

# The Duomatic principle: consent of ultimate beneficial owners.

The English Court of Appeal has recently followed a Privy Council decision that the *Duomatic* principle can apply where it is the ultimate beneficial owner of a company, and not the registered shareholder, that takes all the decisions in the relevant transaction. Isle of Man corporate service providers, directors and trustees will find this decision of interest.

## The Duomatic principle

The *Duomatic* principle is a common law principle to the effect that anything that the shareholders of a company can do by formal resolution in a general meeting, can also be done by them informally if all of them assent to it.

In the case of *Re Duomatic Ltd* [1969] 2 CH 365 (from which the principle takes its name), Buckley J held at 373C:

"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."

It has been held that the unanimous consent of all shareholders must be given in circumstances where the shareholders have knowledge of what they are consenting to.

The effect of the *Duomatic* principle is that it can, in certain circumstances, provide a complete defence to directors to a claim for breach of duty where the act or transaction complained of has been assented to by all of the company's shareholders.

There are however limits to its application and a director's ability to rely on the defence is highly dependent on the particular circumstances. For example, the principle cannot be relied upon where the company is or is likely to become insolvent. This is due to a director's duties being owed to creditors rather than shareholders where the company is in financial difficulty. In these circumstances the consent of shareholders cannot remedy a breach of duty owed to creditors. Similarly, it cannot be used where there is evidence of fraud or where the transaction in question is ultra vires the company.

## Beneficial owners v registered shareholders

Previously, there has been uncertainty as to whether the principle was limited to the assent of the legal registered owners of the shares.

However, this uncertainty was addressed last year in the Privy Council case of *Ciban Management Corpn v Citco (BVI) Ltd* [2020] UKPC 21 ("*Ciban*") at paragraph 47 in which Lord Burrows stated:

"...in some cases doubts have been expressed as to whether the principle applies where it is the beneficial owners, rather than the registered shareholders who consent... But the correct view is that, at least as here where the ultimate beneficial owner, and not the registered shareholder is taking all the decisions in the relevant transactions, the *Duomatic* principle applies as regards the consent of (and authority given by) the ultimate beneficial owner."

## Satyam Enterprises Ltd v Burton

The decision in *Ciban* was recently followed by the English Court of Appeal in the case of *Satyam Enterprises Ltd v Burton* [2021] EWCA Civ 287, judgment dated 8 March 2021.

In that case, a company, Satyam Enterprises Ltd (“Company 1”), appealed against a decision to dismiss its claim against its former sole director and shareholder for damages in respect of an alleged transaction at an undervalue.

The defendant, Mr Burton, was the company’s sole director and shareholder. Mr Burton was also the sole director and shareholder of another company (“Company 2”). Company 1 alleged that Mr Burton had caused Company 1 to transfer a number of properties to Company 2 at an undervalue and in breach of his duties as a director.

The judge at first instance dismissed the claim primarily on the ground that the properties were before and after the transfer held on trust for a Mr Sharma and therefore Company 1 had suffered no loss as there was simply a bare transfer of legal title. In the alternative, the judge held that if he was wrong about that and the properties were beneficially owned by Company 1, then Mr Burton was acting in breach of his duties to Company 1 as a result of Company 1 not benefitting from the expected gain on the properties. However, the judge found that the shares in Company 1 were held by Mr Burton on trust for Mr Sharma who was the ultimate beneficial owner and the actions taken by Mr Burton in transferring the properties were expressly authorised by Mr Sharma and therefore Mr Burton would have a complete defence to any breach of duty to Company 1 based on ratification by Mr Sharma pursuant to the *Duomatic* principle.

As noted above, the Court of Appeal followed the decision in *Ciban* that where the ultimate beneficial owner, and not the registered shareholder, is taking all the decisions in the relevant transactions, the *Duomatic* principle can apply.

Ultimately, an Appeal by Company 1 was allowed and the matter was remitted to the High Court for further hearing on the basis that there were insufficient findings of fact in the judgment and the judge’s reasons were inadequate to explain his conclusion.

Whilst the requirements for the *Duomatic* principle to apply had prima facie been established, where a transaction amounts to an unlawful return of capital, the *Duomatic* principle cannot be relied upon because the transaction would be ultra vires the company (shareholders cannot do informally what they have no power to do formally).

The judge had not dealt expressly with all necessary matters to determine whether there had been an unlawful return of capital. Accordingly, it was not possible to determine whether the judge’s decision relating to the *Duomatic* principle could be upheld and the matter was remitted to the High Court.

## Summary

Whilst the case has been remitted back to the High Court, it is a further helpful example of the potential application of the *Duomatic* principle and confirmation that the principle can apply to the informal consent of beneficial owners; not just registered shareholders.

The *Duomatic* principle is recognised under Manx common law and it is expected that the Manx courts will follow the development of the law in this area by the senior courts in England.

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