

A Meeting of Minds: The Privy Council & Duomatic Principles

Key Takeaways

In the recent British Virgin Islands ("BVI") appeal of *Fang v Green Elite* ("Green Elite"), the Privy Council reaffirmed the principle in *Duomatic*¹. The Privy Council restated that shareholder consent must be unanimous and, if not passed by way of formal resolution, the extent of the consent must be certain and give specific consent for a company to enter a particular transaction. The Board held that a general purpose or intent to enter a transaction is not sufficient.

Background Facts

The matter involved a joint venture between Mr. Fang, Mr. Ooijen and Mr. Leeuw (the "Principals"). The Principals decided to float the business on the Hong Kong Stock Exchange and incorporated a company in the Cayman Islands to serve as the vehicle for the floatation ("CT"). The shares in CT were issued in equal numbers between two companies owned by the Principals, Delco Participation BV ("Delco") and HWH Holdings Ltd ("HWH"). As part of the floatation a share incentive scheme for employees was considered by the Principals. The Judge at First Instance found that two key elements were agreed between the Principals; the Beneficiaries would pay for the shares and there would be a lock-up period before they qualified to receive them. Neither the price nor the length of the lock-up period was agreed.

The floatation did not proceed initially, but the plan was later revived with Green Elite being incorporated in the BVI to facilitate it (Green Elite's shares were issued to HWH and Delco equally). In 2014, Green Elite sold its CT shares and the proceeds of sale were distributed by Mr. Fang/HWH to the other directors (having been initially retained for one year).

The central issue of fact in the trial was what was agreed between HWH and Delco as to the basis on which Green Elite would hold its shares in CT.

Proceedings

Green Elite's liquidators issued proceedings in December 2018 in the BVI Commercial Court against the former directors and HWH seeking an account of the sale proceeds of the CT shares and any dividends. The liquidators claimed that the former directors had breached their fiduciary duty to act in good faith in the best interests of Green Elite, not to act for a collateral purpose and not to act in a way as to place themselves in a position of conflict between their personal interests and the interests of Green Elite. The liquidators also claimed against HWH for knowing receipt.

The active defendants argued that there was no breach of duty, and the payments were properly made to implement Green Elite's purpose to provide an employee share incentive scheme.

¹The decision of the High Court of England and Wales in *re Duomatic Ltd* [1969] 2 Ch365

Further that the payments had been made with the approval of Delco and HWH as the shareholders of Green Elite. The alleged arrangement was not reflected in the articles or memorandum nor in a formal resolution of the shareholders at a general meeting, but it was argued that the approval was given by Delco and HWH when it agreed that Green Elite would act as a vehicle for the employee share incentive scheme. In *Duomatic*, Buckley J said at p373:

"I proceed on the basis that where it can be shown that all shareholders 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 Judge at First Instance found that Delco and HWH had not given their assent to the payments and upheld the claim, ordering the former directors to pay the sums claimed plus interest and costs. The Judge found that there had been no 'meeting of minds' between the shareholders which could, through the application of the *Duomatic* principle, authorise the manner in which Mr. Fang had dealt with the sale proceeds and dividends.

The Court of Appeal of the Eastern Supreme Court (BVI) dismissed the appeal by Mr. Fang and HWH upholding the decision at First Instance. Mr. Fang and HWH appealed as of right to the Privy Council.

Decision

The Privy Council dismissed the appeal and upheld the Court of Appeal's decision.

The Board dismissed Mr. Fang's argument that there had been no breach of duty, as the payments were for a proper purpose. The Board found that this point had not been argued in the Court of Appeal and that the claim against the directors was that they should not place themselves in a position where their personal interests may conflict with the interests of the company. The suggestion that it was to satisfy

the general purpose of Green Elite to provide an employee share incentive scheme was not accepted. The Board therefore found that, without shareholder consent, Mr. Fang and the other directors had acted in breach of their duties in receiving and distributing the proceeds of sale and dividends.

As there was no formal resolution agreeing to the transaction, the Board considered whether the shareholders had consented to the transaction informally by application of the *Duomatic* principle.

The Board held that while the assent given in accordance with the *Duomatic* principle need not have the features of a binding contract, the shareholders should intend to bind themselves legally as if they had passed a formal resolution. Therefore, if it could be shown that the shareholders have all assented to a particular matter, their assent will take effect as if it were a formal resolution. This was not the case on these facts as the terms of the employee incentive scheme had not been confirmed and agreed.

Further Assistance

If you should have any questions, please reach out to your usual Maples Group contacts or any of the contributors below.

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