IGPL General Trading v. Hortin Holdings & Ors

In this case,[1] the Claimant/Appellant sought orders for specific performance of agreements, which were said to create an assured shorthold tenancy agreement in favour of the Appellant in respect of certain property in London. The Appellant contended the Respondents were thus obliged to enter into valid legal leases in respect of the properties. This case raised interesting issues as to the application and scope of the Duomatic principle to acts assented to by shareholders, with far-reaching practical consequences for a common practice in the UAE.

Dans cette affaire, le demandeur/appelant a demandé des ordonnances pour l'exécution spécifique d'accords destinés à créer un contrat de location à court terme, assuré en faveur de l'appelant à l'égard de certaines propriétés à Londres. L'appelant a soutenu que les intimés étaient donc obligés de conclure des baux légaux valides à l'égard des propriétés.
Cette affaire a soulevé des questions intéressantes quant à l'application et à la portée du principe Duomatic aux actes consentis par les actionnaires, avec des conséquences pratiques considérables pour une pratique courante aux EAU.

Anson Cheung
Barrister
Outer Temple Chambers

1 What Happened?

A. THE PARTIES

The Defendants were companies incorporated in the British Virgin Islands (BVI). Mr. Mohammed Abdulla Juma Al-Sari and Mr. Majid Abdulla Juma Al-Sari were the beneficial owners of the shares in the Defendants in equal shares. Imitating Justice Giles and Chief Justice Zaki Azmi as they did in their judgments, and equally meaning no disrespect, these gentlemen will be referred to as **Mohammed** and **Majid**.

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Mohammed and Majid were the sons of Mr. Abdulla Juma Al-Sari, the patriarch of the Al-Sari family (to be referred to as **Abdulla**, as the courts have done in their judgment, and without intending any disrespect).

B. THE ASSET

"The Bridge" in Queenstown Road was a mixed-use residential and commercial development, whose premises were the subject of a long-term lease. Together, the Respondents held the freehold and certain leases of the Bridge and were the Respondents' only substantial assets (the "**London Properties**").

C. THE JUDGMENT IN FAVOUR OF CED

On 27 February 2017, the Commercial Bank of Dubai (the "**Bank**") obtained a judgment from the Sharjah Federal Appeal Court against Abdulla, Mohammed and Majid jointly and together with others, for AED 433,831,116.81 plus interest and costs. The judgment was not paid, and the Bank took steps to enforce it.

As part of its steps to enforce judgment, the Bank obtained judgment against Mohammed and Majid in the Eastern Caribbean Supreme Court in the amount of USD 118,103,193.58 plus interests and costs, and later a charging order over the shares in the Defendants beneficially owned by Mohammed and Majid.

On 19 March 2019, the Bank obtained a final charging order over the shares and an order for sale. The order for sale included the appointment of a receiver with power to realise the Defendants' assets and to sell the shares. In other words, the receiver was empowered to sell the London Properties in order to satisfy the judgment against Mohammed and Majid in the Eastern Caribbean Supreme Court and/or the Sharjah Federal Appeal Court.

D. THE TENANCY AGREEMENT

When the receiver wrote to Majid advising him that the London Properties were to be sold, he was advised instead of a tenancy agreement dated 16 January 2013 between the Respondents as lessors and the Appellant and others as lessees (the "**Tenancy Agreement**"), as supplemented by an Addendum on 4 March 2013. The Respondents' counterparties to the Tenancy Agreement were, respectively, the Appellant and the children of Mohammed and Majid. Abdulla was named as the manager of the Appellant, and the Appellant was also described in the application as a proxy for the Al-Sari family.

It should be noted the Tenancy Agreement prescribed English law as its governing law.

There was only one signatory of the Tenancy Agreement: Abdulla, who signed separately on behalf of each of the Defendants and the eight tenants (including on behalf of the Appellant). Abdulla allegedly signed the Tenancy Agreement on behalf of the Defendants by way of a Power of Attorney granted on 26 June 2008 to Abdulla by Mohammed and Majid.

At the time of the Tenancy Agreement and the Addendum, the sole director of each of the Respondents was Ayre Management Ltd ("**Ayre**"), a company registered in the BVI. It was common ground that whether at the time of the Tenancy Agreement or the Addendum, the director Ayre had not given authority for the Defendants to enter into the Tenancy Agreement – indeed, they knew nothing of the Tenancy Agreement.

E. THE DIFC PROCEEDINGS

The Appellant sought orders for specific performance of the Tenancy Agreement.

The Respondents applied for immediate judgment pursuant to RDC24.1, one of the grounds being that the Tenancy Agreement was not binding on the Defendants because the signatures by Abdulla purportedly on their behalf had been without their authority.

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In turn, the Claimant argued that Abdulla had authority to either exercise the powers of Mohammed and Majid as the beneficial shareholders in the Defendants, via the Power of Attorney granted to him by Mohammed and Majid; alternatively in exercise of an implied actual authority of Mohammed and Majid. Only the former argument will be considered, in the context of the application of the *Duomatic* principle.

2 The Arguments Before the Courts

A. THE RESPONDENTS' CASE

The Respondents' case was essentially concerned with the proper division of power and responsibility between directors and shareholders.

Section 109 of the BVI Business Companies Act 2004, which governed the Respondents provided:

> *"109. (1) The business and affairs of a company shall be managed by, or under the direction or supervision of, the directors of the company.*

> *(2) The directors of a company have all the powers necessary for managing and for directing and supervising the business and affairs of the company.*
>
> *(3) Subsections (1) and (2) are subject to any modifications or limitations in the memorandum or articles."*

Further, the Respondents' Articles of Association provided in identical terms:

> *"The business of the Company shall be managed by the directors [...], and may exercise all such powers of the Company as are not by the Act or by these Regulations required to be exercised by the members subject to any delegation of such powers as may be authorised by these Regulations and to such requirements as may be prescribed by resolution of the members; [...]".*

It was therefore argued that the division of powers by statute and by the Respondents' Articles of Association meant management of the Respondents—including its power to grant leases of the London Properties or contract with third parties more generally—lay with the director of the Respondents, Ayre. Mohammed and Majid, as the ultimate beneficial shareholders, did not have the power *qua* shareholders to bind the Respondents to a contract with third parties, and therefore there could be not have delegated such power to Abdulla. Ergo, the purported signing of the Tenancy Agreement by Abdulla was invalid.

B. THE APPELLANTS' ARGUMENT

The Appellant's argument consisted of three building blocks, which supported the proposition that informal unanimous assent by shareholders could bind a company to a contract with a third party.

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First, it was argued that the well-established cases of *Saloman v. A Saloman & Co Ltd* [1897] AC 22 and *In re Duomatic Ltd* [1969] 2 Ch 365 provided that a company would be bound by the unanimous agreement of its members, in circumstances where the formalities had not been adhered to.

The Appellant relied on Lord Davey's observation in *Saloman* at [57] that *"[a] company is bound in a matter intra vires by the unanimous agreement of its members"*. In *Duomatic*, directors' remuneration, pursuant to the company's Articles of Association, had to be approved by a resolution at a general meeting. However, it was held that the unanimous approval by shareholders of payments to directors (absent a shareholders' resolution) was sufficient:

> *"It seems to me that if it had occurred to Mr Elvins and Mr East, at the time when they were considering the accounts, to take the formal step of constituting themselves a general meeting of the company and passing a formal resolution approving the payment of directors' salaries, that it would have made the position of the directors who received the remuneration, Mr Elvins and Mr Hanly, secure, and nobody could thereafter have disputed their right to retain the remuneration. The fact that they did not take that formal step but that they nevertheless did apply their minds to the question of whether the drawings by Mr Elvins and Mr Hanly should be approved as being on account of remuneration payable to them as directors, seems to lead to the conclusion that I ought to regard their consent as being tantamount to a resolution of the general meeting of the company. In other words, I proceed on the basis that 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."* (at 373A)

Before the Court of Appeal, the Appellant also made reference to a 20th century case *In re Express Engineering* [1920] 1 Ch 466, which had been applied in *In re Duomatic*. In *Express Engineering*, five individuals agreed to sell property to the company by the issuance of debentures. They appointed themselves as directors of the company, and stated the transactions effected through a "board meeting". Technically, the company was therefore transacting with "third parties". However, as interested parties to the transaction, they were precluded by the Company's articles from voting in such transactions. The Court of Appeal held that the transactions were valid, with Lord Justice Warrington noting that the five individuals were acting *qua* shareholders, and

> *"[it] was competent to them to waive all formalities as regards notice of meetings, etc., and to resolve themselves into a meeting of shareholders and unanimously pass the resolution in question. [...] In my judgment they must be held to have acted as shareholders and not as directors, and the transaction must be treated as good as if every formality had been carried out. I agree that the appeal should be dismissed."*

Similarly, Lord Justice Younger held (at 471) that:

> *"the company by the voice of all its shareholders became bound by this agreement, and I agree with the view that when all the shareholders of a company are present at a meeting that becomes a general meeting and there is no necessity for any further formality to be observed to make it so."*

The Appellant therefore relied on *Express Engineering*, and its approval in *Duomatic*, as early authority for the proposition that the unanimous assent of shareholders to an act would become the binding act of the company, without needing to be formally ratified by action on the part of the directors. This would apply equally to transactions with third parties.

The second building block was that where the *Duomatic* principle applies, and shareholders unanimously agree to some act, it becomes an act attributable to the company. This was derived from *Meridian Global Funds Management v Securities Commission* [1995] 2 AC 500 at 506:

> *"It is therefore a necessary part of corporate personality that there should be rules by which acts are attributed to the company. These may be called 'the rules of attribution."*
>
> *The company's primary rules of attribution will generally be found in its constitution, typically the articles of association, and will say things such as "for the purpose of appointing members of the board, a majority vote of the shareholders shall be a decision of the company" or "the decisions of the board in managing the company's business shall be the decisions of the company." There are also primary rules of attribution which are not expressly stated in the articles but implied by company law, such as:*
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> > *"the unanimous decision of all the shareholders in a solvent company about anything which the company under its memorandum of association has power to do shall be the decision of the company:" see Multinational Gas and Petrochemical Co. v. Multinational Gas and Petrochemical Services Ltd. [1983] Ch. 258.*
>
> *These primary rules of attribution are obviously not enough to enable a company to go out into the world and do business. Not every act on behalf of the company could be expected to be the subject of a resolution of the board or a unanimous decision of the shareholders. The company therefore builds upon the primary rules of attribution by using general rules of attribution which are equally available to natural persons, namely, the principles of agency. It will appoint servants and agents whose acts, by a combination of the general principles of agency and the company's primary rules of attribution, count as the acts of the company."*

On that basis, the Appellant argued that the Company could act in two ways under the "primary rules of attribution": first, acting in accordance with the articles of association; second, under company law, acting under the *Duomatic* principle and binding the company to anything which a company, under its articles of association, was empowered to do.

Finally, as the third building block, once an agent is cloaked with the appropriate authority, they are capable of directing acts of the Company as though they were standing in the shoes of all of the Shareholders, pursuant to *Ciban Management Corpn v. Citco (BVI) Ltd* [2021] AC 122. Indeed, Lord Burrows noted in *Ciban* that

> *"[a]pplying the Duomatic principle to our case, [the company] would have been bound had the sole shareholder, Mr Byington, consented to Mr Costa's having authority to give instructions."*

In summary, the Appellant's argument was as follows:

(1) As a matter of law, Mohammed and Majid, *qua* beneficial shareholders, could, by unanimous assent, contract directly on the Respondents' behalf with third parties. In other words, they had the power to authorise and/or authorise the execution of the Tenancy Agreement.

(2) By the second primary rule of attribution, Mohammed and Majid were not constrained by either the Respondents' articles of association, nor was formal ratification of a director required before the Respondents could be bound by the Tenancy Agreement with the Appellant.

(3) Following *Ciban*, shareholders could delegate their authority to act as shareholders to a third party, which Mohammed and Majid did so delegate by the Power of Attorney to Abdulla.

Therefore, as submitted to the Court of First Instance, *"Abdulla had authority to do what Mohammed and Majid did and that Mohammed and Majid had authority to bind the company"* (at [42]).

3 What Was Decided

A. THE COURT OF FIRST INSTANCE

The Court of First Instance decided against the Appellant:

> *"44. I do not think the article or legislation is a sound foundation for the submission, as they are concerned with division of decision-making functions and under the Duomatic principle the division of functions would be subject to decision of the shareholders in general meeting: Ciban is against the Defendants' reliance on the legislation. However, the thrust of the submission went further, and exposed that the question in this case is not simply a decision to enter into the Tenancy Agreement,* ***but the actual entry into it by Abdulla's signatures purportedly on behalf of the Defendants.***
>
> *45. The point of the submission was that execution, the act of signing the Tenancy Agreement, was not a matter for the shareholders in general meeting: it was not something for them as shareholders. If a company's board resolves to enter into an agreement, that is internal to the company and the company is not bound to the agreement unless and until the agreement is duly executed on its behalf, or becomes binding on it by some other means. It is the same if the resolution to enter into the agreement is by the shareholders in general meeting, and it is necessarily the same if the shareholders' assent is not by due resolution in general meeting but informally under the Duomatic principle. The Duomatic principle commonly arises where what is in question is a decision, such as the approval of the payment of directors' salaries in Duomatic itself or of a transaction allegedly in breach of directors' duty as in Multinational Gas and Petrochemical v. Multinational Gas and Petrochemical Services Ltd [1983] Ch 258. In this case there is more. It is not enough to say that, whether by inference of the assent of Mohammed and Majid or of assent of Abdulla on their behalves pursuant to the power of attorney, there was a decision of the Defendants to enter into the Tenancy Agreement. Abdulla's authority to sign it on behalf of the Defendants must still be found."*

...

"49. [...] But the Claimant's argument fails for a more fundamental reason. Let it be assumed that Mohammed and Majid informally resolved that the Defendants should enter into the Tenancy Agreement. Apart from the power of attorney, and in the absence of evidence from any of Mohammed, Majid and Abdulla, there is nothing to warrant finding that they informally resolved that it should be signed by Abdulla on behalf of the Defendants. The power of attorney is the essential link to that appointment of Abdulla, but it is a false link. It empowers Abdulla to act on behalf of Mohammed and Majid—not on behalf of the Defendants. Put another way, in the Claimant's reliance on the power of attorney as embodying Abdulla's authority, he signed the Tenancy Agreement not on behalf of the Defendants, but on behalf of Mohammed and Majid. To say that he signed on behalf of Mohammed and Majid in their capacity as beneficial shareholders does not work, because signing is not something for them in general meetings of the Defendants.

50. This is a fatal flaw in finding authority in Abdulla in the exercise of the powers of Mohammed and Majid as beneficial shareholders. [...]"

In arguing that Mohammed and Majid did not have the capacity to execute the Tenancy Agreement, Justice Roger Giles appeared to implicitly accept that the directors must execute that Tenancy Agreement.

In other words, while the Appellant might have informally resolved the Respondents should enter into the Tenancy Agreement, there still needed some execution of the Tenancy Agreement by the Respondents. In arguing that Mohammed and Majid did not have the capacity to execute the Tenancy Agreement, Justice Roger Giles appeared to implicitly accept that the directors must execute that Tenancy Agreement.

B. THE COURT OF APPEAL

Interestingly, the Court of Appeal decided the case on even broader grounds, holding that shareholders (here, Mohammed and Majid) may not even resolve to have a company enter into a tenancy agreement, let alone resolve to so execute an agreement and bind the company directly:

"83. The cases cited by the Respondents and the other cases mentioned above make the position clear. The shareholders could not by unanimous agreement do that which the Articles do not permit them to do unless they first amend the Articles. In this case the powers were limited not only by the Articles but also by the relevant statute. There is no suggestion that anything which was done by the shareholders or with their authority in this case constituted a decision to amend the Articles. The shareholders were not authorised to enter upon the preserve of the director of the Respondents and authorise the execution of the Shortfall Tenancy Agreement. A fortiori, they were not authorised to execute such an agreement.

84. What they did not have authority to do, they could not authorise someone else to do on their behalf. The Power of Attorney did not validly confer authority on Abdullah to do what he did in this case. The case of Duomatic which was relied upon by the Appellant is of no assistance. It does not confer a common law power on shareholders to override the division of powers between them and directors prescribed by statute and the company's articles. In Ciban Management Corporation v. Citco (BVI) Ltd,44 the Privy Council encapsulated the Duomatic principle thus:

> *"The Duomatic principle is, in short, the principle that anything the members of a company can do by formal resolution in a general meeting, they can also do informally if all of them assent to it. See generally Palmer's Company Law [25th ed (2020)] paras 7.434-7.449; and Peter Watts, "Informal Unanimous Assent of Beneficial Shareholders" (2006) 122 LQR 15. The principle derives its name from In Re Duomatic Ltd [1969] 2 Ch 365, in which it was encapsulated by Buckley LJ at p 373 as follows:*
>
> > *'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.'"*

85. The qualification embedded in the principle is that the matter to which the shareholders assent must be "some matter which a general meeting of the company could carry into effect." For the reasons already stated, the shareholders of the Respondents could not by unanimous resolution execute a tenancy contract nor resolve to execute such a contract without first altering the Articles of Association. They did not do that. They passed no resolution, formal or informal to that effect."

4 Why this Case Is Important

On the facts, the DIFC Courts may well have been right in holding the Tenancy Agreement was invalid. While not canvassed in this case comment, grounds relating to the Tenancy Agreement being a sham were raised and would have been raised at trial.

As a matter of law, the Court of Appeal were also probably right—the division of powers as between shareholders and directors is well-settled. Somewhat unsatisfactorily, neither the Court of First Instance nor the Court of Appeal substantially engaged with the sometimes confusing and broad dicta

in cases applying the *Duomatic* principle. For example, the Privy Council's *dicta* in *Ciban* appeared to suggest that the company would be bound so long as the sole shareholder authorised it; similarly the *dicta* in *Multinational Gas* argued that shareholders may bind the company to do anything *"which the company under its memorandum of association has power to do"* (emphasis added). This *dicta* is not delineated by the suggestion that shareholders may bind the company to something which *shareholders* (as opposed to the company) may do. Indeed, the Appellant sought to rely on such *dicta* which cast the *Duomatic* principle in broad terms. While the Court of Appeal noted that both cases did not concern the division of powers as between shareholders and directors, it would have been helpful for practitioners to see further analysis from the Court.

After the rejection of the Court of Appeal of the Appellant's arguments, it is implicit that the *Duomatic* principle is therefore constrained to a more narrow ground that shareholders may only authorise certain acts which they *qua* shareholders had the power to authorise in a general meeting. In practice, this ruling will mean the *Duomatic* principle may only be used to cure irregularities in procedure, such as in the calling or conduct of a shareholders' meeting, or in replacing the need to have a meeting at all.

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However, the practical implication of the Court's judgment in the UAE cannot be underestimated. The structure of the Al-Sari family's holdings is common practice in the UAE: often, a company will be incorporated to hold valuable assets, with a corporate director appointed. However, the corporate director will not manage the affairs of the company; rather, the beneficial shareholders will delegate their authority by a power of attorney to one individual (e.g., the patriarch of the family), who directs the company's day-to-day affairs with the consent of the beneficial shareholders. The Court of Appeal's decision in *IGPL Holdings* therefore calls into question whether all such similar acts directed by the nominated party holding the power of attorney are liable to be set aside, for want of authority on the basis that the shareholders did not have such power to donate in the first place.

طالب المدعي/ المستأنف في هذه القضية بإصدار أوامر محددة لتنفيذ الاتفاقيات التي قيل أنها تنشئ اتفاقية مضمونة قصيرة المدة لصالح المستأنف تتعلق بممتلكات معينة في لندن. لذا احتج المستأنف بأن المدعى عليهم ملزمين بإبرام عقود إيجار قانونية سارية لهذه الممتلكات. زادت هذه القضية من الاهتمام بتنفيذ مبدأ الـ Duomatic ونطاقه في الإجراءات التي يوافق عليها المساهمون مع تأثير بعيد المدى على الممارسة الشائعة في الإمارات العربية المتحدة.

BIOGRAPHY

ANSON CHEUNG is a barrister at Outer Temple Chambers. She practises in international arbitration, construction and commercial litigation including financial services, professional negligence and pensions. Her practice is based in London but she has also recently spent time and undertaken work in Dubai and Hong Kong. Her experience includes disputes under ICC, LMAA and Adhoc rules in a variety of seats including UK, Europe and MENA regions.
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