application are appropriate, and I will accordingly make the following orders: -

(1) An order pursuant to s.738 of the Companies Act 2014 (as amended) restoring Derbar Developments (Westport) Limited ('the company') to the Register of Companies;

(2) an order pursuant to s.740 of the Companies Act 2014 (as amended) directing the directors of the company, Barry Dobbin and Derek Lavelle, or each of them individually, to cause to be delivered to the Registrar of Companies any and all outstanding annual returns in accordance with part IV of the Companies Act 2014 (as amended);

(3) an order pursuant to s.740 of the Companies Act 2014 (as amended) directing the above-named directors of the company or each of them to

deliver to the Revenue Commissioners all outstanding statements in relation to the company, as is required by s.882 of the Taxes Consolidation Act 1997;

(4) insofar as may be necessary, an order pursuant to s.740 of the Companies Act 2014 (as amended) directing the directors of the company to take all reasonable steps to ensure that the company appoints a director and delivers to the Registrar the notification and consent required by ss. 149(8) and (10) of the Companies Act 2014 (as amended) and ensure either (i) that the person to be appointed is resident in an EEA State; or (ii) unless a certificate under s.140 of the Companies Act 2014 (as amended) has been granted in respect of the company by the Registrar, that the company provides a bond to the Registrar in accordance with s.137 of the Companies Act 2014 (as amended).

72. I will allow the parties ten days from the delivery of this judgment to make brief written submissions of not more than one thousand words in relation to the timeframe within which the proposed orders at paras. 2 and 3 above should occur, and also as to the costs of the application, or any other ancillary order which the parties may consider appropriate. Under no circumstances will any re-argument as to the substantive issues be permitted.