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Fang Ankong and HWH Holdings Limited v Green Elite Limited

FEBRUARY 2023

The Eastern Caribbean Court of Appeal ("the Court of Appeal") has clarified the application of the Duomatic Principle and the need for director and shareholder approval for dispositions of greater than 50% of a company's assets pursuant to s.175 of the BVI Business Companies Act 2004.

Background to the appeal

On 5 January 2023, the Court of Appeal handed down its judgment in *(1) Fang Ankong and (2) HWH Holdings Limited v Green Elite Limited (in Liquidation)* BVIHCMAP2022/0013 *("Green Elite")*. The case concerned a BVI company that had been established for the sole purpose of giving effect to an employee share scheme for the benefit of three employees to reward them for service upon the public listing of Chiho-Tiande Group Limited (a Cayman Islands company) ("CT").

The shares in Green Elite were owned by two companies; 50% by HWH Holdings Limited, whose ultimate beneficial owner was a Mr Fang Ankong ("Mr Fang"); and 50% by Delco Participation BV ("Delco"). In April 2014 Green Elite agreed to sell the shares in CT to a third party for approximately HK $150 million. The sale price was paid to Mr Fang's bank account in three tranches. Mr Fang did not tell the directors of Delco (his joint venture partners) that he had kept the proceeds. Mr Fang held on to these for about a year and then, through a series of further transactions, he caused the sales proceeds, as well as dividends received from the CT shares, to be paid to the three employees equally.

In 2018, Green Elite, through its appointed liquidators, commenced proceedings against Mr Fang and the three employees claiming breach of their fiduciary duties as directors of Green Elite and/or a failure to comply with s.175 of the BVI Business Companies Act ("BCA").

The judge at first instance identified as a key issue whether the *Duomatic* principle applied to permit the payments to the three employees. He found (amongst other matters) that;

(a) as there was never an agreement between Mr Fang and Delco at any time, that the shares should simply be given to employees;

(b) the alleged "understanding" lacked legal effect and the distribution was not within the "agreed purpose" as there were no meetings of minds; there was no *Duomatic* assent;

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(c) the "usual or regular course of business" exception under s.175 BCA potentially applied to the distribution but was negatived by the lack of director approval and shareholder authorisation; and

(d) the directors were liable under s.121 of the BCA.

The appellants appealed. The central issue was whether there was *Duomatic* assent to the distribution of the sale proceeds and dividends in question.

The ECSC Court of Appeal's analysis: The *Duomatic* Principle

The Court of Appeal began by considering the principle *In Re Duomatic Ltd* [1969] 2 Ch 365 and held that:

"The Duomatic principle recognizes a situation where members of a company can reach a unanimous agreement on its affairs without the need for strict compliance with formal procedures. The essence of the doctrine is that shareholders, who have the right to attend and vote at a general meeting of a company can assent to some matter which a general meeting could carry into effect, without the need for a formal resolution. The effect is that the assent is as binding as a resolution in a general meeting would be. However, although characterised by informality, for the Duomatic principle to apply the shareholders must be aware that their assent is being sought to the particular matter and must apply their minds to the issue of assent, that is to say that they have full knowledge. Additionally, there must also be requisite material from which an observer can objectively discern or infer assent. (sic)*"*

The ECSC Court of Appeal held that on the facts of the case the trial judge had needed to consider whether, objectively, the shareholders had, by that "understanding" assented to the payment that had been made. It found that there had been evidence before the Court from which the trial judge could have made the findings he did and that the Court would be slow to interfere with this.

The Court further found that the objective approach described was similar to that to be adopted when determining the formation of a contract, in that concepts of intention to create legal relations and certainty of terms are to be considered. However, the Court made it clear that the *Duomatic* principle is not subject to general contractual principles. It found no fault with the trial judge's analysis in this regard and held that "particularity" of the terms or understanding, "*to some extent would aid in establishing intention and in making the assent unequivocal and unqualified.*"

The Court held that "*if shareholders in a discussion among themselves outline a course of action they do not intend to be bound by or legally enforceable, they cannot be said to have assented to the course of action*." In the instant case the Court of Appeal found that the shareholders of Green Elite had envisaged further discussions when they reached the "understanding" in 2008. Indeed at that point in time Green Elite had yet to be established. As a consequence, the payments to the three employees could not have been made with the full knowledge and consent of all shareholders of Green Elite.

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The Court further considered arguments concerning the application of s.175 BCA which it found was "*a safeguard for a company from the disposition of more than 50% of its assets without the approval of its directors and shareholders.*" The appellants had submitted that the section did not apply where there had been multiple transfers of value where each such transfer was for less than 50% of the company's assets. The Court held that such an approach was inconsistent with legislative intent because the section would otherwise be easily and regularly undermined. As a consequence, the Court held that the payments to the three employees where subject to the approval and authorisation requirements of this section. Finally, the Court found that since the payment to the three employees (who were also directors of Green Elite) was not for a proper purpose, they could be held personally liable under s.121 of the BCA.

The case provides a useful clarification of the application of the *Duomatic* principle in the BVI and the objective test to be applied when considering whether the shareholders have assented or reached a binding agreement on a company's affairs outside the strict terms of its constitution. This will be of significant interest to directors in considering whether, in the circumstances, they are able to take action in reliance on the principle, or whether they would be well advised to adopt a more cautious approach and obtain a resolution in accordance with the company's articles of association. The case is of particular importance in relation to dispositions of more than 50% of a company's assets.

If you would like further information on any of the issues raised above please contact a member of our Dispute Resolution team.

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