

UPDATE

Privy Council clarifies Directors' Duties and Duomatic Principle

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The Privy Council has clarified the interaction between directors' duties on proper purpose and the Duomatic principle.

The Privy Council has dismissed the appeal in *Fang Ankong & Anor v Green Elite Ltd (in liquidation)* [2025] UKPC 47, a decision that reinforces the strict fiduciary standards imposed on directors of BVI companies and clarifies the scope for reliance on the Duomatic principle.

Background

The case arises from a joint venture formed in 1999 between Mr Fang (a PRC-based scrap metal business) and Mr van Ooijen and Mr de Leeuw (Netherlands-based exporters) (together, the **Principals**). In 2008, the Principals planned an IPO on the Hong Kong Stock Exchange via Chiho-Tiande Group Ltd (**CT**), with shares split equally between Delco Participation BV (**Delco**), Mr van Ooijen and Mr de Leeuw's company, and HWH Holdings Ltd (**HWH**), Mr Fang's company.

As part of the IPO, the Principals agreed to reward three key employees through a share incentive scheme. Initially, this was to be implemented via a trust, but due to the 2008 financial crisis, the IPO was paused and the trust was unwound.

The IPO plans were revived in 2010. Green Elite Ltd (**Green Elite**) was incorporated in January 2010 with the express purpose of effecting the employee share benefit scheme for the same intended key employees. Mr Fang and the key employees in question were appointed as directors of Green Elite. CT shares were transferred to Green Elite.

The IPO was successful. The CT shares were sold in April 2014 for HK\$150 million. The proceeds were paid to Mr Fang, which he held for around a year, and then distributed to the three key employees.

When Delco found out that the proceeds of the sale of the CT shares had been paid and distributed by Mr Fang, it applied to wind up Green Elite on just and equitable grounds on the basis that it had lost its substratum. That application was granted. The Joint Liquidators subsequently filed proceedings against Mr Fang and the three key employees for breach of directors' duties.

Mr Fang and one of the other key employees defended the claim, alleging that Green Elite's entire purpose (the **Agreed Purpose**) was to reward the key employees, and so they had acted properly in accordance with that purpose. In the alternative, they argued that HWH and Delco had consented for the CT share proceeds to be paid to the key employees, ie there had been Duomatic assent to the distribution.

Duomatic

The Duomatic principle (from *In re Duomatic Ltd* [1969] 2 Ch 365) provides that, where all shareholders entitled to vote on a matter give their unanimous and informed consent, even informally and outside a general meeting, that consent is as effective as if it had been given by resolution in a properly convened meeting.

The principle only applies where the matter is within the company's powers, the shareholders have full knowledge of what is proposed, and their agreement is clear (demonstrated by some discernible action) and unequivocal.

The Commercial Court & Court of Appeal

At first instance, the Court found that HWH and Delco had only ever agreed that Green Elite would serve as a vehicle for a potential employee incentive scheme. However, they had never reached agreement on the terms of that scheme (price, timing etc). As key terms of the scheme had not been agreed, there was no Duomatic assent authorising Mr Fang's handling of the sale proceeds. The Judge confirmed the principle that where directors receive company property, they bear the burden of justifying the transfer, and that unauthorised payments make directors personally liable to the company. On the facts, the judge rejected the defendants' argument that the Agreed Purpose excused their conduct.

The Court of Appeal dismissed Mr Fang's appeal, finding that Delco and HWH had not intended to bind themselves legally as if they had passed a formal resolution, since none of the key terms of the distribution had been agreed or even discussed.

The Privy Council's reasoning

Improper purpose

The appellants argued that since Green Elite's sole purpose was to operate an employee incentive scheme, any steps taken by the directors to implement that scheme must have been for a proper purpose. The Board rejected this, holding that the scheme's implementation was expressly left to shareholder agreement on key terms. Directors had no authority to fill in the gaps.

Fiduciary duty

The Board drew on *Re George Newman Ltd* [1895] 1 Ch 674 to reaffirm the basic rule: directors are fiduciaries, akin to trustees, and may not appropriate company property for themselves without proper authority. Just as a trustee cannot take trust assets for personal use, a director cannot divert company assets to themselves for their personal benefit. Directors may only obtain remuneration or benefits, in whatever form, with the express approval of shareholders, given at a properly convened meeting or by valid Duomatic assent.

It was irrelevant that Mr Fang believed in good faith he was entitled to act as he did; fiduciary duties are strict and based on objective principles of loyalty and non-conflict.

Duomatic principle

The Board confirmed that informal unanimous shareholder assent can, in principle, validate director conduct. But here, there was no such assent. The only agreement was that Green Elite would in principle serve as a vehicle for the share incentive scheme. The shareholders never agreed on the actual mechanics of the distributions (price, lock-up, timing). A general understanding was insufficient.

Key takeaways

- **Directors as fiduciaries:** Directors, like trustees, must not act in conflict, must not misapply assets, and cannot remunerate themselves without explicit shareholder authority.
- **Strict duties, not diluted by good faith:** A director's honest belief is not a defence to breach of fiduciary duty.
- **Proper purpose is contextual:** A company's 'general purpose' cannot be used as a carte blanche to act without shareholder approval.
- **Duomatic is narrow:** Informal assent only works where shareholders have clearly and unanimously agreed to the specific transaction including its mechanics. There must be certainty over what is being agreed.
- **Practical impact:** The judgment underscores the importance of formal approvals in BVI companies, particularly SPVs for joint ventures or incentive schemes. We would always advise that transactions be properly documented and agreed upon via the relevant shareholder resolutions (where necessary) and board resolutions.

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