Neutral Citation Number: [2010] IEHC 300

THE HIGH COURT

COMMERCIAL

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BETWEEN

SABINA KERR, LIAM YOUNG, MICHAEL TUNNEY, LIAM LENEHAN AND

LAURENCE K. SHIELDS

PLAINTIFFS

AND

CONDUIT ENTERPRISES LIMITED

DEFENDANT

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 22nd day of July, 2010

1. The first named plaintiff is the daughter and residual legatee of the will of Edward B. Kerr, deceased ("Mr. Kerr"). The estate of Mr. Kerr and the second, third, fourth and fifth named plaintiffs (collectively hereinafter "the Landlords") are the owners of a property known as Block V, East Point Business Park, East Wall Road, Dublin 3 ("Block V").

2. By lease dated 5th December, 1997, the Landlords demised Block V to the defendant for a term of 25 years at an annual rent of IR£240,785 (€305,797) payable quarterly in advance ("the Lease"). On the date of execution of the Lease, Mr. Kerr and Mr. Young were both shareholders and directors of the defendant. There were two other persons who were also both directors and shareholders, namely, Ms. Christine Donaghy and Mr. Jeremiah McCarthy.

3. The defendant went into occupation of Block V and until December 2008 occupied Block V and complied with all relevant terms of the Lease including in relation to rent reviews and payment of rent.

4. The defendant entered into a lease of Block P1 East Point on 3rd August, 2000, which it continues to occupy.

5. Between 1997 and 2008, there were multiple ownership changes of the defendant, several of which included due diligence. In May 2006, the defendant was sold to Infonxx Inc., a US registered company.

6. By letter dated 4th December, 2008, the defendant indicated that it proposed to treat the Lease as void and that it would accordingly surrender the property on 3rd January, 2009. The stated basis for the proposed avoidance was that at the time the Lease was entered into Mr. Kerr and Mr. Young were directors of the defendant and from a review of the Company's books and records no resolution was passed either then or subsequently by the members of the defendant approving the Lease. Hence pursuant to s. 29 of the Companies Act 1990, the transaction was voidable at the instance of the defendant and the defendant was electing to treat the Lease as void.

7. By plenary summons issued on 20th April, 2009, the plaintiffs seek a declaration that the Lease of 5th December, 1997, of Block V is valid and binding on the defendant and certain consequential relief.

Issues

8. The relevant facts and submissions in the proceedings all relate to the proper construction of s. 29 of the Companies Act 1990 and its application to the facts herein. Section 29, insofar as relevant, provides:

> "29(1) Subject to subsections (6), (7) and (8), a company shall not enter into an arrangement—
>
> (a) whereby a director of the company or its holding 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 company; or
>
> (b) whereby the company acquires or is to acquire one or more non-cash assets of the requisite value from such a director or a person so connected;
>
> unless the arrangement is first approved by a resolution of the company in general meeting and, if the director or connected person is a director of its holding company or a person connected with such a director, by a resolution in general meeting of the holding company.
>
> (2) For the purposes of this section a non-cash asset is of the requisite value if at the time the arrangement in question is entered into its value is not less than €1,269.74 but, subject to that, exceeds €63,486.90 or ten per cent of the amount of the company's relevant assets, and for those purposes the amount of a company's relevant assets is—
>
> (a) except in a case falling within paragraph (b), the value of its net assets determined by reference to the

accounts prepared and laid in accordance with the requirements of section 148 of the Principal Act in respect of the last preceding financial year in respect of which such accounts were so laid;

(b) where no accounts have been prepared and laid under that section before that time, the amount of its called-up share capital.

(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—

(a) restitution of any money or any other asset which is the subject-matter of the arrangement or transaction is no longer possible or the company has been indemnified in pursuance of subsection (4) (b) by any other person for the loss or damage suffered by it; or

(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, within a reasonable period, affirmed by the company in general meeting and, if it is an arrangement for the transfer of an asset to or by a director of its holding company or a person who is connected with such a director, is so affirmed with the approval of the holding company given by a resolution in general meeting

. . .

(9) In this section—

(a) 'non-cash asset' means any property or interest in property other than cash, and for this purpose 'cash' includes foreign currency;

(b) any reference to the acquisition of a non-cash asset includes a reference to the creation or extinction of an estate or interest in, or a right over, any property and also a reference to the discharge of any person's liability other than a liability for a liquidated sum; and

(c) 'net assets', in relation to a company, means the aggregate of the company's assets less the aggregate of its liabilities, and for this purpose 'liabilities' includes any provision for liabilities or charges within paragraph 70 of the Schedule to the Companies (Amendment) Act, 1986."

9. The defendant relied, in its submissions, on the proper interpretation of s. 29 on s. 25(4)(c) and (5) which provide:

"25(4) For the purposes of this Part, the value of a transaction or arrangement is-

. . .

(c) in the case of a transaction or arrangement, other than a loan or quasi-loan or a transaction or arrangement within paragraph (d) or (e), the price which it is reasonable to expect could be obtained for the goods, land or services to which the transaction or arrangement relates if they had been supplied at the time the transaction or arrangement is entered into in the ordinary course of business and on the same terms (apart from price) as they have been supplied or are to be supplied under the transaction or arrangement in question;

. . .

(5) For the purposes of subsection (4), the value of a transaction or arrangement which is not capable of being expressed as a specific sum of money (because the amount of any liability arising under the transaction is unascertainable, or for any other reason) shall, whether or not any liability under the transaction has been reduced, be deemed to exceed €63,486.90."

10. The issues which require to be resolved in these proceedings are some or all of the following:

(i) whether the Lease of 5th December, 1997, was a non-cash asset of the requisite value for the purposes of s. 29 of the Companies Act 1990;

(ii) was the defendant in breach of s. 29(1) when it entered into the Lease on 5th December, 1997;

(iii) if so, was the Lease voidable at the instance of the defendant in December 2008, having regard, in particular, to s. 29(3)(b) and the rights allegedly acquired by Bank of Scotland (Ireland) Ltd. and Investec Limited.

(iv) Is the defendant now estopped from avoiding the Lease.

Applicability of s. 29 of the Act of 1990

11. The parties are agreed that the onus is on the defendant to establish that s. 29 of the Act of 1990 applied to the grant of the Lease on 5th December, 1997. Further, that this requires the defendant to establish that the Lease was then a non-cash asset of the requisite value within the meaning of section 29(2).

12. It is not in dispute that the defendant, in entering into the Lease, acquired an interest in property other than cash, and did so from two of its then directors who were two of the lessors. The issue in dispute is as to whether or not that "interest in property",

constituting the non-cash asset, was of the requisite value specified by s. 29(2) *i.e.* not less than €1,269.74 and exceeding either €63,486.90 or 10% of the amount of the company's relevant assets.

13. The following are the relevant facts and expert evidence adduced upon which the Court has to determine this issue in dispute. The Landlords purchased Block V in December 1997 for approximately IR£3.2 million. The Lease demised Block V to the defendant for a term of twenty-five years. The initial rent reserved under the Lease was IR£240,785 (€305,797 approximately) *per* annum. The Lease contained a five-yearly upward-only rent review clause. No premium or fine was payable by the defendant to the Landlords on the grant of the Lease.

14. The expert evidence of Mr. Michael Donohoe, valuer, called by the defendant, was that the initial rent reserved under the Lease represented market rent in December 1997. The capitalised value of the Lease to a landlord in December 1997 was in his opinion €3,760,000. That sum, he explained, as being the capital value of the interest of the Landlords on an investment basis, having applied a yield appropriate to office investments of a similar nature pertaining at that period. Mr. Donohoe expressed the opinion that the assignment value of the Lease, if the defendant, as tenant, was to assign the Lease to another party, was a nil value.

15. The defendant also adduced expert evidence from Mr. Kieran Wallace, chartered accountant, and a partner in KPMG. First he reviewed the defendant's audited financial accounts for the year ended 31st March, 1997, and concluded that an accurate valuation of the defendant's net assets at that date was IR£102,919.

16. Mr Wallace did not review the subsequent financial statements of the defendant. However, in his report to the Court, which constituted his evidence by consent (he was not presented to give oral evidence and not required by the plaintiffs to attend for cross-examination), in the context of referring to the value of the "transaction" for the purposes of s. 25(4)(c) of the Act of 1990, states, at paragraph 2.4.3:

> "In respect of the lease, and on the basis that the lease/rental charge paid was the market rate, I would expect the Company to have accounted for that rent as an annual expense in its profit and loss account and that no asset value relating to the lease would be accounted for on the Company's balance sheet. The value of the transaction to the Company is the annual rental charge under the contract and recording the expenses would be consistent with S. 25(4)(c) of the Companies Act 1990."

17. The agreed documents produced in evidence included the abridged financial statements for the year ended 31st March, 1998. It is commoncase, as expected by Mr Wallace that the defendant did not include, in its balance sheet, an asset value in relation to the Lease and that the rent payable was treated as an expense in the accounts.

18. On the above facts and undisputed evidence, the relevant figure for determining ten per cent. of the amount of the company's relevant assets is the defendant's net assets as disclosed in its abridged financial statements for the period ended 31st March, 1997, being IR£102,919. Ten per cent. of same is IR£10,292 (€13,068). As this is less than €63,486.90 it is the relevant figure.

19. Counsel for the defendant makes a number of alternative submissions as to why the acquisition by the defendant of the lessee's interest under the Lease in December 1997 was the acquisition of a non-cash asset with a value greater than IR£10,292.

20. First, counsel draws attention to and relies upon the definition of the value of "a transaction or arrangement" for the purposes of Part III of the Act of 1990, in section 25(4)(c). Section 29 of the Act of 1990 is within Part III. However, whilst s. 29(1) prohibits a company from entering into "an arrangement" whereby the company acquires one or more non-cash assets of the requisite value, it is not the value of the arrangement which is relevant, but rather, the value of the non-cash asset, for the purposes of the application of section 29. Considering Part III of the Act of 1990, there is, in my view, a clear distinction made by the Oireachtas in the words used in ss. 25 and 29 between, on the one hand, the value of "a transaction or arrangement", as defined in s. 25(4), and the value of "a non-cash asset" for the purposes of section 29. Section 25 does not address the valuation of a non-cash asset for the purposes of s. 29, and, accordingly, I have formed the view that it is not applicable to the valuation of the non-cash asset acquired by the defendant in entering into the Lease in December 1997. It appears appropriate to note that a lease may constitute a credit transaction for the purposes of Part III of the Act of 1990 by reason of the definition of credit transaction in s. 25(3)(b) as a transaction under which one party "leases . . the use of land . . in return for periodical payments". However, s. 29 does not, of course, apply to a "credit transaction" as defined, but rather, to the acquisition of a "non-cash asset". Other sections in part III of the 1990 Act do apply to credit transactions.

21. It follows from this conclusion that insofar as Mr. Wallace has expressed an expert view to the Court that the value "of the transaction to the company" is the annual rental charge under the contract, having regard to the definition in s. 25(4)(c), such value is not a relevant value for the purposes of the Court determining the value of the Lease as a "non-cash asset" for the purposes of section 29.

22. Counsel for the defendant also drew attention to s. 25(5) of the Act of 1990, and, if necessary, sought to rely on same. As it also applies to the value of a "transaction or arrangement", for the same reasons in my view, the sub-section does not apply to the valuation of a non-cash asset allegedly acquired in breach of section 29.

23. The primary submission of counsel for the defendant was that the appropriate value of the non-cash asset for the purposes of s. 29 is the capital value of the non-cash asset. In support of that proposition, he referred the Court to a judgment of the English High Court, Lewison J. in *Ultraframe (U.K.) Limited v. Fielding* [2005] E.W.H.C. 1638 (Ch.), [2006] F.S.R. 17. That judgment primarily concerns the application of s. 320 of the UK Companies Act 1985, (which is, for this purpose, in similar terms to s. 29 of the Act of 1990) to licences of intellectual property rights. However, in the course of the judgment, Lewison J. considered the application of s. 320 of the 1985 Act, to the grant of a lease. At issue appear to have been leases at rack rents by the directors, Mr. and Mrs. Fielding, to a company Sequest.

24. At para. 1369, Lewison J., having referred to reservations expressed by counsel as to the application of s. 320 to the grant of leases, stated:

> ". . . in my judgment, it plainly does. If, say, a director grants a long lease to a company at a substantial premium, I can see no policy reason for holding that the literal words of section 320 do not apply to such a transaction."

25. Lewison J. then went on to consider whether or not the leases are non-cash assets of the "requisite value". In considering that issue, he stated as follows:

"1371 The essential question, therefore, is how to characterise the asset acquired by the company. Is it the lease; or is it the right to possession granted by the lease? First, on the face of it, the comparators are all capital sums, especially the company's net asset value, and its called up share capital. In any comparison one would expect to compare like with like. That would indicate that one is looking for a capital value on the other side of the comparison. Second, a non-cash asset is described in terms of property or an interest in property. The property interest created by a lease is the lease itself. Third, a lease may be granted for an indeterminate period (e.g. an annual tenancy). If one is required to assess the aggregate of the rental payments that will fall due during the term of the lease, the practical problems will be acute. If, on the other hand, one is expected to undertake a discounted cash flow or a capitalisation of the rent at an appropriate rate, there would seem to be a lot of room for argument about value, which is unlikely to have been Parliament's intention. And if a lease is granted for a long fixed term at a modest rent, an assessment of the aggregate rental payments which will fall due during the term might bring the transaction within the scope of section 320. Since the purpose of the section is to deal with 'substantial' property transactions, this would be surprising. Fourth, Hodgson J. held in Niltan Carson Ltd v. Nelson [1988] BCLC 298 that the periodic rent would appear in the company's accounts as a debit item and could not, therefore, represent its value for the purposes of the section. Fifth, contracts with directors require the director's interest to be disclosed either under the articles or under section 317 of the Companies Act or both; and consequently there is some control over a company entering into rack rent leases with a director.

1372 I conclude, therefore, that the asset is properly characterised as the lease rather than the periodic value of the right to occupy; that the relevant value is its capital value."

26. I respectfully agree with Lewison J. that where a company enters into a lease, as lessee, then, for the purposes of s. 29 of the Act of 1990, what it acquires, as the non-cash asset, is the lessee's interest in the property granted by the lease or as is sometimes shortly put, "the lease". Further, that having regard to the comparators in s. 29(2), that the value of the non-cash asset is the capital value of the lease.

27. There is one further refinement which may be implicit in the judgment of Lewison J. but if not, is, in any event, a view which I have formed on the proper interpretation of s. 29 of the Act of 1990. When, as on the facts herein, a company is acquiring the non-cash asset from the directors, what the defendant has acquired is the lessee's interest in the property under the Lease. It is therefore the capital value of the lessee's interest under the Lease or the capital value of the Lease to the defendant/lessee which is the relevant value for the purposes of section 29(2).

28. The expert evidence of Mr. Donohoe gives the Court two capital values. First, the capital value of the lease to a landlord and, secondly, the assignment value of the lease if the lease were to be assigned by the tenant *i.e.* the defendant. The landlord's interest under a lease is quite different to that of the tenant. The landlord has the right to receive the rent and the benefit of other covenants. It is clear that the capital value opined by Mr. Donohoe is the right of the landlord to receive rent on an investment basis applying appropriate yields. That is not the interest which has been transferred to the defendant, as tenant. The defendant as tenant has an estate or interest in the property which gives it a right to exclusive possession and, *inter alia*, a right to assign its interest under the Lease, subject to consent of the landlord.

29. In my view, the assignment value of the Lease is similar to the capital value of the lessee's interest. If the defendant, as lessee, had, shortly after the grant of the Lease, sought to realise the capital value of the Lease granted to it, it could have done so by assigning, in accordance with clause 5.30 of the Lease, with the consent of the landlord. Mr. Donohoe's view is that there was no capital value to the defendant on such an assignment. The further relevant evidence of the nil capital value is the absence of the payment by the defendant of any premium or fine on the granting of the Lease. Consistent with the nil capital value, the Lease is not represented in the balance sheet of the defendant as an asset with a value.

30. Accordingly, I have concluded that the defendant has failed to establish, as a matter of probability, that the value of the non-cash asset acquired by the defendant from two of its directors and others *i.e.* the Lease or the lessee's interest under the Lease, was, in December 1997, in excess of IR£10,292. Hence, whilst the defendant did acquire a non-cash asset from two directors, it has failed to establish that it acquired a non-cash asset of the requisite value within the meaning of s. 29 of the Act of 1990.

31. Whist this conclusion is sufficient to dispose of the proceedings in favour of the plaintiffs, I have decided that, having regard to the absence of prior authority in this jurisdiction, and that the subsequent issues are, in part, dependent on findings of fact on the evidence I heard, that I should also consider the next issue if s. 29 were held to apply to the grant of the Lease contrary to the conclusion I have formed.

Breach of Section 29(1)

32. The next issue identified is whether the defendant was in breach of s. 29 of the Act of 1990 when it entered into the Lease on 5th December, 1997. Section 29(1) in its express terms prohibits the company from acquiring a non-cash asset (including a lease) of the requisite value from its directors unless the arrangement is first approved by a resolution of the company in general meeting.

33. Evidence was given by the three surviving directors/shareholders from 1997 and the surviving Landlords. All appeared truthful and I accept their evidence. Whilst much evidence was given in relation to the start-up and development of the defendant, the need to acquire new premises in 1997, the discussions leading up to the decision to enter into the Lease and to the keeping of minutes of the meetings of the board of directors and the company and failure to produce same, it is sufficient to make the following findings of fact, many of which were not in dispute:

(i) In 1997, there were four persons who were both all the directors and all the shareholders of the defendant. They were the late Mr. Kerr, Mr. Young, Ms. Christine Donaghy and Mr. Jeremiah McCarthy. The latter three were the first directors and shareholders in early 1996 and Mr. Kerr became a shareholder and director a few months later.

(ii) The defendant operated initially out of 11/12, Warrington Place. In November 1996, it entered into a one year lease of an office premises at Clanwilliam House, Lower Mount Street. Its business expanded rapidly and, in particular, in February 1997, it obtained a contract from Esat Digfone which had recently been awarded Ireland's second mobile licence.

(iii) In the summer of 1997, the search for new and bigger premises became acute. Ultimately, Block V, East Point Business Park, was identified.

(iv) In 1997, it was the practice to hold regular board meetings of the defendant. Mr. Kerr was chairman and conducted procedurally correct directors' meetings, giving each director an opportunity to consider and have their say on the issues involved. Minutes of Board meetings were kept and signed by Mr Kerr. The files with those minutes appear to have been

mislaid prior to the commencement of these proceedings.

(v) Whilst the defendant was expanding rapidly, it had no financial track record and it was not feasible for it to obtain finance to purchase Block V. A group of investors was identified including two of the directors/shareholders to acquire Block V. It was proposed that the defendant enter into a Lease with the investors.

(vi) At several of the directors' meetings in the autumn of 1997, the move to Block V and the proposed Lease were discussed. At one such meeting, prior to execution of the Lease it was expressly resolved by the directors that the defendant enter into the Lease of Block V. It was known to all four directors/shareholders that the investors acquiring Block V and intended lessors included two of the directors/shareholders. The principal terms, such as rent and reviews, were also known to all the directors/shareholders.

(vii) No general meeting of the defendant was held at which there was a resolution passed by the shareholders authorising the defendant to enter into the Lease. Nevertheless, all four shareholders with an entitlement to attend and vote at a general meeting of the company, had agreed, at a meeting of the Board of Directors, that the defendant should enter into the Lease. Enterprise Ireland then held non-voting preference shares. It had a right to receive notice of, attend, but not vote at, general meetings of the defendant.

(viii) The arrangement whereby the defendant entered into the Lease was honest and *intra vires* the defendant.

(ix) The defendant's abridged financial statements for the year ended 31st March, 1998, in their notes under a heading 'Related Party Transactions' states "the company leases its premises from a consortium of owners, two of whose participants are directors of Conduit Enterprises Limited. Details of their interest in the premises are as follows:

	%
Edward Kerr	15
Liam Young	10
	25

Total rent payable by the company to the consortium amounted to IR£78,259 for the year ended 31 March 1998 (1997: IR£Nil)."

These financial statements were approved in July 1998 and put before the Annual General Meeting and subsequently filed in the company's office.

(x) The fact that the Lease was a "related party transaction" was regularly disclosed in subsequent accounts and in the due diligence conducted prior to the acquisition in 2006.

34. On the above findings of fact, I find that all the shareholders with a right to both attend and vote at a general meeting of the defendant ("the ordinary shareholders") had, albeit at a meeting of a board of directors of the defendant, agreed to and authorised the defendant to enter into the Lease of 5th December, 1997 prior to its execution.

35. Counsel for the plaintiffs submits that on those facts the Court should treat the agreement of all the ordinary shareholders to the defendant entering into the Lease as satisfying the requirement of s. 29(1), that the arrangement whereby the company was to enter into the Lease be first approved by a resolution of the company in general meeting. He does so in reliance upon the purpose of the section and the mischief sought to be prevented thereby, *Buchanan Ltd. v. McVey* [1954] I.R. 89 certain other Irish authorities and also a significant line of English authority which has become known as the "*Duomatic* principle".

36. Counsel for the defendant submits that the Court should not follow the English line of authority in the application of the *Duomatic* principle. He submits that to do so would do violence to the clear intention of the Oireachtas expressed in the words used by it in s. 29(1) of the Act of 1990. He submits that s. 29(3) sets out the exclusive circumstances in which the Oireachtas intended that an arrangement entered into without prior approval by resolution of the company in a general meeting would not be subsequently voidable at the instance of the company. Counsel for the defendant also submits that whilst it is accepted that the evidence is that all four shareholders, in their capacity as directors, approved the defendant entering into the Lease, there is no evidence of their specific agreement to the precise terms of the Lease.

37. In this jurisdiction, since the decisions of the High Court and Supreme Court in *Buchanan Ltd. v. McVey* [1954] I.R. 89, it appears settled law that the informal agreement of all the shareholders to do something which is honest and *intra vires* the company is to be regarded as an act of the company and does not require a formal resolution of the company in general meeting. That case concerned a claim by a liquidator for monies due to the company by the defendant as director, trustee and agent. Amongst the defences raised was that the defendant had received the sums alleged, not in his capacity as director, but as a shareholder in pursuance of an agreement between all the corporators and that, accordingly, an action for account did not lie against him at the suit of the company. In the High Court, Kingsmill Moore J., at p. 96, stated:

> "There was no formal meeting of the Company to authorise the disposal of its property to the defendant, no resolution, however informal, to that effect. It is now settled law that neither meeting nor resolution is necessary. If all the corporators agree to a certain course 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: *In re Express Engineering Works Ltd* (1); *Parker and Cooper Ltd v. Reading* (2).
>
> The two necessary pre-requisites are 1, that the transaction to which the corporators agree should be *intra vires* the Company; 2, that the transaction should be honest: *Parker and Cooper Ltd v. Reading* (1), per Astbury J. at pp. 984, 985.

38. In the Supreme Court, Maguire C.J., at p. 118, without reference to authority, stated in shorter form the same principle:

> "It is admitted that there was no formal meeting of the Company to authorise the disposal of its property to the defendant and no formal resolution to that effect. It is however settled law that no meeting and no formal resolution is necessary. It is necessary however that an agreement of this kind to be valid must both be *intra vires* the Company and

must be honest. The trial Judge held that neither of these requisite conditions was fulfilled."

39. Whilst the principle, as stated in *Buchanan Ltd. v. McVey* has subsequently been cited with approval by the Supreme Court and High Court (see *In Re Greendale Developments (In Liquidation) (No. 2)* [1998] 1 I.R. 8, Keane J. at p. 21 and *In Re P.M.P.A. Garages Ltd*. [1992] I.R. 315, Murphy J., at p. 326), it does not appear to have been considered in relation to the type of statutory requirement specified in s. 29(1) of the Act of 1990. However, what appears to be the same principle has been so applied in England and is known as the *Duomatic* principle.

40. The *Duomatic* principle applied by the English Courts, *inter alia*, to s. 320 of the Companies Act 1985, derives from a decision of Buckley J. in *Re Duomatic Limited* [1969] 2 Ch. 365. On the facts of that case, Schedule 1, Table A, Part 1, Art. 76, applied to the company which provided "the remuneration of the directors shall from time to time be determined by the company in general meeting". The liquidators sought repayment of sums paid to two directors, Mr. Elvins and Mr. Hanly, as salaries on the grounds that such sums had never been voted in general meeting. On the facts, it was held that no formal resolution was passed but the remuneration had been approved of by the shareholders with a right to attend and vote at a general meeting. It appears from the judgment of Buckley J. that the two cases relied upon by counsel for the directors in that case were the same two cases cited by Kingsmill Moore J. in *Buchanan Ltd. v. McVey* as authority for the proposition that he then considered to be settled law, namely, *In Re Express Engineering Works Ltd.* [1920] 1 Ch. 466, and *Parker and Cooper Ltd. v. Reading* [1926] Ch. 975. At p. 371, Buckley J. quoted from Lord Sterndale M.R., Warrington L.J. and Younger L.J. in *In Re Express Engineering Works Ltd*. as follows:

Lord Sterndale M.R. at p. 470:

> "In the present case these five persons were all the corporators of the company and they did all meet, and did all agree that these debentures should be issued. Therefore it seems that the case came within the meaning of what was said by Lord Davey in *Salomon v. Salomon & Co. Ltd*. [1897] A.C. 22 …. It is true that a different question was there under discussion, but I am of opinion that this case falls within what Lord Davey said. It was said here that the meeting was a directors' meeting, but it might well be considered a general meeting of the company, for although it was referred to in the minutes as a board meeting, yet if the five persons present had said 'We will now constitute this a general meeting,' it would have been within their powers to do so, and it appears to me that this was in fact what they did."

Warrington L.J. said at p. 470:

> "'It was competent to them' - that is, the five corporators of the company - 'to waive all formalities as regards notice of meetings, etc., and to resolve themselves into a meeting of shareholders and unanimously pass the resolution in question. Inasmuch as they could not in one capacity effectually do what was required but could do it in another, it is to be assumed that as business men they would act in the capacity in which they had power to act. In my judgment they must be held to have acted as shareholders and not as directors, and the transaction must be treated as good as if every formality had been carried out.'"

Younger L.J. said, at p. 471:

> "I agree with the view that when all the shareholders of a company are present at a meeting that becomes a general meeting and there is no necessity for any further formality to be observed to make it so. In my opinion the true view is that if you have all the shareholders present, then all the requirements in connection with a meeting of the company are observed, and every competent resolution passed for which no further formality is required by statute becomes binding on the company."

41. Buckley J. then considered what was stated by Astbury J. in *Parker and Cooper Ltd. v. Reading,* where he, in turn, considered *In re Express Engineering Works Ltd*. and an earlier decision of *In re George Newman & Company Ltd*. [1895] 1 Ch. 674 (which had been considered by the Court of Appeal *In re Express Engineering Works Ltd*.), and then stated at p. 984:

> "Now, the view I take of both these decisions is that where the transaction is *intra vires* and honest, and especially if it is for the benefit of the company, it cannot be upset if the assent of all the corporators is given to it. I do not think it matters in the least whether that assent is given at different times or simultaneously."

Buckley J. then stated at p. 372:

> "Thus, the effect of his judgment was to carry the position a little further than it had been carried in *In re Express Engineering Works Ltd*. [1920] 1 Ch. 466, for Astbury J. expressed the view that it was immaterial that the assent of the corporators was obtained at different times, and that it was not necessary that there should be a meeting of them all at which they gave their consent to the particular transaction sought to be upheld."

42. Having further considered submissions on the facts of *re Duomatic Ltd*. at p. 373, Buckley J. stated:

> "The fact that they did not take that formal step but that they nevertheless did apply their minds to the question of whether the drawings by Mr. Elvins and Mr. Hanly should be approved as being on account of remuneration payable to them as directors, seems to lead to the conclusion that I ought to regard their consent as being tantamount to a resolution of a general meeting of the company. In other words, I proceed upon the basis that 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. The preference shareholder, having shares which conferred upon him no right to receive notice of or to attend and vote at a general meeting of the company, could be in no worse position if the matter were dealt with informally by agreement between all the shareholders having voting rights than the would be if the shareholders met together in a duly constituted general meeting."

43. Whilst the principle, as stated by Buckley J. *In re Duomatic Ltd*. is expressed in slightly different terms to its expression by Kingsmill Moore J. in the High Court and Maguire C.J. in the Supreme Court in Buchanan Ltd. v. McVey, it is, in substance, the same principle. Insofar as the Irish decision refers to "all the corporators", that must be a reference to all shareholders with a right to both attend and vote at a general meeting of the company, and it appears to me that it follows that if, in accordance with Buchanan Ltd. v. McVey, the agreement of all the corporators is to be treated as an act of the company, then it must also be treated as binding as a resolution in general meeting, which is the normal way in which shareholders would act.

44. Whilst *In Re Duomatic Limited* did not concern a statutory requirement, subsequent decisions in England and Wales have applied the same principles to the requirement in s. 320 of the 1985 Act, which is in similar terms to s. 29 of the 1990 Act. In *NBH Limited v. Hoare* [2006] E.W.H.C. 73 (Ch.), Park J., who had previously expressed doubt as to the application of the *Duomatic* principle to a statutory requirement for a resolution in *Demite Ltd. v. Protec* [1998] B.C.C. 638, formed the view that it did apply. Those judgments are only of persuasive authority, whereas *Buchanan Ltd. v. McVey* both states the law in Ireland and is binding on me.

45. I now turn to the intention of the Oireachtas in enacting s. 29 of the Act of 1990 and its purpose. The purpose of s. 29 of the Act of 1990 is 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. Section 29(1) only requires an ordinary resolution. The mischief sought to be avoided appears confined to the protection of shareholders with a right to vote. It does not have any wider ambit. Notice is not required to be given to any other person of the proposed transaction and the resolution of the shareholders is not one which requires to be filed in the Companies Registration Office. Section 29 does not no so require and it does not come within the types of resolution specified in s. 143 of the Act of 1963, which require filing in the Companies Registration Office.

46. The issue of interpretation appears to be whether the Court should construe s. 29 of the Act of 1990 from the words used as evidencing an intention by the Oireachtas to preclude a Court from applying to the express requirement for a resolution of a general meeting a principle which the Supreme Court considered in 1954 to be settled law. For the reasons already set out, I consider the principle to include the treatment of the agreement of all shareholders with a right to both attend and vote at a general meeting of the company as effective as or in the words of Buckley J. in *In Re Duomatic Limited* "as being tantamount to" a resolution of a general meeting of the company . I have concluded that s. 29 of the Act of 1990 does not include an intention to so preclude the Court. Further, that if the Court were to so interpret s. 29(1) it would fail to reflect the plain intention of the Oireachtas and may even, in its application to certain facts, make it absurd. Having regard, *inter alia*, to s. 5 of the Interpretation Act 2005, it is not an interpretation which I consider I should apply. Section 5 of the Interpretation Act 2005, insofar as relevant, provides:

> "5(1) In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction)—
>
> (a) that is obscure or ambiguous, or
>
> (b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of—
>
> (i) in the case of an Act to which paragraph (a) of the definition of "Act" in section 2 (1) relates, the Oireachtas, or
>
> (ii) in the case of an Act to which paragraph (b) of that definition relates, the parliament concerned,
>
> the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole."

47. The fact that the Oireachtas did not specify any special requirements in relation to the holding of the general meeting or any special requirements in relation to a resolution passed for the purposes of s. 29(1), including registration in the Companies Registration Office, appears to me to demonstrate that there was no intention to interfere with the principle considered in *Buchanan Ltd. v. McVey* to be settled law. Insofar as the Oireachtas required approval of a majority of shareholders with a right to vote by a resolution of the company in general meeting, that is, of course, the normal way in which shareholders of a company should take formal decisions. However it does not evidence an intention to preclude the agreement of all shareholders with a right to vote being treated as effective as a resolution in general meeting in accordance with the principle determined in *Buchanan Ltd. v. McVey* to be settled law.

48. Counsel for the defendant sought to rely on s. 29(3) as indicting an intention by the Oireachtas to impose the mandatory procedural requirement of approval by resolution of the company in general meeting and not to permit the continued application of the principle stated in *Buchanan Ltd. v. McVey* to be settled law. That sub-section makes an arrangement entered into in contravention of s. 29(1) voidable at the incidence of the company unless one of three situations set out in sub-paragraphs (a), (b) and (c) of s. 29(3) exist. One of these is affirmation by the company in general meeting "within a reasonable period". It does not appear to me that this sub-section precludes the application of the principle in Buchanan Ltd. v. McVey. It is, rather, directed to a situation where not all the shareholders were made aware of and agreed to the transaction prior to it being completed. The requirement that the affirmation be within a reasonable time appears to me to emphasize the intention of the Oireachtas by the enactment of s. 29 to protect the then shareholders of the company from transactions between the company and directors of which they might not be aware.

49. Section 29 contains no time limit on the company's right to avoid an arrangement entered into in breach of section 29(1). On the facts herein, there have been multiple changes of ownership since the Lease in December 1997. The defendant sought to avoid the Lease approximately eleven years after its creation and when it had occupied Block V as tenant and complied with its obligations under the Lease, including a series of rent reviews.

50. The potential absurdity of an interpretation of s. 29(1) which excludes the application of the principle approved of by the Supreme Court as settled law in *Buchanan Ltd. v. McVey* may be demonstrated by facts which differ only slightly from the facts of the present case. Suppose the Landlords had included all four of the persons who were then the shareholders entitled to both attend and vote at a general meeting of the defendant Would the Oireachtas have intended, in the enactment of s. 29, that where a company entered into a transaction with all of its then ordinary shareholders, obviously fully aware of and consenting to the transaction, eleven years later, following many changes of ownership, the company should be entitled to avoid the transaction just because all the shareholders who entered into the transaction did not also record their approval by the passing of a resolution in general meeting. It appears to me such an interpretation would be absurd, having regard to the clear intention of the Oireachtas to protect shareholders against transactions entered into by directors with the company unless notice is given to and there is approval of shareholders representing a majority of the voting shares.

51. Hence, if, contrary to my first conclusion, s. 29 applies to the grant of the Lease, I conclude that s. 29(1) does not preclude the Court applying the principle as stated by the Supreme Court in *Buchanan Ltd. v. McVey* to the facts herein for the purpose of determining whether the defendant was in breach of s. 29(1) in entering into the Lease. Counsel for the defendant submitted that, even if the Court were, as a matter of principle, willing to treat the approval of all four ordinary shareholders given as directors to the company entering into the Lease as compliance with the requirement for a resolution in general meeting , that the evidence does not

disclose approval of the "arrangement" whereby the defendant was to acquire the Lease sufficient to meet the requirements of section 29(1). Whilst I accept the submission of counsel that the evidence must disclose approval by all ordinary shareholders of the arrangement to enter into the Lease, on the findings of fact made I am satisfied that the plaintiffs have adduced such evidence. On the findings of fact, I am satisfied that all ordinary shareholders, prior to the approval given as directors to the defendant entering the Lease, were aware that the lessors included two directors and were aware of the key terms of the Lease. That appears sufficient approval of the arrangement for the purposes of section 29(1). A proposed resolution to approve the arrangement would not appear to require greater knowledge of the shareholders.

52. The second matter to which I wish to refer in the application of the principle as stated by the Supreme Court in *Buchanan Ltd. v. McVey* to the facts herein is not a matter relied upon by counsel for the defendant, correctly, in my view. The evidence is that Enterprise Ireland was, in 1997, the holder of non-voting preference shares in the defendant. In accordance with Article 2(d) of the Articles of Association, it did have a right to receive notice of and to attend but not to vote at general meetings of the Company. However, the undisputed evidence of Mr. Young, in his witness statement to the Court, was that Enterprise Ireland was also notified and approved of the move to Block V, East Point, and was directly involved in securing an Enterprise Ireland Area Certificate required by the defendant prior to the Lease being signed in 1997. In such factual circumstances, it does not appear that the existence of a preference shareholder with a right to receive notice of and attend but not vote at a meeting of the company precludes the Court, in accordance with Buchanan Ltd. v. McVey, treating the approval of all the ordinary shareholders to the arrangement to enter into the Lease as a resolution of the Company in general meeting, for the purposes of s. 29(1) of the Act of 1990.

53. Accordingly, I have concluded that even if contrary to my first conclusion that the entering into the Lease by the defendant in December 1997 was not the acquisition of a non-cash asset of the requisite value for the purposes of s. 29(1) that the defendant did not act contrary to s. 29(1) in entering into the Lease.

54. In the circumstances, it does not appear to me necessary to consider the further issues in the proceedings. It follows from the conclusions reached that the defendant was not entitled to treat the Lease as void as stated in its letter of 4th December, 2008.

Reliefs

55. The plaintiffs are entitled to the declaration sought at paragraph one of the plenary summons *i.e.*

> "1. A Declaration that the Lease of the 5th day of December, 1997 made between Edward B. Kerr, Deceased, Liam Young, Michael Tunney, Liam Lenehan and Laurence K. Shields of the First Part and the Defendant of the Second Park, to hold the property known as ALL THAT AND THOSE the lands, hereditaments and premises comprising Block V, East Point Business Park, East Wall Road in the City of Dublin for the term of twenty-five years from and including the 4th day of December, 1997 (hereinafter "the Lease"), is valid and binding upon the Defendant."

56. The parties did not address the further consequential reliefs sought. I will hear the parties as to the entitlement and/or necessity for any further orders arising out of the findings and conclusion in this judgment.

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