[2025] UKPC 47
Privy Council Appeal No 0107 of 2023

JUDGMENT

Fang Ankong and another (Appellants) *v* Green Elite Ltd (In Liquidation) (Respondent) (Virgin Islands)

From the Court of Appeal of the Eastern Caribbean Supreme Court (British Virgin Islands)

before

Lord Briggs
Lord Sales
Lord Hamblen
Lord Burrows
Lord Richards

JUDGMENT GIVEN ON
30 September 2025

Heard on 26 and 27 November 2024

Appellants
Jonathan Crow KC
Matthew Chan
(Instructed by Mishcon de Reya LLP (London))

Respondent
John Machell KC
Peter Ferrer
Christopher Pease
Robert Maxwell Marsh
(Instructed by Harney Westwood & Riegels LLP (London))

LORD RICHARDS:

1. This appeal concerns a claim by the Respondent company, Green Elite Ltd ("Green Elite"), against its former directors and HWH Holdings Ltd ("HWH"), a company owned and controlled by one of the former directors. The claim relates to the payment of HK$150 million, comprising the proceeds of sale of the Company's only assets, together with a further HK$8.7 million, paid to the former directors and HWH. Green Elite alleged that these payments were made and received in breach of the duties owed by the former directors.

2. After a trial at which extensive evidence was given, Jack J, sitting in the High Court (Commercial Division) of the Eastern Caribbean Supreme Court (British Virgin Islands), upheld the claim (BVIHC (COM) 2018/0222). He ordered the former directors to pay the total sums claimed plus interest, and HWH to pay HK$3.45 million (being part of the HK$8.7 million) plus interest, to the Company. The Court of Appeal of the Eastern Caribbean Supreme Court (BVI) dismissed an appeal by Fang Ankong, one of the former directors, and HWH. Mr Fang and HWH appeal as of right to the Board.

The facts

3. The background to the present case is a joint venture formed in about 1999 between Mr Fang, who ran a scrap metal business in the People's Republic of China ("the PRC"), and Stephan van Ooijen and Herman de Leeuw, whose business based in the Netherlands included the export of scrap metal from Europe.

4. In 2008, Mr Fang, Mr van Ooijen and Mr de Leeuw ("the Principals") decided to float the business on the Hong Kong Stock Exchange by an initial public offering. Chiho-Tiande Group Ltd ("CT") was incorporated in the Cayman Islands to serve as the vehicle for the flotation. The shares in CT were issued in equal numbers to Delco Participation BV ("Delco"), a Dutch company owned by Mr van Ooijen and Mr de Leeuw, and to HWH, a company incorporated in the British Virgin Islands ("BVI") and owned by Mr Fang.

5. As part of the flotation, the Principals envisaged that there would be a share incentive scheme for three key employees – Fang Anlin (Mr Fang's brother), Mr Gu Liyong and Mr Ding Guopei (Mr Fang's brother-in-law). At Mr Ding's request, it was agreed that any benefits should go to his daughter, Ms Ding Li. To implement that arrangement, the following steps were taken:

(i) On 8 July 2008, New Asset Holding Ltd ("NAH") was incorporated in the BVI.

(ii) On 28 August 2008, Mr Fang, as settlor, and Standard Chartered Trust (Cayman) Ltd ("SC Trust"), as trustee, settled the FDG Trust as a discretionary trust governed by Cayman law with Mr Fang Anlin, Mr Gu and Ms Ding as the initial beneficiaries ("the intended Beneficiaries").

(iii) On the same day, the shares in NAH were transferred to SC Trust as trustee of the FDG Trust.

(iv) HWH and Delco each transferred four shares in CT to NAH at a price of US$6,275,000, making a total price of US$12,550,000. HWH lent NAH the funds necessary to pay for the shares. Between July and September 2008, Mr Fang transferred US$6,275,000 to Delco in payment for its shares.

(v) Mr Fang signed a memorandum of wishes, requesting SC Trust to exercise its discretion to direct NAH to distribute its shares in CT "in equal shares per stirpes to each of the Beneficiaries then living".

6. The Judge found that two key elements were agreed between the Principals. First, the intended Beneficiaries would have to pay for their shares and, second, there would be a lock-up period before they qualified to receive them. Neither the price nor the length of the lock-up period was agreed, although three years was in contemplation for the lock-up period (para 128).

7. As a result of the global financial crisis in 2008, the Principals decided not to proceed with the flotation.

8. By early 2010, the Principals had decided to revive the plans for a flotation. It was decided to unwind consensually the FDG Trust. The intended Beneficiaries signed a letter addressed to SC Trust and NAH, disclaiming their interest in the Trust. The eight shares in CT held by NAH were transferred back to HWH and Delco, with no agreement as to the repayment of the sum of US$6,275,000 which had been paid to Delco. These steps were taken at the end of January 2010, but the letter and transfers were backdated to 12 October 2008.

9. As part of the plans for the revived flotation, Green Elite was incorporated in the BVI in January 2010, and its shares were issued to HWH and Delco equally. As Smith JA(Ag) said in para 7 of his judgment in the Court of Appeal (with which Michel JA and Webster JA(Ag) agreed), Green Elite's "sole purpose was to effect an employee share benefit scheme" for the intended Beneficiaries. Mr Fang and the intended Beneficiaries were appointed as its directors and remained its directors at all material times thereafter.

10. The central issue of fact at trial was what was agreed between HWH and Delco as to the basis on which Green Elite would hold its shares in CT. The Board refers to the Judge's findings later in this judgment.

11. In March 2010, Delco and HWH each transferred four CT shares to Green Elite at par (HK$0.01 per share). As a result of subsequent capitalisation issues, Green Elite held 60 million CT shares, representing 6% of CT's issued share capital at the time of the IPO in July 2010.

12. Dividends were paid by CT. Green Elite transferred dividends received by it, totalling some HK$8.7 million, to the directors and HWH.

13. In April 2014, Green Elite sold its CT shares for HK$150 million. The price was paid not to Green Elite but to Mr Fang's personal bank account in March and April 2015. Delco was not told that the price had been paid to Mr Fang and there was no board meeting to approve it.

14. In December 2015, Hong Kong solicitors acting for Delco sent a letter before action to Green Elite, demanding payment of Delco's share of the dividends and the sale proceeds.

15. Between April 2015 and December 2017, Mr Fang paid the proceeds of sale of the CT shares to the intended Beneficiaries in equal shares. Mr Gu received his share by one payment in February 2016, while the payments to Fang Anlin and Ms Ding were made by two payments in April 2015 and some 40 payments made between February 2016 and December 2017.

16. In March 2017, Delco applied to the BVI court for an order to wind up Green Elite on the grounds that its substratum had been lost. This was opposed by Green Elite and HWH, and the petition was dismissed by Wallbank J. In June 2018, the Court of Appeal allowed an appeal and made a winding-up order. At the same time, the Court of Appeal upheld the decision of Wallbank J that Green Elite was not a trust company.

The proceedings

17. Green Elite, acting by its liquidators, commenced these proceedings in December 2018 against the four former directors and HWH. It claimed orders that the four former directors account to it for the sale proceeds and any dividends on grounds (among others) of breach of fiduciary duty and (in the case also of HWH) of knowing receipt. The pleaded case was that the four directors owed fiduciary duties to act in good faith in the best

interests of Green Elite, not to act for a collateral purpose and not to act so as to place themselves in a position of conflict between their personal interests and the interests of Green Elite. It was alleged that, in breach of duty, Mr Fang had diverted the proceeds of sale of the CT shares to himself and/or HWH and had retained the benefit of the funds for at least one year before wrongfully distributing them to the other directors, and that each of those other directors, in breach of duty, received HK$50 million intended for Green Elite. It was also alleged that the distribution of the sale proceeds was made in breach of section 175 of the Business Companies Act 2004 ("the BCA"), rendering the former directors liable to account for the proceeds.

18. Green Elite's pleaded case was reflected in the submissions made at trial. Mr Machell QC, leading for Green Elite, submitted that the claim was put on two alternative principal bases, breach of fiduciary duty and breach of section 175. As regards breach of fiduciary duty, the closing submissions referred to the duties to exercise powers for a proper purpose and to do so honestly and in what the directors consider to be the best interests of the company. The submissions also included the following:

> "138. Without more, it is obviously a breach of fiduciary for directors to transfer the whole of the assets of a company to themselves. Prima facie, directors do not have authority to pay the assets of a company to themselves and to do so involves a breach of fiduciary duty. Where a director receives company property, the burden is on the director to show that the transaction is proper…
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> 145. In the present case, the directors had no authority to pay the company's assets to themselves unless they can establish that there was an agreement between the shareholders that gave them that authority and that section 175 was satisfied."

19. Mr Fang and HWH, and Mr Gu ("the active defendants"), filed defences and were represented at the trial. Fang Anlin and Ms Ding have not participated at all in the proceedings.

20. The active defendants denied that the directors committed any breach of duty. They argued that the payments were properly made to implement Green Elite's purpose to provide an employee share incentive scheme. If the payments would otherwise have constituted breaches of duty, their case was that the payments were made with the unanimous approval of Delco and HWH as the only shareholders and therefore duly authorised. It argued that such approval was given when Delco and HWH agreed that Green Elite would act as the vehicle for the employee share incentive scheme for the intended Beneficiaries.

21. The active defendants submitted that the arrangement involving Green Elite in effect reproduced the FDG Trust. Their case was that Delco and HWH had agreed when Green Elite was formed and the CT shares transferred to it that the shares, or their proceeds of sale, would in due course be transferred to the intended Beneficiaries at times and in proportions to be decided by Mr Fang in his discretion. This agreement was not reflected in the memorandum and articles of Green Elite nor was it embodied in a formal resolution of the shareholders in general meeting. But, if it was agreed as alleged by the active defendants, it had the same effect as a formal resolution in accordance with 'the *Duomatic* principle', so-called after the decision of the High Court of England and Wales in *In re Duomatic Ltd* [1969] 2 Ch 365 ("*Re Duomatic*"). In that case, Buckley J said at p 373:

> "I proceed upon 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."

22. On the evidence which the Judge heard at trial, which included oral evidence from most of the major participants in the relevant events, the Judge found that Delco and HWH had not given their assent to the payments as alleged by the active defendants. While he accepted that the purpose of establishing Green Elite was as the vehicle for a share incentive scheme for the benefit of the intended Beneficiaries, he found "as a fact that Mr Fang knew and agreed with the Delco side that Green Elite would be set up first. The decision on how to reward the Three Employees would be taken later" (para 115). Further, the Judge found that the two key elements which the Principals had agreed in principle as regards the FDG Trust, that the intended Beneficiaries should pay for their shares and that there should be a lock-up period, continued in relation to Green Elite (para 129). No price was agreed nor any means of fixing it, and no lock-up period was agreed.

23. Looking at the evidence overall, the Judge found that "there was never any meeting of minds on the terms which Mr Fang believed gave him the absolute power to deal with the proceeds of sale of the CT shares held by Green Elite…. Mr Fang and Delco agreed: Green Elite was to be set up first; how to reward the employees was to be determined later" (para 140).

24. Having found as a fact that HWH and Delco had agreed no more than that Green Elite would be set up as the vehicle for the proposed share incentive scheme, the Judge held that there was no agreement between the shareholders which could, through an application of the *Duomatic* principle, authorise the manner in which Mr Fang had dealt with the sale proceeds and dividends. He specifically agreed at para 150 with the proposition in para 138 of Green Elite's closing submissions, quoted above, that where a director receives company property the burden of proof is on the director to justify the

transfer, and with the further submission that where a director causes an unauthorised payment, the director is liable to the company for the amount of the payment. He recorded in the same paragraph that he did not understand Mr Ayres QC, leading for the active defendants, "to demur from these general propositions: his case was that the fulfilment of the legally binding Agreed Purpose exonerated the directors". The Judge rejected the defendants' case on the basis of his findings of fact.

25. Accordingly, the Judge made the orders against the defendants referred to above. He also held that there had been a breach of section 175 of the Companies Act 2004, entitling Green Elite to the same relief, but the orders he made were not dependent on that.

26. In reaching his decision that Mr Fang's actions were not authorised, the Judge in some places in his judgment used language appropriate to the formation of a contract. He asked whether the parties intended to create legal relations and whether their understanding was "legally binding".

27. Mr Fang and HWH ("the appellants"), but not Mr Gu, appealed. The grounds of appeal related principally to the Judge's decision that there was no unanimous consent by the shareholders to the distribution of the sale proceeds and dividends such as to satisfy the *Duomatic* principle, and to his decision as regards section 175. The appellants particularly challenged what they submitted was the Judge's approach in equating the requirements for unanimous shareholder consent with the requirements for the formation of a contract.

28. The Court of Appeal dismissed the appeal. They rejected the appellants' submission that the Judge had confused unanimous shareholder consent with a binding contract. Smith JA(Ag) said at para 43: "The Judge, in assessing whether the *Duomatic* principles applied, simply sought to ascertain whether, objectively, the shareholders intended to bind themselves legally *as if they had passed a formal resolution*" (emphasis added). The understanding between Mr Fang and the shareholders was not intended to have legal effect "until there was a later decision between HWH and Delco, which there never was" (para 44). He concluded at para 50 that the Judge correctly applied the relevant principles in considering the *Duomatic* issue. "The Judge rightly found that the understanding's material deficiencies, as set out above, neutered any legal effect. I agree with the respondent that the simple fact is that no agreement was reached and, no agreement having been reached on fundamental aspects, it is impossible to see, objectively, how a binding agreement was reached in relation to Delco's CT shares. Put another way, it is impossible to see how the shareholders of Green Elite would have agreed by way of formal resolution to something which lacked critical details."

29. At para 51, Smith JA(Ag) said: "It is common ground between the parties that if this Court finds there was no *Duomatic* assent, the appeal cannot succeed, and the section 175 point becomes irrelevant". For completeness, he went on to consider section 175.

Grounds of appeal

30. The agreed statement of facts and issues identify seven issues raised by the appeal to the Board. Three issues concern section 175. The other issues raised by the appellants were summarised by them in their Written Case as follows:

> (i) Whether the payments by Mr Fang to the intended Beneficiaries were made for an improper purpose, within the meaning of section 121 of the BCA.
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> (ii) If so, whether the payments were nevertheless the subject of a valid assent for the purposes of the *Duomatic* principle.
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> (iii) If so, whether the directors were in breach of section 121.

31. For the reasons given below, the Board rejects the appellants' case on the first and second of those issues, so that the third issue does not arise, and on that basis concludes that the appeal should be dismissed. It is not therefore necessary to consider the issues in relation to section 175 and the Board does not do so.

Breach of fiduciary duty

32. The appellants argue that the Judge was wrong to hold that, in making the payments to the intended Beneficiaries, Mr Fang was in breach of his duty to exercise his powers as a director for a proper purpose. In short, they submit that, as Smith JA(Ag) said at para 7, the sole purpose of Green Elite was to effect an employee share benefit scheme for the intended Beneficiaries and that therefore any power exercised by Mr Fang as a director to further or implement that purpose was exercised for a proper purpose. In this connection, Mr Crow KC appearing for the appellants relied on well-known authorities such as *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 and *Eclairs Group Ltd v JKX Oil and Gas plc* [2015] UKSC 71, [2015] Bus LR 1395. He argued that, in implementing the agreed purpose of Green Elite, Mr Fang was simply exercising the general powers of management conferred by the articles on the directors. The Judge had found that Mr Fang had not acted dishonestly but had genuinely believed that he was entitled to act as he did and that he had not therefore acted in breach of his duty under section 120 to "act honestly and in good faith and in what the director believes to be the best interests of the company". Mr Crow submitted that there was therefore no basis on

which Mr Fang could be held to have acted in breach of duty, and it was irrelevant whether or not the shareholders had assented to his actions.

33. There are a number of reasons why, in the Board's view, this submission must fail.

34. First, it was not argued in the Court of Appeal. On the contrary, as Smith JA(Ag) recorded at para 51 of his judgment, it was common ground between the parties that, if there was no *Duomatic* assent, the appeal could not succeed. It is not necessary to determine whether the appellants are now permitted to resile from that common ground, because it can in any event be seen that, for other reasons, the submission must fail.

35. Secondly, the submission proceeds on the false basis that the only case on breach of duty advanced by Green Elite at trial was that Mr Fang and the other directors breached their duties under sections 120 and 121 of the BCA. As the references above to the statement of claim show, Green Elite specifically pleaded the duty of directors not to place themselves in a position where their personal interests might conflict with the interests of the company, as well as the duties under sections 120 and 121, and that the directors in this case acted in breach of those duties.

36. Further, at trial, counsel made very clear that Green Elite put its case in part on the duty of directors not to transfer assets of the company to themselves for their personal benefit without authority to do so: see the extracts from their closing submissions quoted above. This reflects a basic tenet of fiduciary duties, applicable to directors as much as to other fiduciaries with possession or control over the assets of their principal or beneficiary. As Lindley LJ (giving the judgment of the Court of Appeal, sitting with Lord Halsbury and AL Smith LJ) put it in *In re George Newman Ltd* [1895] 1 Ch 674 at page 686:

> "Directors have no right to be paid for their services, and cannot pay themselves or each other, or make presents to themselves out of the company's assets, unless authorised so to do by the instrument which regulates the company or by the shareholders at a properly convened meeting. The shareholders, at a meeting duly convened for the purpose, can, if they think proper, remunerate directors for their trouble or make presents to them for their services out of assets properly divisible amongst the shareholders themselves."

37. The Judge expressly accepted this part of Green Elite's case at paras 150-151, where he also recorded that he did not understand Mr Ayres QC to demur from the general propositions stated in para 150 and that his case was that "the fulfilment of the legally binding Agreed Purpose exonerated the directors".

38. In the Board's view, this was self-evidently a case in which the basic principle stated by Lindley LJ applied.

39. Thirdly, the appellants rely on the agreement or understanding of the shareholders for their case that the general purpose of Green Elite was to provide an employee share incentive scheme for the intended Beneficiaries, but in doing so they pick out only one element of that agreement or understanding. As the Judge found, it was an essential part of it that implementation of the purpose was still to be agreed between the shareholders, including the length of the lock-up period and the price to be paid by the intended Beneficiaries for the shares. Mr Crow submitted that these were mechanics which did not detract from or qualify the purpose of Green Elite but, given that the understanding existed on the basis that these matters were to be agreed between the shareholders, they cannot be treated separately from the general purpose, nor did the directors have any authority to decide those matters themselves.

40. The Board is therefore satisfied that, without a valid shareholder consent, Mr Fang and the other directors acted in breach of duty in receiving and (in Mr Fang's case) distributing the proceeds of sale and dividends.

Unanimous assent

41. It is well established that, in a matter which is intra vires a company and lawful, the shareholders of a company can give their consent not only by a formal resolution passed at a general meeting but also by the unanimous consent given informally by the shareholders who would be entitled to vote on such a resolution. As Lord Burrows observed in *Ciban Management Corporation v Citco (BVI) Ltd* [2020] UKPC 21, [2021] AC 122 at para 32, the origins of the *Duomatic* principle pre-date the decision in *Re Duomatic* by many years. In *Re Duomatic*, Buckley J applied the earlier first instance decision in *Parker and Cooper Ltd v Reading* [1926] Ch 975 that not even an informal meeting was required and, further, that it was not the consent of all shareholders that was required but the consent of those shareholders with the right to vote if the matter were put to a meeting as a resolution. It is not in doubt that Delco and HWH could, by unanimous informal consent, have authorised or ratified the relevant actions of the directors.

42. It is unnecessary to discuss the authorities on the *Duomatic* principle or particular issues that might arise from them. That is because, on the facts found by the Judge, there was no agreement by the shareholders to the steps which were taken by Mr Fang and the other directors: the receipt and retention by Mr Fang personally of the proceeds of sale; the subsequent payments by Mr Fang to the other directors of the proceeds of sale of the CT shares and the receipt of those proceeds by the other directors; and the payment by Mr Fang of dividends paid on the CT shares to, and their receipt by, the other directors and HWH. Those actions, and the breaches of duty involved in them, were not approved

by Delco and hence there can have been no *Duomatic* approval of them. The Judge found that all that was agreed by the shareholders was that Green Elite would be used to provide an employee share incentive scheme for the intended Beneficiaries, and that all other matters relating to the scheme were to be agreed by the shareholders later, but they never were agreed.

43. The appellants were right to submit in their Written Case that the "issue before the court was simply whether there was or was not a *Duomatic* assent on the facts". On the facts found by the Judge, there was not a *Duomatic* assent.

44. It is clear that assent given in accordance with the *Duomatic* principle need not have the particular features of a binding contract. It is not a question of creating legal relations, as that is understood in the law of contract, nor whether the assent is "legally enforceable". Nor is it necessary to ask whether such assent has "legal effect". While the Board considers that it was misguided of the Judge to use these expressions, the Board agrees with the Court of Appeal that what the Judge had in mind was that the shareholders intended to bind themselves legally *as if they had passed a formal resolution* and he was not suggesting that there needed to be a contract. Provided that it can be shown that the shareholders have all assented to a particular matter, their assent will take effect as if it were a resolution passed at a general meeting.

Conclusion

45. For the reasons given in this judgment, the Board will humbly advise His Majesty to dismiss this appeal.