THE HIGH COURT

[2023] IEHC 203

Butler J.

Record No. 2021 207 COS

IN THE MATTER OF K4S REAL ESTATE LIMITED (IN LIQUIDATION)

-and-

SECTION 631 OF THE COMPANIES ACT 2014

Judgment of Ms. Justice Butler delivered on 25th day of April 2023

Introduction

1. This is an application made by the liquidator of K4S Real Estate Limited (*"the company"*) ostensibly seeking directions under s.631 of the Companies Act 2014 but in reality, seeking relief under s under ss.238 and 608, in effect, to have the sale of a house by the company set aside. The proceedings as originally instituted concerned three separate properties and also sought relief under ss.604 and 615 of the 2014 Act. However, by the time the application was heard the dispute concerned only one property, No. 12 Willouise, Sallins, County Kildare (No.12). This is a three bedroomed terrace house in a development of some forty houses in turn part of a larger estate in County Kildare which the company

was developing between the date of its incorporation in 2017 and the date on which it went into voluntary liquidation on 4 June 2021.

2. Under a contract dated 20 December 2018 the company agreed to sell No.12 to Olive McCormack, the mother of the company's then solicitor, for the sum of €250,000 subject to the immediate payment of a deposit of €150,000. The liquidator contends that this price represented a significant undervalue of the property and thus deprived the company of the full value of that asset to the detriment of its creditors. There is an issue as to whether that property was bought by Olive McCormack on her own behalf or on trust for Louise Meade. On 29 November 2019 a series of transactions were entered into the overall effect of which was the transfer of Olive McCormack's interest in the contract to purchase No.12 to Louise Meade who then charged the property as security for a loan made to her father, John Meade, by Tulfarris Ronaver Limited (*"Tulfarris"*). The company joined the assignment to Louise Meade to confirm its consent (a requirement of special condition 27 of the December 2018 contract) and consented to a further assignment of the contract by way of security between Louise Meade and Tulfarris. Both of these documents were signed by Noel Keane who was the only director and shareholder of the company at the material time.

3. In January 2021 the company entered into a group sale of thirty-one units in the Willouise development to an approved housing body for the sum of €8.8m. That transaction gave rise to a VAT liability to the Revenue Commissioners in excess of €1m. However, the purchase monies were used by the company to discharge other debts including the sums then owed to its principal financer, Lotus DAC, which exceeded €7m. and the VAT liability was not discharged. Some months later on 4 June 2021 at a duly convened EGM the company's sole director and shareholder placed the company into voluntary liquidation and a liquidator was appointed. In the intervening period the company had made efforts to complete

outstanding sales of the property in the development. A completion notice was served in respect of No.12 on 26 April 2021 which expired on 24 May 2021.

4. In the course of examining the company's affairs, the liquidator took the view that the contract for the sale of No.12 and two other similar contracts entered into around the same time were at an undervalue. Ultimately, the case made in respect of No.12 was either that the sale was in breach of s.238 of the Companies Act as Louise Meade was a "*connected person*" and the transaction was not approved by resolution of the shareholders at an EGM or, alternatively, that the effect of the sale was a fraudulent disposition within the meaning of s.608 because the company was deprived of the full value of its lawful assets. Either way the liquidator seeks the directions of the court pursuant to s.631 of the 2014 Act to allow him to proceed with the sale of No.12 in order to realise its market value for the benefit of its creditors.

5. Prior to the hearing of the application, the High Court directed that a number of persons be put on notice of it. Of these notice parties, affidavits have been sworn by or on behalf of Louise Meade, John, Meade, Olive McCormack and Tulfarris. Louise Meade and Tulfarris were represented at the hearing and opposed the application. Written legal submissions were filed on behalf of John Meade but at the opening of the application counsel on his behalf informed the court that whilst he stood over his affidavit evidence, John Meade would not be playing an active part in the proceedings. For the avoidance of doubt, counsel for Tulfarris formally adopted John Meade's written submissions.

6. This is necessarily only a very brief outline of what is a very complex and unclear factual matrix. In order to consider the legal issues, I propose to look at the history of the disputed transactions in greater detail, at the relevant legislative provisions and the respective positions adopted by the parties. I will then address whether it is appropriate to grant the relief sought by the liquidator.

The Disputed Transactions – Relations Between the Parties

7. In order to understand why the transactions in respect of No.12 are impugned by the liquidator it is necessary to appreciate the relationships between the various parties involved. The company was incorporated by John Meade in 2017 for the purposes of carrying out a phase of the Willouise development comprising forty units. The original plan was that Noel Keane and Louise Meade would be appointed directors and that the shareholding in the company would be split between them with Louise Meade holding 80% and Noel Keane holding 20% in trust for John Meade. This plan changed when, due to ill health, Louise Meade was unable to participate. Instead, Noel Keane, a long-standing friend of John Meade, became a 100% shareholder and the sole director of the company. Noel Keane, in an e-mail to the liquidator the contents of which were confirmed by him on affidavit, states that he did not have decision making authority on behalf of the company but took all of his instructions from John Meade and Louise Meade. Noel Keane identifies a large number of payments made to Meade family members who were put on the company payroll including Louise Meade who worked as a project supervisor for the company.

8. John Meade accepts that, when his daughter became ill and could not take up her intended directorship of the company, he became a *de factor* director of the company in her place. This is also acknowledged by Louise Meade. He did not formally become a director and his role was not reflected in the company's official returns.

9. At some stage in late 2019 the Meades and Mr. Keane fell out, but it is not entirely clear when this occurred. Louse Meade states that she had ceased all involvement with the company by May 2019. By November 2019 Noel Keane had appointed new company solicitors and instructed then not to take instructions from John Meade. In December 2019

he asked John Meade to formalise existing relationships and to remove him as a director. Apparently, this could not be done because of the terms of the facility agreement with the company's financier, Lotus DAC. Instead, Noel Keane states that he took on the role of managing director *"in its true form"* and that from January 2020 John Meade had no further role in the company.

10. The liquidator makes a number of allegations about the propriety of certain payments from the company to members of the Meade family and to business associates of John Meade. These matters are not currently before the court and therefore I make no comment on them. There is also a suggestion that property in Oldcastle, County Meath, owned by Louise Meade, was paid for using company funds. Again, I make no comment as to the correctness or otherwise of these allegations save to note that the Oldcastle lands have some peripheral relevance to this application as they form part of the security provided to Tulfarris for the November 2019 loan. The liquidator informed the court that separate proceedings either have been or will be brought in respect of the Oldcastle lands.

Disputed Transactions – December 2018 Contract

11. As is often the case with property development, very significant expense is incurred in carrying out the development which, it is hoped, will ultimately be met by the proceeds of sale of the built property. In the meantime, a development company is heavily dependent on sources of credit in order to carry out the construction works necessary to complete the development. In the case of the Willouise development the company secured credit finance from Lotus DAC. However, matters did not progress as smoothly as intended and in 2018 the company faced significant cash-flow difficulties. A proposed sale of the entire development to an approved housing body, Circle, did not materialise and in late 2018 Lotus was pressing for repayment and made a cash call.

12. In these circumstances John Meade states that the three transactions which were originally the subject of this application (including that relating to No.12) were *"bona fide transactions entered into on commercial terms by the company with the objective of preserving its cash flows"*. He describes the prices as *"attractive prices (though not distorted from the market"*). Louise Meade confirms that a decision was taken to sell some property to buyers with resources to pay a *"substantial deposit above the normal industry conventions"* but does not mention the price to be paid.

13. Noel Keane's account is similar. When asked directly by the liquidator why the sales of three properties were agreed at prices apparently *"substantially less than their market value"*, he replies in an e-mail dated 1 July 2021 (confirmed by him on affidavit) that the purpose of the *"discounted sale"* was to bring the respective deposits *"into the company quickly"*, to pay company debts notably, interest to Lotus DAC.

14. Finally, although not on affidavit, in a letter to the liquidator dated 14 September 2021 the solicitor who acted for the company at the material time explains that Lotus DAC were seeking repayment of interest due on its loans by 23 December 2018 in default of which it threatened to appoint a receiver. In this context the company *"proposed that five units be sold immediately with enhanced deposits being paid by various purchasers in consideration of a discount, which would be released to the company and used to make the repayment to Lotus immediately"*. Hence, a discount was offered (purely for commercial purposes).

15. The terms of the December 2018 contract which is in the form of a land sale and building agreement reflect this rationale. Of the €250,000 purchase price agreed for the property, €150,000 was to be paid immediately as a deposit.

16. Accepting, as I do, that the sale of No.12 in December 2018 was structured so as to secure the immediate payment of an enhanced deposit in exchange for some discount, two questions arise. Firstly, what was the extent of the discount, i.e. by how much was the market

value of the property reduced, and secondly whether the immediate benefit to the company in terms of cash flow should be taken into account when considering whether the sale was at an under-value. I will return to both of these issues below.

17. Separate to the price of the property there are serious issues regarding the identity of the purchaser. Counsel for Tulfarris, which of course was not involved in the December 2018 transaction, describes its circumstances as *"murky"*. This is something of an understatement.

18. The named purchaser (described as *"an employer"* under contract) is Olive McCormack. Olive McCormack is the mother of the company's then solicitor, Barry McCormack, and the contract was signed in trust on her behalf by her son. It was countersigned by Noel Keane on behalf of the company. The liquidator suggests that this contract reflected a deal made between John Meade and Barry McCormack rather than Olive McCormack and that the deposit may have been paid by Barry McCormack. No evidence is proffered to support this theory and the court must assume in the absence of other evidence that the deposit of €150,000 was paid by Olive McCormack as she states in her affidavit.

19. More significantly, a declaration of trust in respect of No.12 which is also dated 20 December 2018 was signed by Olive McCormack who is described as the trustee and Louise Meade who is described as the beneficial owner. The deed recites that the purchase price of the property *"is being provided by the beneficial owner"*, i.e. Louise Meade, and that the contractual interest to [sic] the property *"has at all times"* been held by Olive McCormack in trust for Louise Meade. The operative part of the deed records Olive McCormack's agreement to transfer the property to such persons as the beneficial owner directs. The liquidator suggest that this declaration of trust was not signed on 20 December 2018 but was signed later and backdated. No particular evidence is offered in support of this proposition but, strikingly, the terms of the declaration of trust are not consistent with the accounts given

on affidavit by either of the parties to it and those accounts are themselves mutually inconsistent.

20. In her affidavit Louise Meade outlines her understanding that Olive McCormack saw the property as an investment that might be used by a family member but that she was prepared to allow her, i.e. Louise Meade, to purchase the property if her financial and health circumstances allowed her to do so. She then states that this understanding was *"documented in the form of a trust entered between us in December 2018".* The trust declaration does not actually reflect an understanding that Olive McCormack had agreed to transfer her interest in the contract to Louise Meade if the latter's circumstances improved but rather recites that the purchase price was being provided by Louise Meade which, on all accounts, was not the case.

21. Olive McCormack has sworn an affidavit in which she gives an account of her involvement in this transaction which, at best, strains credulity. Her account makes no reference at all to the declaration of trust. She states categorically that she purchased No.12 in good faith and on her own behalf and not on behalf of Louise Meade or of her son or anyone else. She states that she paid the deposit from her personal savings account. She describes being interested in a property in the Willouise estate to facilitate her son who commutes to work in Dublin by train. John Meade contacted her offering the option to purchase a property *"at a discount provided we paid a larger deposit…within a matter of days".* She believes the real discount was in the order of €40,000, although John Meade told her the property was worth €360,000 suggesting a discount of €110,000.

22. The bizarre element of her account is at paras. 3 and 4 of her affidavit. She claims to have been informed by John Meade that Louise Meade was also interested in purchasing No.12 but was not in a position to pay such a large deposit. She then states *"I felt it was only right and proper that we would give his daughter the option to purchase the property*

from us before the close of sale, if she was in a financial position to do so. We then agreed with Mr. Meade that if his daughter could refund our deposit, we would gladly transfer our contract to her." She stated that in November 2019 she transferred her interest in No.12 to Louise Meade pursuant to this agreement but was only refunded €145,000 of the deposit. She describes her decision to transfer to Louise Meade as being based *"on integrity"*.

23. This account is very hard to understand. If Olive McCormack's interest in the property was to facilitate her own son and she paid €150,000 from her personal savings account to secure it, it is simply illogical that she would feel it *"right and proper"* to give Louise Meade the option of purchasing the property, much less that she would actually affect the assignment of her interest to Louise Meade at a €5,000 loss. No evidence is offered of any relationship between Olive McCormack, a retired teacher, and Louise Meade or John Meade which would enable the court to accept that as a matter of *"integrity"* she felt obliged to sell her interest in the December 2018 contract to Louise Meade at a loss.

24. Not only does Olive McCormack not mention the declaration of trust, the account she gives is inconsistent with this declaration in material respects. This is most notable as regards the payment of the deposit but also her apparent agreement (according to the declaration of trust) not just to assign her interest in the 2018 contract to Louise Meade but to assign it to anyone whom Louise Meade might direct. It is hard to see why whatever personal obligation Olive McCormack may have felt towards John or Louise Meade would have extended to any third party to whom Louise Meade might direct that she assigned the contract.

25. Noel Keane, who signed the December 2018 contract on behalf of the company, describes Olive McCormack as *"the original purchaser"* but characterises the deal itself as one between John Meade and Barry McCormack. He then states that in December 2019, Louise Meade paid €145,000 to McCormack solicitors and that John Meade and Barry

McCormack agreed that the contract would be assigned to her. He expressly states that Olive McCormack did not buy the property in trust for Louise Meade but that Louise Meade is now fronting the purchase of it for her father, John Meade. He also states that when the sale did not close in 2019 as originally scheduled, Barry McCormack sought his money back – which, if correct, might explain why a sum of €5,000 less than the deposit originally paid was accepted.

26. In correspondence to the liquidator previously referred to, Barry McCormack states that as Louise Meade was not in a position to pay an enhanced deposit in December 2018, Olive McCormack agreed to purchase the property in trust for her and to provide the funding to help keep the company afloat. No rational explanation is offered as to why a retired school teacher would do these things. Barry McCormack has not sworn an affidavit and thus the contents of his correspondence amount to no more than hearsay evidence which might explain why the liquidator had a particular understanding of matters but does not prove that that understanding was correct.

27. Thus, there are three different accounts on affidavit as to who was beneficially entitled to purchase No.12 under the December 2018 contract. Louise Meade says that the property was the subject of a trust in her favour. Olive McCormack says that there was no trust. She bought the property on her own behalf but had a separate agreement with John Meade to allow Louise Meade to buy it off her. Noel Keane says in effect that Olive McCormack was only a nominal purchaser with Barry McCormack being the real counter-party to the deal and that Louise Meade stepped in when the sale did not close and Barry McCormack sought the refund of his deposit. None of these accounts matches the terms of the declaration of trust and indeed only Louise Meade mentions the trust at all. None of the parties sought to cross-examine any of these deponents on their affidavits leaving the court in an impossible

position where it is simply not possible to determine which, if any, of these three accounts is correct.

28. The significance of all of this is that if Olive McCormack bought the property in trust for Louise Meade at a time when John Meade was a *de facto* director of the company, then as Louse Meade is a person connected to John Meade, the contract would be subject to s.238 of the 2014 Act and potentially voidable if it were not approved by the shareholders. On the other hand, if Olive McCormack was genuinely the purchaser in December 2018, the contract would not fall under s.238 and nor would the subsequent assignment of her interest in the contract to Louise Meade in 2019. Again, I will return to this issue below.

Disputed Transactions – 29 November 2019

29. In November 2019 John Meade obtained a loan of €375,000 from Tulfarris. This loan was secured on two properties, No.12 Willouise and the Oldcastle lands. A number of documents were executed to give effect to this agreement all of which are dated 29 November 2019.

30. The first is a deed of assignment under which Olive McCormack transferred her estate and interest in the December 2018 contract to Louise Meade. This assignment is also signed by Noel Keane for the purposes of confirming the company's consent to the assignment pursuant to special condition 27 of the December 2018 contract which required the prior written consent of the company to any such assignment. It is notable that the deed of assignment is predicated on the existence of a trust in the terms of the declaration of trust. It recites that Olive McCormack was at all times acting as trustee for Louise Meade; that Louise Meade paid the deposit of €150,000 and that Louise Meade had called on Olive McCormack to assign her interest to her. Whilst there is a dispute between Olive McCormack and Louise Meade as to whether there was a trust, both are agreed that Louise

Meade did not pay the €150,000 (which of course calls into question the basis of the alleged trust).

31. The second document is a loan agreement for the sum of €375,000 between Tulfarris and John Meade. Although the terms of the loan agreement provided that it was repayable by 30 September 2020 in default of which Tulfarris would be entitled to exercise its rights under the mortgage, it appears that as of the date of the hearing (July 2022) the loan had not been repaid nor the security realised. The loan recites that it is subject to a personal guarantee to be supported by a charge to be provided by Louise Meade. The purpose of the loan is stated to be for the lender's business (this is presumably a typographical error and should refer to the borrower's business) including the repurchase of assets. In fact, it appears that of the €375,000, €220,000 was used to repay an unrelated loan to Noel Keane and €145,000 was used to repay the deposit paid by Olive McCormack under the December 2018 contract. Tulfarris states that it was unaware of this and would not have been happy to lend on foot of the security if it had known the money lent was being used to purchase the security. Tulfarris's deponent states that it understood from John Meade that Louise Meade was the legal and beneficial owner of No.12 which was held on trust on her behalf by Olive McCormack.

32. The third document is a deed of guarantee and indemnity executed by Louise Meade in favour of Tulfarris in respect of John Meade's debts. Related to that, the fourth document is a mortgage debenture also executed as between Louise Meade and Tulfarris and under which the property at No.12 the subject of the December 2018 contract is charged in favour of Tulfarris. These documents are in a fairly standard commercial form and proceed on the basis that Olive McCormack's interest in the December 2018 contract has been assigned to Louise Meade.

33. The fifth and final document executed on 29 November 2019 is a consent by the company to the assignment by Louise Meade of the December 2018 contract to Tulfarris by way of security. This also consents to the removal of special condition 27 from the December 2018 contract thus permitting further assignment without the company's consent. This document was signed by Noel Keane on behalf of the company.

34. The fact that Noel Keane, who was the only director and shareholder of the company at the material time, signed these two consents to the assignment of the December 2018 contract is of some significance. There is a suggestion made in correspondence from the liquidator to the Property Registration Authority (in respect of Tulfarris's application to register an inhibition) that these consents were falsified as, although Noel Keane acknowledged his signature, he *"insists"* that he had not seen the document and had no knowledge of it. This is inconsistent with the company's solicitor's account in the same correspondence to the effect that Noel Keane was heavily involved in the November 2019 transaction (since a debt to him would be paid off out of the proceeds of the loans) and was provided with the consent documentation a day prior to his signing it to enable him to take advice on it. Without expressly conceding the issue, in later correspondence the liquidator's position alters to saying that Noel Keane is unable to recollect signing the consent to assignment on behalf of the company.

35. The substantive content of Noel Keane's affidavit is to be found in two e-mails from him to the liquidator which he formally confirms at para. 7 of his affidavit as a *"true and accurate… account of matters relating to the affairs of the company"*. Although he gives an account of the November 2019 transactions, in neither e-mail does he suggest that his signature confirming the consent of the company to these assignments was anything less than completely valid.

December 2018 Contract - Completion Notice

36. By 2020 John Meade and Noel Keane had fallen out, from January 2020 John Meade ceased to play an active role in the company and Noel Keane took control as managing director. The development progressed and by January 2021 a group sale of thirty-one units to a different approved housing body, Tuath, was completed. Instead of resolving the company's problems this sale exacerbated them as the purchase monies, which included VAT, were used to discharge the company's existing debts leaving an outstanding VAT liability to the Revenue Commissioners of over €1m. euro. Noel Keane then took steps to try to complete all of the other outstanding sales in order to get in funds to discharge the Revenue debt.

37. On 26 April 2021 a completion notice was served on Louise Meade requiring her to complete the purchase of No. 12 within 28 days – i.e. by 24 May 2021. For various reasons the sale did not complete and very quickly two things happened. The first of these is that on 31 May 2021 Tulfarris applied to the Property Registration Authority to register an inhibition on the folio to prevent any dealing in the property by the company and on 4 June 2021 the company went into voluntary liquidation.

38. There is a significant dispute between the liquidator, Louise Meade and Tulfarris as to the validity of the completion notice and the consequences of the sale not completing prior to the date stipulated in that notice. Tulfarris says that the completion notice was not valid as it was not served on it in circumstances where the company was aware of its interest in the December 2018 contract having consented to its assignment to Tulfarris by way of security. Louise Meade says that the completion notice was not valid as the company was not in a position to complete the sale at the time it was served. This is due to alleged non-compliance with a condition of the planning permission for the development which required the completion of a childcare facility before more than a certain number of units could be

sold or occupied. She contends that she is ready, willing, and able to complete the contract and is entitled to specific performance of it by the company. The liquidator claims that the completion notice is valid, as does Noel Keane, and that on the expiration of the relevant period the company was released from its contract due to non-compliance by Louise Meade and that the deposit was forfeit to the company. The liquidator argues that specific performance does not lie against a liquidator. Tulfarris disagrees and argues, with convincing logic, that the liquidator's position that the deposit was forfeit under a valid completion notice was inconsistent with this application seeking to void the contract under s.238 or 608. The seeking of that relief presumes that there is a contract in existence to be set aside. Tulfarris also points out that while specific performance might not lie against the liquidator, it does lie against a company in liquidation.

39. All of this places the court in an invidious position. In principle it would be reasonable to expect a court to be satisfied that there is a contract in existence before making any order to set that contract aside. However, not only is the issue of the validity of the completion notice not properly before the court, the basic material necessary to decide that issue such as the completion notice itself and the grant of planning permission of which the development is allegedly in breach, are not before the court either. Consequently, the court cannot decide whether the completion notice served by the company on Louise Meade in April 2021 is valid nor, alternatively, whether Louise Meade would be entitled to an order for specific performance to enforce the December 2018 contract. Instead, the court must presume, without deciding, that there is a *prima facie* valid contract in existence which is capable of being subject to the relief claimed if the court is otherwise satisfied that that relief should be granted.

Legislative Framework – Section 238

40. The first of the two sections under which the liquidator seeks relief is s.238. This section is found in Part 5 of the 2014 Act which deals with the duties of directors and other officers of a company. Its application does not depend on the company being insolvent. The basic purpose of this section is to prevent a company from entering into certain arrangements with its directors or persons connected to the directors unless the arrangement is approved in advance by a resolution of the shareholders of the company at a general meeting. Any such transaction is voidable – rather than being void – at the instance of the company unless the case falls into one of three categories. These include the payment of restitution, circumstances where the rights of a *bona fide* purchaser for value without notice would be affected or where the transaction is affirmed by resolution of the company within a reasonable time after it being entered into. Thus, the purpose of s.238 is to protect the shareholders of a company against the diminution or deprivation of the company's assets by the directors rather than to protect the company's creditors.

41. The relevant parts of s.238 provide as follows:-

"238.(1) Subject to subsections (4) and (5), a company (the "relevant company") shall not enter into an arrangement under which —

(a) a director of the relevant company...or a person connected with such a director, acquires or is to acquire, one or more non-cash assets of the requisite value from the relevant company…

unless the arrangement is first approved—

(i) by a resolution of the relevant company in a general meeting…,

(3) An arrangement entered into by a company in contravention of this section and any transaction entered into in pursuance of the arrangement (whether by the company or any other person) shall be voidable at the instance of the company unless—…

(b) any rights acquired bona fide for value and without actual notice of the contravention by any person who is not a party to the arrangement or transaction would be affected by its avoidance, or

(c) the arrangement is affirmed by a resolution of the company in general meeting passed within a reasonable period of time after the date on which the arrangement is entered into…."

42. Under s.221 of the 2014 Act a person in accordance with whose directions or instructions the directors of a company are accustomed to act, described in the section as a *"shadow director"*, is to be treated for the purposes of Part 5 as a director. As noted above, although not formally appointed a director of the company, John Meade accepts that he was a *de facto* or shadow director during the relevant period. Under s.220(1)(a) of the 2014 Act a person is connected with a director if that person is, *inter alia*, the director's child. As Louise Meade is John Meade's daughter and as he is to be treated under Part 5 as a director, it follows that she is a connected person for the purposes of s.238. There was some dispute on the affidavits as to whether Louise Meade was herself a shadow director. Given that she had not taken up her intended directorship due to ill health, I am not prepared to presume without more that her subsequent employment by the company as a project manager amounted to her acting as a shadow director. However, it is not necessary for me to formally determine this issue as it makes no difference to the operation of s.238 whether she herself was a shadow director or was a connected person through her relationship with her father. Either way the provisions of s.238 are engaged if there was a transaction between the company and Louise Meade, an issue to which I shall return.

43. Finlay Geoghegan J. described the purpose of the predecessor to s.238 in *Kerr v. Conduit Enterprises Limited* [2010] IEHC 300 as follows:

"…to protect the shareholders of a company against directors entering into certain transactions with the company in which they have a personal interest, without the approval of at least those shareholders holding a simple majority of the voting shares…the mischief sought to be avoided appears confined to the protection of shareholders with the right to vote."

Legislative Framework – Section 608

44. Unlike s.238, s.608 which falls within Part 11 of the 2014 Act dealing with the winding up of companies, only applies in circumstances where a company is being wound up. Although generally described as dealing with *"fraudulent dispositions"*, the liquidator was careful to articulate that *"fraud"* in this context has a particular meaning, i.e. an action which deprives a company of its lawful assets rather than the broader and potentially more prejudicial meaning it bears in other legal contexts. The intention of the parties to the transaction is not determinative, rather the court must look to the effect of the transaction. Thus, the central issue for the purposes of s.608 is whether the December 2018 contract provided for the sale of the property at an undervalue. The identity of the purchaser is of less significance although it may have an indirect bearing on the ease with which a court could conclude that the transaction was at an undervalue.

45. The relevant parts of s.608 provide as follows:

608.(1) The court has the following power where, on the application of a liquidator, creditor or contributory of a company which is being wound up, it can be shown to the satisfaction of the court that—

(a) any property of the company of any kind whatsoever was disposed of either by way of conveyance, transfer, mortgage, security, loan, or in any way whatsoever whether by act or omission, direct or indirect, and

(b) the effect of such disposal was to perpetrate a fraud on the company, its creditors or members.

(2) That power of the court is to order, if it deems it just and equitable to do so, any person who appears to have—

(a) the use, control or possession of the property concerned, or

(b) the proceeds of the sale or development of that property, to deliver it or them, or pay a sum in respect thereof, to the liquidator on such terms or conditions as the court thinks fit.

….

(4) In deciding whether it is just and equitable to make an order under this section, the court shall have regard to the rights of persons who have bona fide and for value acquired an interest in the property the subject of the application.

46. Thus, the structure of s.608 is to confer upon the court a power to make orders against third parties in respect of company property that is no longer in the possession of the company. The section does not use statutory language indicative of whether, when the criteria set out in s.608(1) are met, the exercise of that power by a court is mandatory or discretionary. Instead it confers upon the court a considerable margin of appreciation in determining whether it is just and equitable to make an order under the section, in the framing of any such order and the attaching of terms or conditions to it. The key criteria is that the court must regard it as just and equitable to make an order and one of the matters to which it must have regard in forming a view on this issue is the rights of *bona fide* purchasers for value of the property the subject of the application.

47. There is a difference in this regard between ss.238 and s.608 in that under s.238(3)(b) a contract cannot be voided where the rights of a *bona fide* purchaser for value without notice

would be affected whereas under s.608(4) such rights are matters to which the court must have regard but are not determinative of the court's consideration either way. In this case, Tulfarris relied on its position as a *bona fide* purchaser for value without notice under both ss.238 and 608.

The Positions of the Parties

48. The positions being adopted by the respective parties may be apparent from the account of the disputed transaction set out above. Nonetheless it may be useful to summarise them as regards the matters which remain in dispute.

49. The liquidator seeks relief under either or both sections he has invoked. The central thrust of the liquidator's case is that the December 2018 contract for the sale of No.12 was significantly undervalue. On this basis, he says that if that contract was genuinely one transferring property to Olive McCormack then it diverted property away from the company and had the effect of a fraudulent disposition under s.608. Alternatively, if the December 2018 contract was one under which Olive McCormack acquired rights in trust for Louise Meade then it falls within s.238 as Louise Meade is a connected person. It is significant in this regard that the property was subsequently used to secure a loan for John Meade, a *de facto* director of the company. Further, if Olive McCormack did not acquire rights pursuant to the December 2018 contract in trust for Louise Meade, the liquidator contends that the November 2019 assignment is necessarily invalid as the trust is an essential component of the title. He refutes the Notice Parties' reliance on the company's participation in both the 2018 and 2019 transactions as being equivalent to shareholder approval on the basis that in order to be effective such approval cannot be dishonest. He contends that the actions of Noel Keane as the sole shareholder of the company were dishonest because the transaction was at a significant undervalue.

50. Louise Meade argues that the 2018 sale was not at an undervalue based on both a valuation of the property as of December 2018 and the fact that sale at a discount in exchange for the immediate payment of an enhanced deposit provided real benefit to the company. It was accepted on her behalf in the course of argument that both the declaration of trust and the assignment to her are false insofar as they recite that she made the deposit of €150,000 in 2018 when she did not in fact do so. The point is made on her behalf that at the time of the December 2018 and November 2019 transactions were entered into the company was not insolvent although it was dependant on continuing credit from Lotus DAC. The Revenue debt which triggered the voluntary winding up did not arise until January 2021 and is entirely unrelated to the impugned transaction. Finally, if the court directs, Louise Meade is prepared to close the sale of No.12 at a value in excess of €250,000.

51. Tulfarris makes a very extensive argument on a number of different issues. Although Tulfarris contends that the completion notice was invalid as it was not served on it and that the liquidator's position on the completion notice is inconsistent with the relief sought, it is satisfied that the court does not have to make any decision on the validity of the completion notice in order to determine the application. Most significantly Tulfarris argued that its involvement in the transaction is completely at arm's length and involved only dealings with the Meades and not with the company. It lent no money to and took no security from the company. The company's involvement in the November 2019 transactions was limited to confirming the assignments as between the other parties but it did not itself assign or purchase anything. It disputes the assertion that there is a problem with the chain of title due to the recitation of the trust on the assignment between Olive McCormack and Louise Meade and contends that the existence and/or non-existence of a trust became irrelevant once Olive McCormack had assigned her interest (whatever that was) to Louise Meade. Tulfarris rejects the liquidator's contention that by reason of e-mail correspondence between the solicitor for

Louise Meade and the solicitor for Tulfarris on 21 November 2019, in which both the contract price of €250,000 and a purported value for No.12 of €360,000 are set out, that Tulfarris was on notice of the fact that the December 2018 transaction was at undervalue. It accepts that it was aware of the relationship between John Meade and Louise Meade but denies being aware that Louise Meade was a *"connected person"* because it was not aware that John Meade was a shadow director of the company. Tulfarris disputes both the contention that the December 2018 sale was at an undervalue and the valuation now placed by the liquidator on the property. It relies on its status as a *bona fide* purchaser for value without notice for the purposes of both ss.238 and 608. It contends that informal approval had been given by the sole shareholder of the company to both the December 2018 and November 2019 transactions. Finally, Tulfarris made a technical argument to the effect that the liquidator did not have standing to bring an application pursuant to s.238 which, under s.238(3) can only be brought at the instance of the company. The liquidator objected to this issue being raised as it had not been flagged in the written submissions and he had no prior notice of it.

Valuation

52. The central thrust of the liquidator's case under both sections is that the property was sold at an undervalue so the first issue for the court to determine is the value of the property in December 2018. Given the importance of this issue it is surprising to say the least that although the liquidator instituted these proceedings in July 2021 he did not seek a formal valuation of No.12 until February 2022. When a formal valuation was eventually obtained by the liquidator, both the current market price and the December 2018 price suggested by the liquidator's valuer were significantly less than those posited by the liquidator in his grounding affidavit. Nonetheless there was still a difference, albeit it a smaller one, between

the liquidator and the notice parties as to the true market value of the property in December 2018.

53. Before I look at the various values which have been placed in evidence, I should confirm that I accept the notice parties' contention that the relevant date for which the value of the property needs to be ascertained is December 2018, i.e. the date of the contract. Property is an asset given to fluctuations in value. The *bona fides* of a transaction cannot be retrospectively assessed by reference to changes in the value of a property which have taken place subsequent to its sale. A company cannot be said to have been deprived of a lawful asset if it received market value for the asset at the time it was sold, nor can the transaction be characterised as dishonest because of an increase in the value of the asset subsequent to its sale being agreed.

54. The liquidator's grounding affidavit states that No.12 had a current market value in July 2021 of €470,000. This value appears to be based on a letter from an estate agent to the liquidator in which the estate agent recommended advertising the property seeking offers in excess of that figure and went on to set out its proposed terms of business for the sale of all three properties. As Tulfarris correctly points out, this is not a valuation, it is a sales pitch. Further, in his third affidavit the liquidator acknowledged that what he described as this *"valuation advice"* had actually misdescribed the three-bedroom townhouses as five-bedroom townhouses. Therefore, the €470,000 valuation, insofar as it could ever be characterised as a valuation, related to a different and bigger property. Nonetheless, the figure of €470,000 (or possibly a little less) was still quoted as the current value of the property in the opening of the case by the liquidator.

55. Until he received a formal valuation in February 2022, the liquidator relied on the figure of €360,000 as being the market value of No.12 in December 2018 and therefore, argued that there had been a consequent loss to the company of €110,000 under the contract.

The figure of €360,000 seems to have derived from a *"Schedule of Accommodation"* prepared in 2018 at a time when the sale of the entire development to Circle, an approved housing body, was under discussion. The same value was placed on all similarly sized three bed units. Notably, the proposed sale to Circle at those prices did not proceed.

56. In his replying affidavit John Meade states that these were not professional valuations prepared by a valuer but rather were sales prices calculated by him for negotiation purposes to take account of particular features of the proposed Circle sale. These included the requirement of the intending purchaser that all forty properties be ready, in turn-key condition, by mid-2020 which in the view of both John and Louise Meade would have added considerably to the cost of completing them. It seems likely that the same Schedule of Accommodation was the basis for the €360,000 figure quoted by John Meade to Olive McCormack and also by Noel Keane in his e-mail of 1 July 2021 to the liquidator. Although the liquidator relies on the subsequent use of this figure by them, neither Mr. Meade nor Mr. Keane are qualified valuers.

57. In the course of the exchange of affidavits, the Notice Parties all relied on a valuation prepared by Coonan Property which places a market value of €250,000 on No.12 as of December 2018. Philip Byrne of Coonan Property is the only valuer to have sworn an affidavit in which he both confirms John Meade's account of how the Schedule of Accommodation came to be prepared and also the soundness of the valuation prepared by him. In addition, he places a current value on the property in January 2022 of €320,000.

58. The liquidator attempted to impugn the credibility of this valuation by suggesting that it was influenced by long standing business relations between the Meades and Coonan Property. In contrast he characterised his own valuations as *"independent"*. I cannot see any justification for this suggestion, and I note that the liquidator did not seek to cross-examine Mr. Byrne on his affidavit in order to interrogate the valuation itself. I do not think

it can be inferred from ongoing business dealings that a professional person would deliberately mislead the court by providing a valuation which he did not believe to be sound. It may be that having mistakenly attributed the Schedule of Accommodation to Coonan Properties, the liquidator then assumed that the figure of €250,000 was a downwards revision of a previous valuation rather than being the only valuation provided by that firm. In any event, no doubt prompted by these allegations, both John Meade (DNG McCormack) and Tulfarris (French Estates) sought and received second opinions from different valuers both of whom agreed that the market value of the property in December 2018 was €250,000.

59. The liquidator was critical of these valuations on the basis that the valuers who provided them did not seek and consequently did not have access to No. 12 for the purpose of inspecting it prior to completing their reports. Whilst access to a property for the purpose of internal inspection is certainly desirable, I am not convinced that its absence in the context of a new-build townhouse on an estate of similar properties is critical either way. Both valuations look at the sale of similar types of properties in Sallins including in the Willouise estate in and around December 2018. Louise Meade herself has carried out a similar comparative exercise identifying at least six other three-bedroom properties sold in Sallins during 2018 for prices between €161,000 and €270,000.

60. The liquidator then introduced a different argument to the effect that as No.12 was not completed in December 2018, all valuations of it as a completed unit should be disregarded and instead it should be valued as of when it was finished and the sale was ready to complete in January 2021. This argument appears to be based, firstly, on the fact that the December 2018 contract was by way of land sale and building agreement and, secondly, on pre-completion notice correspondence in early 2021 sent by Noel Keane following the sale of thirty-one units to Tuath. However, John Meade confirms that No. 12 was a completed and furnished showhouse in December 2018. Mrs McCormack states that she had viewed it prior

to the December 2018 contract. The liquidator's own valuer refers to No. 12 as a *"former showhouse"* and the liquidator has not introduced any evidence to suggest it was not actually built by December 2018. The form of contract used was likely a standard one prepared for the sale of all or any units in the development. It did not specifically take into account the circumstances of No.12. Further, it seems that Noel Keane's desire to complete the transaction from January 2021 onwards arose not because building work on the unit had just finished, but because the company needed to raise funds to discharge the VAT liability arising as a result of the Tuath's sale.

61. The final valuations in this series are those provided on behalf of the liquidator all of which date from January/February 2022. The first of these is provided by the same estate agent that had recommended seeking offers in excess of €470,000 in July 2021. In an e-mail dated 27 January 2022 he gives an updated estimated value of between €355,000 to €375,000 for No. 12. However, he describes No. 12 as a *"finished 4-bed end of terrace home"* when, in fact, it is a three-bedroom townhouse, albeit with a completed non-habitable attic space. He does not give a December 2018 value. The second valuer describes No.12 as a three-bedroom home with an additional attic room and recommends quoting €365,000 *"to establish market reaction"*. Both of these prices appear to be quoted on the basis of marketing tactics rather than by way of formal valuation. This is not a criticism of the estate agents involved, it is merely to note that the purpose of the valuation and consequently the methods used to reach it are likely to have been different than if a formal valuation had been carried out.

62. The third and final valuation is one provided by Colliers in the form of a professional valuation of the three properties which were originally the subject of this application. Under the heading *"Relevant Date"* it notes that the relevant date is 21 February 2022 *"with further assumptions of anticipated market price in December 2018 and March 2019"*. Those further

assumptions are not made explicit in the report. There then follows a detailed description of the location of the properties and of the properties themselves. The methodology used is an examination of the prices sought and/or achieved for a number of similar properties in the same area - including within the Willouise estate - between 2016 and 2022. At the time of the report an identical house to No.12 had been placed on the market with a guide price of €310,000 but bidding had already exceeded that. Colliers give a current market value in February 2022 of €360,000 and an anticipated market value as of 1 December 2018 of €310,000.

63. Three things are evident from this analysis of the valuation evidence. Firstly, none of the valuations provided make any allowance for the fact that the sale required an immediate payment of an enhanced deposit. Thus, the benefit to the company's cash flow from the impugned transaction is not addressed. Secondly, there was never any real evidential basis for the liquidator's initial valuations of €470,000 (current value) or €360,000 (December 2018 value). Thirdly, when the liquidator eventually sought a formal valuation, the claimed differential between the sale price and market value as of December 2018 was reduced by nearly 50% from €110,000 to €60,000. Whilst a difference of €60,000 is not negligible, in a fluctuating property market it is commensurately more difficult to assume that the smaller differential arose because of a deliberate undervaluing of the property to the detriment of the company.

64. So, where does that leave the Court? Valuation of property is never an exact science as is evident from the fact that at least one of these valuations is qualified by reference to the availability or non-availability of a first-time buyer's grant. I note too that the ultimate sale of thirty-one units to Tuath is stated to have been at a discount of €100,000 per unit – although no specific evidence was offered as to this and no breakdown provided as to the value placed on different sized units in the context of this sale. Ostensibly, the Court is faced

with competing December 2018 valuations for No.12 of €310,000 or €250,000. Both values are based on the standard methodology of a comparative analysis between prices achieved for similar sized property in the same general area. However, the first figure is the view of one valuer whereas the second figure is supported by three valuers.

65. More significantly in the context of litigation, the only valuer who has provided evidence on affidavit to support his value is Philip Byrne of Coonan Property (who supports the €250,000 valuation). The liquidator did not seek to cross-examine Mr Byrne. When squarely faced with the problems this created in light of the Supreme Court decision in *RAS Medical v Royal College of Surgeons* [2019] 1 IR 63, it was suggested on the liquidator's behalf that the Court could rely on the liquidator's valuer's report because it had been adopted by the liquidator. I do not accept this submission. I accept that the liquidator is exercising a specific statutory role in the context of the winding-up of the company. Nonetheless he has brought this application before the court and bears the onus of proving that the orders he seeks should be made. He must discharge that onus according to the usual rules of evidence. Where there is a dispute on a key issue and an opposing party has adduced formal evidence to support their position which evidence has not been challenged, the court cannot prefer contrary hearsay evidence simply because it has been led by the liquidator. In those circumstances I am compelled to conclude that the market value of No.12 Willouise in December 2018 was more likely to have been in the order of €250,000 than €310,000.

66. Furthermore, even if €250,000 does not represent the absolute maximum price that might have been achieved for No.12 in December 2018, I am satisfied that it was a reasonable value for the company to have placed on the contract in all of the circumstances. A consideration of those circumstances must include the fact that the company was in urgent of funds in order to maintain its then-existing credit from Lotus DAC and the contract required the immediate payment of significantly enhanced deposit by the purchaser. In

addition to the striking failure to procure a valuation before commencing proceedings, one of the significant weaknesses in the liquidator's case is his failure to engage with the rationale behind the transaction and the undoubted benefit conferred on the company by the immediate payment of such a large deposit.

67. Instead, the liquidator adopted a stance, which I regard as unsustainable, that there was no benefit to the company or no evidence before the Court as to the benefit to the company. Given that the director of the company, Noel Keane, and the *de facto* director of the company, John Meade, have both sworn to the immediate financial crisis and threat of receivership facing the company in late 2018 which was staved off in part through the use of the funds raised by this deposit, this stance simply cannot be correct. The value to the company of a transaction entered into in a non-standard form prejudicial to the intending purchaser and in circumstances of great urgency cannot necessarily be equated with the market value of the transaction absent those features. I note that John Meade describes the December 2018 sale as being at an attractive price but not deviated from the market and Olive McCormack states that she understood she was getting a discount but a far smaller discount than had been represented to her by John Meade.

68. I also do not accept the argument made by the liquidator that the company should have put itself into liquidation at that time. A company set up for the purposes of carrying out a specific residential development will always be operating on credit until the building works have reached a point where the units can be sold in order to realise a profit. This does not necessarily mean that the company is insolvent until that point is reached as it is likely to be in possession of very valuable assets, albeit assets which cannot be realised until the development is complete.

Conclusions on S.608

69. In light of my conclusions on the valuation evidence, I do not think that the liquidator has established that the effect of the disposal of No.12 pursuant to the December 2018 contract was to perpetrate a fraud on the company, its creditors, or members. Therefore, the criteria set out in s.608(1) have not been satisfied such that the court does not have jurisdiction to exercise the power conferred on it by that section to make orders requiring the property to be delivered up to the liquidator or, in the context of this particular application, for the sale to be completed on terms designed to mitigate the effect of the alleged fraud. I will refuse the relief sought under s.608.

Discussion on s.238

70. The liquidator has sought alternative relief under s.238 which section is not dependant on his establishing that the effect of the transaction was fraudulent. Strictly speaking an arrangement may contravene s.238 simply because it is entered into between a company and a director or a connected person without the requisite advance approval by resolution of the company in general meeting. The transaction does not have to be at an undervalue nor does the liquidator have to establish any other improper conduct. However, an arrangement which breaches s.238 is not automatically void but instead is voidable at the instance of the company. In considering whether a transaction which is alleged to breach s.238 should be voided, the Court must consider the transaction as a whole which necessarily will include the extent to which the company has been disadvantaged by entering into it.

71. In the context of this application, the notice parties have made two specific arguments concerning s.238. The first is to contend that the consent of the shareholders can be assumed to have been given to both the 2018 and 2019 transactions because the only shareholder, Noel Keane, signed the relevant documentation on behalf of the company. The second is an

argument made on behalf of Tulfarris and will only arise in the event that the first argument does not succeed. Tulfarris argues that relief should in any event be declined because it is a *bona fides* purchaser for value without notice and under s.238(3)(b) the fact that its rights would be affected is an automatic bar to the grant of relief under the section. However, before either of these issues are reached it is necessary, if possible, to identify precisely the transaction which the liquidator seeks to impugn. This issue arises because of the two conflicting accounts given concerning the 2018 transaction, namely that Olive McCormack was the purchaser on her own behalf, or that Olive McCormack purchased in trust for Louise Meade.

72. In my view, it is not possible for the Court to resolve this issue on the basis of affidavit evidence. The evidence on affidavit as set out above, is contradictory and indeed at times simply illogical. However, both Louise Meade and Olive McCormack have sworn affidavits and the liquidator has not sought to cross examine either of them. Therefore, in accordance with the law as set out by the Supreme Court in *RAS Medical v. Royal College of Surgeons* (above) the court is faced with two conflicting accounts on affidavit neither of which can be rejected. In *RAS Medical*, the Supreme Court held that it was inappropriate for sworn affidavit evidence to be rejected either by reference to other sworn affidavit evidence or documentary materials without giving the deponent concerned an opportunity to answer any question as to why the sworn evidence should not be regarded as credible or reliable. Clarke C.J. stated at para. 92 of that judgment:

> *"[92] But it is frankly not appropriate for parties to enter into controversy as to the facts contained either in affidavit evidence or in documents which are admitted before the court without successful challenge, without exploring the necessity for at least some oral evidence. If it is suggested that there are facts which are material to the final determination of the proceeding and in respect of which there is potentially*

conflicting evidence to be found in such affidavits or documentation, then it is incumbent on the party who bears the onus of proof in establishing the contested facts in its favour to use appropriate procedural measures to ensure that the potentially conflicting evidence is challenged. Where, for example, two individuals have given conflicting affidavit evidence and where it is considered that a resolution of the dispute between those witnesses is necessary to the proper disposition of the case, then there has to be cross-examination and the onus in that regard rests on the party on whom the onus of proof lay to establish the contested fact."

73. The onus of proof on this application lies on the liquidator. Notwithstanding the contents of the declaration of trust (the validity of which has now been questioned by Tulfarris) and of Louise Meade's affidavit, the contradictory evidence in Olive McCormack's affidavit and the undisputed fact that Olive McCormack paid a €150,000 deposit for the property means that the liquidator has not discharged the onus of proof upon him to show that the December 2018 transaction was one entered into on behalf of or for the benefit of Louise Meade. I don't discount that this may indeed have been the case, but the evidence before me does not establish that it was. Nor can the Court safely conclude that this was the case in the face of unchallenged contradictory evidence on affidavit from Olive McCormack. Consequently, the liquidator has not established that the December 2018 transaction was entered into by a person connected with the company within the meaning of ss. 220 and 221 of the 2014 Act nor, by extension, the applicability of s.238 to that transaction.

74. The liquidator makes a strong case to the effect that as a result of the 2019 transactions, No. 12 ended up being provided as security for a loan made by Tulfarris to John Meade, a former *de facto* director of the company. However, in circumstances where the liquidator has not established that Louise Meade was the beneficiary of a trust created in December

2018, then legally speaking it follows that the initial assignment on 29 November 2019 between Olive McCormack and Louise Meade was not one to which the company was a party and, thus, is not one to which s.238 applies.

75. Arguments made by the liquidator as regards the propriety of Tulfarris accepting the further assignment of the contractual rights relating to No.12 by way of security for the loan and allegedly not following Law Society guidelines as to the need for a certificate in relation to transactions between natural persons and companies are off-point since the 2019 transactions did not involve the company (other than in a confirmatory capacity). In other words, the security which Tulfarris acquired pursuant to that assignment was not something which it acquired from the company although the company consented to both Olive McCormack's assignment to Louise Meade and Louise Meade's assignment to Tulfarris.

76. Based on the above analysis I am not satisfied that the liquidator has established that either of these transactions came within s.238. I have some sympathy with the liquidator because even to an impartial observer the circumstances in which Olive McCormack ostensibly purchased property in December 2018 which came to be transferred to Louise Meade in November 2019 and then used to secure John Meade's loan are certainly irregular. It may well be the case that one or other of the transactions do, in fact, come within the criteria set out in s.238(1) but on the state of the evidence before the Court it is not possible to conclude to the requisite standard of proof that this is the case. It is tempting to assume that if one version of the transaction does not fall within s.238, then the other must - but in order to grant relief the court must be satisfied that the transaction falls within the section and cannot simply assume this to be the case because the transaction is not otherwise satisfactorily explained. Consequently, it follows that the Court should not exercise jurisdiction to avoid either of these contracts. However, lest I am wrong in this conclusion I propose to offer a brief view on both of the other issues which have been raised.

77. All of the parties cited the *Duomatic* principles to the Court – principles which flow from *Re Duomatic Limited* [1969] 2 Ch 365 – without actually opening that case nor providing a copy of it to the Court in the Book of Authorities. Simply put, the principle is as follows:

> *"Where it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be."*

Applying that principle, the assent of the only shareholder of the company to both the 2018 transaction to which the company was a party and the 2019 transactions which the company affirmed amount in substance to the consent of the company as if a resolution had been passed at a general meeting. The same principle had been recognised somewhat earlier by the Irish Courts in *Buchanan Limited v. McVeigh* [1954] IR 89. There, Kingsmill Moore J. held in the High Court (in a judgment affirmed by the Supreme Court) that where the corporators of a company agreed to a transaction, then, however informal the manner of their agreement, it is an act of the company and binds the company subject only to two pre-requisites, is firstly that the transaction should be *intra vires* the company and secondly that the transaction should be honest.

78. There is no question but that the transactions in question are *intra vires* the company. However, the liquidator contends that the *Duomatic* principles do not apply because the second criteria set out in *Buchanan v. McVeigh* is not complied with, namely that the transaction was not honest. However, the only ground advanced by the liquidator upon which he impugned the honesty of the transaction was that it was at an undervalue. As I have already found that the liquidator has not established that the transaction was at an undervalue, it follows that he has not established that it was dishonest such that the *Duomatic*

principle should not apply. Therefore, were the Court required to determine this issue, I would be compelled to conclude that the arrangements had been approved within the meaning of s.238(1)(i) such that the transaction did not come within s.238(1).

79. The second issue which is raised by Tulfarris only is even that if the transaction came within s.238(1) nonetheless the contract would not be voidable because rights acquired by it *bona fide* for value and without actual notice of the contravention would be affected by its avoidance (s.238(3)(b)). Tulfarris was unable to put a specific value on the rights required by it because the loan of €375,000 was secured not only on No.12 but also on the Oldcastle lands, the value of which was not before the Court. Nonetheless, it argued that it was not a volunteer in the November 2019 transactions and thus, it had required rights for value in the December 2018 contract.

80. Against this the liquidator argued that because of the e-mails between Louise Meade's solicitor (who had previously been the company's solicitor) and Tulfarris on 21 November 2019 in which both the contract price and the value of the property at €360,000 were set out, Tulfarris had actual notice of the discrepancy which should have triggered enquiries in relation to s.238.

81. Whilst there is certainly logic in the liquidator's suggestion that these circumstances should have triggered further enquiries, the text of s.238(3)(b) speaks in terms of the *bona fide* purchaser *"without actual notice of the contravention"*. The contravention in question is a contravention of s.238 – i.e. that a director or a connected person has acquired an asset from the company without the approval of its shareholders. Failure to follow a line of enquiry as to the value of the property is not the equivalent of actual notice of the connection between the Meades and the company much less of the absence of shareholder approval for the transaction. This is particularly so in circumstances where John Meade was not a registered director of the company such that it should have been readily apparent to anyone

dealing with him or his daughter that s.238 could potentially be engaged. This issue is perhaps the least clear cut of the three, especially since Tulfarris was under the impression that Louise Meade was the beneficiary of a trust by virtue of having paid the deposit for the property in December 2018 which it now believes not to have been the case. However, in light of my conclusions that there was *de facto* shareholder approval of the transaction and that the only basis on which the liquidator alleges the transaction was not honest has not been made out, it seems to me that the liquidator's objections to Tulfarris' *bona fides* have not made out either.

82. In light of these conclusions, I do not propose to rule on the procedural objection taken by Tulfarris to the effect that only the company and not the liquidator can bring an application under s.238. The proceedings are unusual in that the title does not indicate the identity of the applicant and, although the initial grounding affidavit is sworn by the liquidator, he does not state whether he is swearing it on his own behalf or on behalf of the company in liquidation. I note the authority relied on by Tulfarris (*Tucon Process Installations Ltd. (In liquidation) v Bank of Ireland* [2016] IECA 211) to the effect that the nomination of specific parties as potential applicants expressly precludes such statutory applications being brought by a party other than those specified. I also acknowledge the difference between the liquidator acting *qua* liquidator and the liquidator relying on the power under s.627 of the 2014 Act to bring or defend proceedings in the name of the company. However, as this point was not raised in any form prior to the hearing such that the liquidator did not have an effective opportunity of replying to it and because it will not be determinative of this application either way, I do not propose to address it further.

Summary of Conclusions:

83. In all of the circumstances I am not satisfied that the liquidator has established that the contract entered into in December 2018 was at an undervalue. In those circumstances, it would be inappropriate for the Court to grant relief under s.608. Further, whilst the grant of relief under s.238 is not dependant on the impugned contract being at an undervalue, it is dependent on the liquidator establishing that the transaction was one between the company and either a director or a person connected with such a director. For the reasons set out above I am not satisfied that the liquidator has discharged this onus of proof either. Consequently, I will refuse the relief sought.