XXIV BARRISTERS' CHAMBERS

XXIV.CO.UK

Ciban Management Corporation v Citco (BVI)

In *Ciban v Citco* the Privy Council reviewed the limits of the Duomatic principle in the context of offshore companies of which the ultimate beneficial owner ('*the UBO*') is not a registered shareholder but over which the UBO wishes to keep control over it through agents and nominee directors. The Privy Council considered whether the Duomatic principle applies to bind a company and its UBO who had, by his conduct, conferred apparent authority on an agent who had (at least arguably) then defrauded the UBO and the company.

The background was that a Brazilian businessman, Mr Byington, set up a number of BVI companies but did everything he could to remain in the shadows apparently to defraud creditors and/or evade tax. At the time, BVI companies could issue bearer shares. Mr Byington asked his US lawyer to hold all the bearer shares of one of these companies, called Spectacular.

He paid Citco BVI to act as registered agent and for them to provide a nominee corporate director ('TCCL') for Spectacular. Mr Byington refused to sign any management agreement with Citco so as to remain in the shadows. He used his right-hand man, a Mr Costa, to pass on all instructions to Citco. There was accordingly very little visible (and no direct) connection between Spectacular and Mr Byington and nothing which would have alerted any outsider to any connection.

After a couple of years Mr Costa instructed Citco and its subsidiary (the sole director) to grant a power of attorney to a local Brazilian lawyer who then used the power of attorney to sell Spectacular's only asset – a building in Sao Paolo, without Mr Byington's knowledge or consent.

Spectacular (under Mr Byington's control) sued Citco, its registered agent, and TCCL, its sole director for breaching their duties to it in permitting the power of attorney to be granted. TCCL defended the claim on the basis that Mr Byington had given ostensible authority to Mr Costa and therefore Mr Costa's instructions were binding on Mr Byington as an act of the company itself under the Duomatic principle.

STEVEN THOMPSON QC

The Duomatic principle is named after the decision of Buckley J in *re Duomatic* [1969] 2 Ch 365. It has been applied since in the Court of Appeal in *Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services* [1983] Ch 258 which was itself reviewed and approved by Lord Hoffmann in the Privy Council *Meridian Global Funds Management Asia v Securities Commission* [1995] 2 AC 500 in his famous analysis of the laws of attribution. In short, the shareholders of a company can bind it (and the board) if they make an informal but informed decision which is legal, intra vires the company.

Here Mr Byington did not know about Mr Costa's actions. The Duomatic principle does not apply where the body of shareholders do not give their informed consent to an action. But what about where the sole shareholder had set up a system, using agents to pass on his instructions, on which the nominee director of the company had come to rely? In those circumstances, the Privy Council made clear, the concept of ostensible authority means that the shareholder is bound by the actions of his agent even if in fact he had not consented to them, indeed even if he was unaware of them.

Another limitation of the Duomatic principle is that it cannot be invoked where there has been dishonesty. But what is the relevant dishonesty? In this case the Privy Council assumed that Mr Costa had been dishonest. But neither Mr Byington nor TCCL was acting dishonestly. Had Mr Byington wanted the power of attorney to be granted, no complaint could have been made. Mr Costa's alleged dishonesty was irrelevant: Mr Byington took the risk that his ostensible agent would betray him.

The Privy Council also clarified that the Duomatic principle applies even where it is the UBO, rather than registered shareholders, who control the company. The Board explained that where the UBO rather than the shareholder takes all the decision, the Duomatic principle applies as regards the consent of (and authority given by) the UBO.

So overall the *Duomatic* principle did apply in this case.

"By reason of that principle" the Board concluded "the ostensible authority conferred by Mr Byington counts as ostensible authority conferred by Spectacular. Spectacular cannot be allowed to deny that it authorised Mr Costa to give the instructions to TCCL. It follows that we see no reason to interfere with the decision of the Court of Appeal (upholding Bannister J) that there was no breach of the duty of care owed by TCCL to Spectacular."

The Privy Council also commented, albeit briefly, on Section 80 of the International Business Companies Ordinance (Cap 291). That section has been replaced by the substantially same Section 175 of the Business Companies Act 2004. In its old and current form, it requires the shareholders as well as the directors to approve the sale of more than half of the assets of an offshore BVI company. Famously there has never been any clear decision on its operation, other than those of the lower courts in this case.

The Privy Council did not have to consider in any detail the arguments presented by counsel on s.80 but it did pour some doubt on the lower courts' decisions that the duty under s.80 was owed to the UBO/shareholder rather than to the company itself.

The Privy Council was also sceptical about the findings below that the sale of the only asset of this (property holding) company was in the usual or regular course of the business carried on by the company. With respect that second view must be right: the company was not trading property but only holding it. That comment, although obiter, would have ramifications for single purpose vehicles which wish to sell their only asset.

The Board also doubted whether the Court of Appeal had been correct in deciding that the issuing of a power of attorney (then used to sell the asset) was not caught by s.80. The Court of Appeal found that it was not a disposition so it was not caught. But the Privy Council disagreed pointing out that the power of attorney was one of the primary documents being used to sell the land. That point might benefit from further and fuller exploration in a suitable case in the future.

The Board made two final

general observations. First, it did not mean to suggest that the law in the BVI imposes a lower standard of care on directors than under English law. In this regard, the law is the same.

Secondly the Board added that it was

> "conscious that the kind of arrangements put in place by Mr Byington – by which he chose to hide from public view his position as ultimate beneficial owner – may not be uncommon. In this case, it has not been necessary for the Board to consider the propriety of that course of action but it may be required to do so in other circumstances. A central message of the decision in this case is that the ultimate beneficial owner who chooses such arrangements takes the risk of being betrayed by an agent who is being used to convey instructions to the director. Although there may be claims by the ultimate beneficial owner against the agent, the ultimate beneficial owner, on facts comparable to this case, cannot throw the risk taken onto the director by instigating an action by the company against the director for breach of the director's duty of care. The courts will treat the ultimate beneficial owner – Mr Byington in this case – as having been hoist by his own petard."

This is good news for professional corporate services providers in the offshore world, but a salutary lesson and an ominous warning for shady UBOs who hide their assets in offshore companies and then disguise their control and ownership of those assets and companies. ■

THE JUDGMENT CAN BE FOUND HERE

Steven Thompson QC, instructed by Harney Westwood & Reigels, acted for the successful Respondents, Citco BVI Limited and its daughter company Tortola Corporation Company Limited, as he had in the Eastern Caribbean Court of Appeal in 2018 and at trial before Justice Bannister in 2012.