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# DUOMATIC REVISITED: A STEP TOO FAR?

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Those familiar with the Duomatic principle, named after the decision in *In re Duomatic Ltd.*[1] (**Duomatic**), will be aware that it is the principle of decision - making by shareholders by way of informal unanimous consent. In summary, if 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".*

In order for the Duomatic principle to apply, there are two requirements which need to be satisfied. Firstly, the consent of shareholders with a right to vote must be unanimous and secondly, the consent must be given by shareholders in full knowledge of what it is they are consenting to.

In a claim brought by the liquidators of the company, the case of Duomatic involved the payment of remuneration to two directors, at a time when they were the only directors and ordinary shareholders. The payments to the directors were not formally approved in a general meeting, as required under the Articles, but were approved informally by the directors themselves, who signed and approved the company accounts in the presence of the company's auditor. The court decided that, although the payments were not formally approved in a general meeting, "*the payments were in fact agreed to by persons who should properly agree to them, at the appropriate times*[2]". The court therefore regarded their consent as equivalent to a resolution of a general meeting of the company.

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[1] In re Duomatic Ltd. [1969] 2 Ch 365, 373
[2] In re Duomatic Ltd. [1969] 2 Ch 365, 369

Although the company had a preference shareholder, the court came to the conclusion that he did not need to be informed of the payments. The court noted in this regard that as the preference shareholder had no right to attend or vote at a general meeting, "*he could be in no worse position if the matter were dealt with informally by agreement between all shareholders having voting rights than he would be if the shareholders met together in a duly constituted general meeting*[3]".

The importance of documenting resolutions should always be kept in mind. Had the directors taken the formal step of holding a general meeting and passing a formal resolution to approve the payment, the position of the directors would have been secure and no one (in this case the liquidator) could have disputed their right to the payments.

Further, the Duomatic principle is not universal, although it has been invoked successfully in a number of cases; there are limits on its scope. For example, in situations where a formal resolution would be invalid, where there is evidence of fraud or the company acting *ultra vires*, or where the company is facing financial difficulties, the principle may not apply. Similarly, certain statutory provisions, which are there to protect creditors, are not capable of being waived under the principle.

The recent judgement of *Randhawa & Ors v Turpin & Anor*[4], also known as *In the matter of BW Estates* (**BW Estates**) applied the Duomatic principle and has sought to extend its application. The applicants, who were judgement creditors, sought a declaration that the administrator of the company had not been validly appointed, as the board meeting which resolved to make the appointment was inquorate. The company had a sole director who was the registered holder of 75% of the company's share capital, which he held on bare trust for his father, Mr Williams. The owner of the remaining 25% of the company's share capital was held by an Isle of Man company, Belvedere Investment Company Limited (**Belvedere**), which had been dissolved in 1996. The administrator was appointed by the sole director at a board meeting.

The issue in the case arose from the fact that the Articles prescribed a quorum of two for directors meetings, save for the powers of a sole director to convene a general meeting or appoint an additional director. However, in reviewing the facts and circumstances of the case, the court took the view that "*there was a consistent course of conduct under which Mr Williams and the sole director informally sanctioned the exercise of all the directors' powers by one director alone which thereby operated as an informal amendment to or variation of the Articles*[5]". This informal amendment of the Articles was, the court considered, binding on the company under the Duomatic principle.

Looking specifically at the appointment of the administrator, the company had held an informal meeting, prior to the board meeting, at which it was decided to put the company into administration. Both the sole director and Mr Williams were in attendance. Mr Williams was held to have informally approved of the administration and, as the beneficial owner of 75% of the share capital of the company with the right to direct how his son should vote, was taken to have effectively passed a special resolution informally authorising the sole director to make an appointment acting alone. Although he was not at the board meeting which formally appointed the administrator, he stood by knowing what would happen and never objected to it.

Unlike in the case of Duomatic, there was no distinction here between ordinary shareholders who hold voting rights and preference shareholders with no voting rights. However, there is a distinction between those shares held by Mr Williams, and those held by the other registered shareholder Belvedere. As nothing had been done to restore Belvedere, the court decided that as the owner of the 25% shareholding, it was "content" for the owner of the 75% shareholding to run the company. Therefore, the voting member, the sole director, could

[3] In re Duomatic Ltd. [1969] 2 Ch 365, 373
[4] Randhawa & Ors v Turpin & Anor [2016] EWHC 2156 (Ch)
[5] Randhawa & Ors v Turpin & Anor [2016] EWHC 2156 (Ch), para 28

bind the company unanimously, as they alone triggered the Duomatic principle. The 25% shareholder was therefore considered to have acquiesced to the appointment of the administrator.

BW Estates appears to have broadened the principle in Duomatic, which focused on registered members and has extended the principle to consent of beneficial owners. However, the case has been set down for appeal in February 2017.

Whilst the decision in BW Estates appears to relax the already informal principle of Duomatic, those producing corporate authorities should bear in mind that the use of Duomatic should be seen as a fall back. Pending any appeal, BW Estates and Duomatic remind us that any decision of the board of directors or shareholders should be well documented. The alternative is that decision – making may be challenged by any party adversely affected and by any insolvency practitioner investigating the company's affairs.

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