

BVI company law: Eastern Caribbean Court of Appeal provides further clarity on the application of the *Duomatic* principle

Briefing Summary: In two recent decisions from the BVI, the Eastern Caribbean Court of Appeal has provided useful clarity on the application and scope of the *Duomatic* principle. In particular, the Court addressed the evidentiary standard for establishing *Duomatic* assent, as well as whether the *Duomatic* principle gave a sole beneficial owner a "power" over which receivers could be appointed.

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The *Duomatic* principle provides that unanimous assent to decisions or actions by those who ultimately exercise power over the affairs of the company (shareholders or beneficial owners) are binding whether or not the formal procedures stipulated in the company's articles of association have been complied with. Disputes frequently arise as to the circumstances in which the *Duomatic* principle should apply to ratify informal actions, particularly where those actions cause prejudice to other stakeholders.

Fang Ankong and HWH Holdings Ltd v Green Elite (in Liquidation)

In the recent appeal of *Fang Ankong and HWH Holdings Ltd v Green Elite Ltd (in Liquidation)* BVIHCMAP 2022/0013, (the 'Green Elite appeal'), for example, the main issue before the Court of Appeal was whether a unanimous 'understanding' between the shareholders of Green Elite Ltd resulted in the shareholders' binding assent for the directors of the company to distribute more than 50% of the company assets to its employees.

The Court of Appeal emphasised that in order to rely on the *Duomatic* principle, there must be material from which assent can be objectively ascertained or, in the case of acquiescence, inferred. That objective approach was broadly similar to the objective approach which must be taken when determining formation of a contract, in that the concepts of intention to create legal relations and certainty of terms come into play. This was not to say, however, that *Duomatic* assent is subject to general contractual principles.

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In the Green Elite appeal, the Court found that, objectively, the shareholders, in arriving at the 'understanding', envisaged further discussions, as indicated by the lack of agreement on and certainty of key terms. In the circumstances, the Court found that the shareholders did not intend to create a binding and enforceable agreement, and that *Duomatic* principle was therefore not engaged.

Sergey Taruta and JSC VTB Bank and Arrowcrest Ltd v JSC VTB Bank and Sergey Taruta

A few days after its decision in the Green Elite appeal, the Court of Appeal handed down another important decision on the *Duomatic* principle in the consolidated appeals of *Sergey Taruta and JSC VTB Bank BVIHCMAP 2021/0043 and Arrowcrest Ltd v JSC VTB Bank and Sergey Taruta BVIHCMAP 2022/003* (the 'Arrowcrest appeals'). In that appeal, the issue was a whether it had been appropriate for the Commercial Court to appoint receivers over the so-called "*Duomatic* power" of a judgment debtor who was the indirect sole beneficial owner of a BVI company (which was held through an intermediate Cypriot company, Arrowcrest).

The Court held that since the *Duomatic* principle does no more than allow for the ratification of informal decisions made by shareholders or beneficial owners, it did not give rise to a 'power' (in the strict sense of the word) to control a company or its assets by the persons who ultimately make decisions for the company. The recognition of such a power would be inconsistent with the concept of separate legal personality between the company and its beneficial owners. The Court went to emphasise that a company's shareholder cannot, in any event, dispose of that company's assets: *"It is in my view, manifestly clear from the authorities, that a shareholder, whether or not he is a sole shareholder, has no right to dispose of the property of a company, either for his own benefit or for that of others."*

As a result of these findings, the Court discharged the receivership order, concluding that: *"Duomatic principles do not give rise to a power over or control of a company or its assets by the persons who ultimately make the decisions for that company. It certainly does not give rise to a power over which receivers could be appointed. It is not a power at all."*

Key takeaways

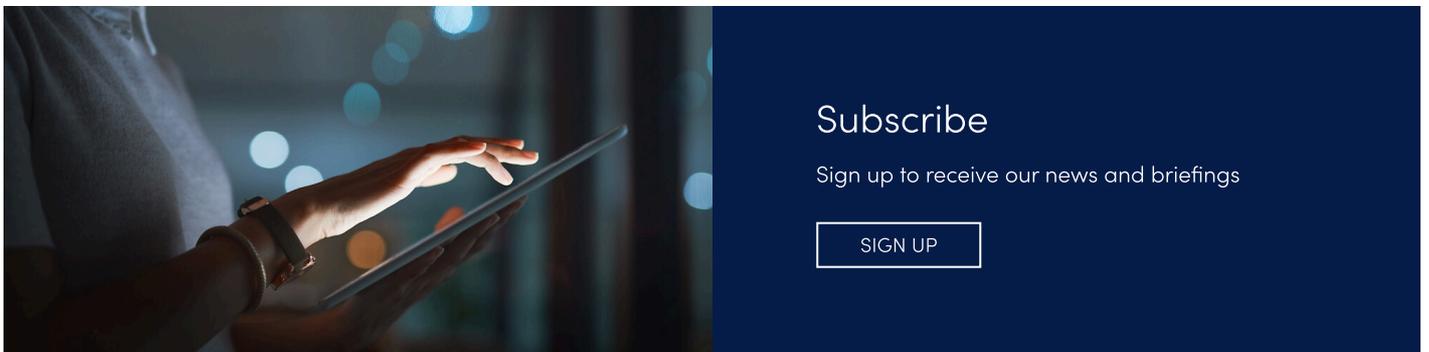
The key takeaway from these decisions is that the *Duomatic* principle remains an important tool for ratifying the unanimous informal decisions of beneficial owners. These decisions will only be ratified, however, where there was proof of actual assent, indicated by evidence of an objective unqualified or unequivocal agreement, or acquiescence. Where shareholders merely outline a course of action they do not yet intend to be bound by or to be legally enforceable, they cannot be said to have assented to the course of action based upon the *Duomatic* principle. Consequently, shareholders or beneficial owners of companies should, where possible, ensure that proper formalities are followed, and decisions properly documented and minuted, particularly where such decisions are significant to the company and its stakeholders.

Additionally, while a sole beneficial owner may have the ability informally to direct the way the shares in a company are voted, it is now clear that this is no more than the consequence of the rule in *Duomatic* – that informal ability to influence indirectly a company's affairs is not, in itself, a right or power of control, and it cannot be invoked by a third party to trump the fundamental doctrine of separate corporate personality. Further, the *Duomatic* principle does not bestow on that shareholder a right to dispose of the assets of the company for any purpose other than in furtherance of the objectives of the company. The *Duomatic* principle cannot be invoked to justify a legal or beneficial owner to do something that would be ultra vires the company.

Carey Olsen acted for Arrowcrest Ltd in the Arrowcrest appeals, instructing Stephen Moverley Smith KC and Tom Roscoe.

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